MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

July 7, 2005 to July 29, 2005

DANILO ANSELMO
REPORTER OF DECISIONS

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SUPREME COURT

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

Commissioners

MICHAEL J. SCHMEDLEN, Chief Commissioner
SHARI M. OBERG, Deputy Chief Commissioner

JOHN K. PARKER	JÜRGEN O. SKOPPEK
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KATHLEEN A. FOSTER	GARY L. ROGERS
NELSON S. LEAVITT	RICHARD B. LESLIE
DEBRA A. GUTIERREZ-McGUIRE	FREDERICK M. BAKER, Jr.
ANNE-MARIE HYNOUS VOICE	KATHLEEN M. DAWSON
DON W. ATKINS	RUTH E. ZIMMERMAN
	LAURA L. MOODY[1]

State Court Administrator: CARL L. GROMEK

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

[1] From July 18, 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
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
ALTON T. DAVIS, Grayling	2007[1]

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

[1] From July 19, 2005.

CIRCUIT JUDGES

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

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

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

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

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

[1] To July 19, 2005.

		Term Expires January 1 of
47.	STEPHEN T. DAVIS, Escanaba,	2011
48.	HARRY A. BEACH, Otsego,	2009
	GEORGE R. CORSIGLIA, Allegan,	2011
49.	SCOTT P. HILL-KENNEDY, Big Rapids,	2007
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.		
56.	THOMAS S. EVELAND, Dimondale,	2007
	CALVIN E. OSTERHAVEN, Grand Ledge,	2009
57.	CHARLES W. JOHNSON, Petoskey,	2007

DISTRICT JUDGES

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

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

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

		Term Expires January 1 of
44.	TERRENCE H. BRENNAN, Royal Oak,	2009
	DANIEL SAWICKI, Royal Oak,	2007
45A.	WILLIAM R. SAUER, Berkley,	2009
45B.	MICHELLE FRIEDMAN APPEL, Huntington Woods,	2009
	DAVID M. GUBOW, Huntington Woods,	2009
46.	STEPHEN C. COOPER, Southfield,	2011
	SHEILA R. JOHNSON, Southfield,	2009
	SUSAN M. MOISEEV, Southfield,	2007
47.	JAMES BRADY, Farmington Hills,	2009
	MARLA E. PARKER, Farmington Hills,	2011
48.	MARC BARRON, Birmingham,	2011
	DIANE D'AGOSTINI, Bloomfield Hills,	2007
	KIMBERLY SMALL, West Bloomfield,	2009
50.	LEO BOWMAN, Pontiac,	2007
	MICHAEL C. MARTINEZ, Pontiac,	2009
	PRESTON G. THOMAS, Pontiac,	2011
	CYNTHIA THOMAS WALKER, Pontiac,	2009
51.	RICHARD D. KUHN, Jr., Waterford,	2009
	PHYLLIS C. McMILLEN, Waterford,	2007
52-1.	ROBERT BONDY, Milford,	2007
	BRIAN W. MacKENZIE, Novi,	2009
	DENNIS N. POWERS, Highland,	2007
52-2.	DANA FORTINBERRY, Clarkston,	2009
	KELLEY RENAE KOSTIN, Clarkston,	2011
52-3.	LISA L. ASADOORIAN, Rochester Hills,	2007
	NANCY TOLWIN CARNIAK, Rochester Hills,	2011
	JULIE A. NICHOLSON, Rochester Hills,	2009
52-4.	WILLIAM E. BOLLE, Troy,	2009
	DENNIS C. DRURY, Troy,	2007
	MICHAEL A. MARTONE, Troy,	2011
53.	THERESA M. BRENNAN, Brighton,	2005[1]
	L. SUZANNE GEDDIS, Brighton,	2011
	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
	THOMAS P. BOYD, Okemos,	2007[2]

[1] From July 18, 2005.

[2] From July 25, 2005.

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

[3] Resigned July 15, 2005.

		Term Expires January 1 of
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.	ROBERT L. DONOGHUE, Midland,	2007
	JOHN HENRY HART, Midland,	2009
76.	WILLIAM R. RUSH, Mt. Pleasant,	2009
77.	SUSAN H. GRANT, Big Rapids,	2009
78.	H. KEVIN DRAKE, Fremont,	2009
79.	PETER J. WADEL, Branch,	2009
80.	GARY J. ALLEN, Gladwin,	2009
81.	ALLEN C. YENIOR, Sterling,	2009
82.	RICHARD E. NOBLE, West Branch,	2009
83.	DANIEL L. SUTTON, Prudenville,	2009
84.	DAVID A. HOGG, Harrietta,	2009
85.	BRENT V. DANIELSON, Manistee,	2009
86.	JOHN D. FORESMAN, Traverse City,	2011
	MICHAEL J. HALEY, Traverse City,	2009
	THOMAS J. PHILLIPS, Traverse City,	2007
87.	PATRICIA A. MORSE, Gaylord,	2009
88.	THEODORE O. JOHNSON, Alpena,	2009
89.	HAROLD A. JOHNSON, Jr., Cheboygan,	2009
90.	RICHARD W. MAY, Charlevoix,	2009
91.	MICHAEL W. MacDONALD, Sault Ste. Marie,	2009
92.	BETH GIBSON, Newberry,	2009
93.	MARK E. LUOMA, Munising,	2009
94.	GLENN A. PEARSON, Gladstone,	2009
95A.	JEFFREY G. BARSTOW, Menominee,	2009
95B.	MICHAEL J. KUSZ, Iron Mountain,	2009
96.	DENNIS H. GIRARD, Marquette,	2011
	ROGER W. KANGAS, Ishpeming,	2009
97.	PHILLIP L. KUKKONEN, Hancock,	2009
98.	ANDERS B. TINGSTAD, Jr., Bessemer,	2009

MUNICIPAL JUDGES

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

PROBATE JUDGES

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

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

[1] Retired July 8, 2005.

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

JUDICIAL CIRCUITS

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

TABLE OF CASES REPORTED

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TABLE OF SPECIAL ORDERS NOT RELATED TO SPECIFIC CASES

TABLE OF ADMINISTRATIVE ORDERS AND RULES ADOPTED

Administrative Orders

Administrative Orders Rescinded

Rules Adopted

Michigan Court Rules of 1985

ADMINISTRATIVE ORDERS

Entered July 13, 2005, effective immediately (File No. 2003-04)—REPORTER.

On order of the Court, Administrative Order No. 1988-4 is amended as follows, effective immediately.

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

ADMINISTRATIVE ORDER No. 1988-4

SENTENCING GUIDELINES

Administrative Order No. 1985-2, 420 Mich lxii, and Administrative Order No. 1984-1, 418 Mich lxxx, are rescinded as of October 1, 1988. The Sentencing Guidelines Advisory Committee is authorized to issue the second edition of the sentencing guidelines, to be effective October 1, 1988. Until further order of the Court, every judge of the circuit court must thereafter use the second edition of the sentencing guidelines when imposing a sentence for an offense that is included in the guidelines.

Whenever a judge of the circuit court determines that a minimum sentence outside the recommended minimum range should be imposed, the judge may do so. When such a sentence is imposed, the judge must explain on the record the aspects of the case that have

persuaded the judge to impose a sentence outside the recommended minimum range.

Staff Comment: The amendment of MCR 6.425(D), effective immediately, eliminated the requirement that the sentencing court complete a sentencing information report. Given this amendment of MCR 6.425(D), and because the judge is required to explain any departure on the record, the requirement that the judge complete a sentencing information report was also stricken from this administrative order. References to the Recorder's Court of the City of Detroit and the Sentencing Guidelines Advisory Committee were also stricken because they no longer exist.

Entered July 13, 2005, effective January 1, 2006 (File No. 2003-04) —REPORTER.

On order of the Court, Administrative Order Nos. 1990-4, 1991-5, and 1992-5 are rescinded, effective January 1, 2006.

Staff Comment: Effective January 1, 2006, plea acceptance by district court judges in felony cases is governed by MCR 6.111.

Entered July 13, 2005, effective January 1, 2006 (File No. 2003-04) —REPORTER.

On order of the Court, Administrative Order No. 2000-3 is amended as follows, effective January 1, 2006.

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

ADMINISTRATIVE ORDER No. 2000-3

VIDEO PROCEEDINGS (CIRCUIT AND DISTRICT COURTS)

On order of the Court, Administrative Orders 1990-1, 1991-2, 1992-1, and 1993-1 are rescinded.

Staff Comment: Effective January 1, 2006, video and audio proceedings are governed by MCR 6.006.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted July 13, 2005, effective January 1, 2006 (File No. 2003-04) —REPORTER.

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

RULE 2.510. JUROR PERSONAL HISTORY QUESTIONNAIRE.

(A)-(C) [Unchanged.]

(D) Summoning Jurors for Court Attendance. The court clerk, the court administrator, the sheriff, or the jury board, as designated by the chief judge, shall summon jurors for court attendance at the time and in the manner directed by the chief judge or the judge to whom the action in which jurors are being called for service is assigned. For a juror's first required court appearance, service must be by written notice addressed to the juror at the juror's residence as shown by the records of the clerk or jury board. The notice may be by ordinary mail or by personal service. For later service, notice may be in the manner directed by the court. The person giving notice to jurors shall keep a record of the notice and make a return if directed by the court. The return is presumptive evidence of the fact of service.

RULE 2.511. IMPANELING THE JURY.

(A)-(C) [Unchanged.]

(D) Challenges for Cause. The parties may challenge jurors for cause, and the court shall rule on each challenge. A juror challenged for cause may be directed to answer questions pertinent to the inquiry. It is grounds for a challenge for cause that the person:

(1) is not qualified to be a juror;

(2) is biased for or against a party or attorney;

(3) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be;

(4) has opinions or conscientious scruples that would improperly influence the person's verdict;

(5) has been subpoenaed as a witness in the action;

(6) has already sat on a trial of the same issue;

(7) has served as a grand or petit juror in a criminal case based on the same transaction;

(8) is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys;

(9) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney;

(10) is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal prosecution;

(11) has a financial interest other than that of a taxpayer in the outcome of the action;

(12) is interested in a question like the issue to be tried.

Exemption from jury service is the privilege of the person exempt, not a ground for challenge.

(E) Peremptory Challenges.

(1) A juror peremptorily challenged is excused without cause.

(2) Each party may peremptorily challenge three jurors. Two or more parties on the same side are considered a single party for purposes of peremptory challenges. However, when multiple parties having adverse interests are aligned on the same side, three peremptory challenges are allowed to each party represented by a different attorney, and the court may allow the opposite side a total number of peremptory challenges not exceeding the total number of peremptory challenges allowed to the multiple parties.

(3) Peremptory challenges must be exercised in the following manner:

(a) First the plaintiff and then the defendant may exercise one or more peremptory challenges until each party successively waives further peremptory challenges or all the challenges have been exercised, at which point jury selection is complete.

(b) A "pass" is not counted as a challenge but is a waiver of further challenge to the panel as constituted at that time.

(c) If a party has exhausted all peremptory challenges and another party has remaining challenges, that party may continue to exercise their remaining peremptory challenges until such challenges are exhausted.

(F) Replacement of Challenged Jurors. After the jurors have been seated in the jurors' box and a challenge for cause is sustained or a peremptory challenge or challenges exercised, another juror or other jurors must be selected and examined. Such jurors are subject to challenge as are previously seated jurors.

(G) [Unchanged.]

RULE 6.001. SCOPE; APPLICABILITY OF CIVIL RULES; SUPERSEDED RULES AND STATUTES.

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.006, 6.102, 6.106, 6.125, 6.427, 6.445(A)-(G), and the rules in subchapters 6.600-6.800 govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E) [Unchanged.]

RULE 6.004. SPEEDY TRIAL.

(A) Right to Speedy Trial. The defendant and the people are entitled to a speedy trial and to a speedy resolution of all matters before the court. Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice.

(B) [Unchanged.]

(C) Delay in Felony and Misdemeanor Cases; Recognizance Release. In a felony case in which the defendant has been incarcerated for a period of 180 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, or in a misdemeanor case in which the defendant has been incarcerated for a period of 28 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, the defendant must be released on personal recognizance, unless the court finds by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community. In computing the 28-day and 180-day periods, the court is to exclude

(1) periods of delay resulting from other proceedings concerning the defendant, including but not limited to

competency and criminal responsibility proceedings, pretrial motions, interlocutory appeals, and the trial of other charges,

(2) the period of delay during which the defendant is not competent to stand trial,

(3) the period of delay resulting from an adjournment requested or consented to by the defendant's lawyer,

(4) the period of delay resulting from an adjournment requested by the prosecutor, but only if the prosecutor demonstrates on the record either

(a) the unavailability, despite the exercise of due diligence, of material evidence that the prosecutor has reasonable cause to believe will be available at a later date; or

(b) exceptional circumstances justifying the need for more time to prepare the state's case,

(5) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run, but only if good cause exists for not granting the defendant a severance so as to enable trial within the time limits applicable, and

(6) any other periods of delay that in the court's judgment are justified by good cause, but not including delay caused by docket congestion.

(D) Untried Charges Against State Prisoner.

(1) The 180-Day Rule. Except for crimes exempted by MCL 780.131(2), the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a

statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail.

(2) Remedy. In the event that action is not commenced on the matter for which request for disposition was made as required in subsection (1), no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information, or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

RULE 6.005. RIGHT TO ASSISTANCE OF LAWYER; ADVICE; APPOINTMENT FOR INDIGENTS; WAIVER; JOINT REPRESENTATION; GRAND JURY PROCEEDINGS.

(A)-(D) [Unchanged.]

(E) Advice at Subsequent Proceedings. If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial, or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,

(1) the defendant must reaffirm that a lawyer's assistance is not wanted; or

(2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or

(3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

The court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel.

(F)-(G) [Unchanged.]

(H) Scope of Trial Lawyer's Responsibilities. The responsibilities of the trial lawyer appointed to represent the defendant include

(1) representing the defendant in all trial court proceedings through initial sentencing,

(2) filing of interlocutory appeals the lawyer deems appropriate,

(3) responding to any preconviction appeals by the prosecutor, and

(4) unless an appellate lawyer has been appointed, filing of postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing.

(I) [Unchanged.]

RULE 6.006. VIDEO AND AUDIO PROCEEDINGS.

(A) Defendant at a Separate Location. District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignment on the warrant, arraignments on the information, pretrials, pleas, sentencing for misdemeanor offenses, show cause hearings, waivers and adjourn-

ments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations.

(B) Defendant in the Courtroom—Preliminary Examinations. As long as the defendant is either present in the courtroom or has waived the right to be present, on motion of either party, district courts may use telephonic, voice, or video conferencing, including two-way interactive video technology, to take testimony from an expert witness or, upon a showing of good cause, any person at another location in a preliminary examination.

(C) Defendant in the Courtroom—Other Proceedings. As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use two-way interactive video technology to take testimony from a person at another location in the following proceedings:

(1) evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status;

(2) with the consent of the parties, trials. A party who does not consent to the use of two-way interactive video technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.

(D) Mechanics of Use. The use of telephonic, voice, video conferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court.

RULE 6.102. ARREST ON A WARRANT.

(A)-(C) [Unchanged.]

(D) Warrant Specification of Interim Bail. Where permitted by law, the court may specify on the warrant the bail that an accused may post to obtain release before arraignment on the warrant and, if the court deems it appropriate, include as a bail condition that the arrest of the accused occur on or before a specified date or within a specified period of time after issuance of the warrant.

(E)-(F) [Unchanged.]

RULE 6.104. ARRAIGNMENT ON THE WARRANT OR COMPLAINT.

(A) Arraignment Without Unnecessary Delay. Unless released beforehand, an arrested person must be taken without unnecessary delay before a court for arraignment in accordance with the provisions of this rule, or must be arraigned without unnecessary delay by use of two-way interactive video technology in accordance with MCR 6.006(A).

(B) Place of Arraignment. An accused arrested pursuant to a warrant must be taken to a court specified in the warrant. An accused arrested without a warrant must be taken to a court in the judicial district in which the offense allegedly occurred. If the arrest occurs outside the county in which these courts are located, the arresting agency must make arrangements with the authorities in the demanding county to have the accused promptly transported to the latter county for arraignment in accordance with the provisions of this rule. If prompt transportation cannot be arranged, the accused must be taken without unnecessary delay before the nearest available court for preliminary appearance in accordance with subrule (C). In the alternative, the provisions of this subrule may be satisfied by use of two-way interactive video technology in accordance with MCR 6.006(A).

(C) Preliminary Appearance Outside County of Offense. When, under subrule (B), an accused is taken before a court outside the county of the alleged offense either in person or by way of two-way interactive video technology, the court must advise the accused of the rights specified in subrule (E)(2) and determine what form of pretrial release, if any, is appropriate. To be released, the accused must submit a recognizance for appearance within the next 14 days before a court specified in the arrest warrant or, in a case involving an arrest without a warrant, before either a court in the judicial district in which the offense allegedly occurred or some other court designated by that court. The court must certify the recognizance and have it delivered or sent without delay to the appropriate court. If the accused is not released, the arresting agency must arrange prompt transportation to the judicial district of the offense. In all cases, the arraignment is then to continue under subrule (D), if applicable, and subrule (E) either in the judicial district of the alleged offense or in such court as otherwise is designated.

(D)-(G) [Unchanged.]

RULE 6.106. PRETRIAL RELEASE.

(A)-(C) [Unchanged.]

(D) Conditional Release. If the court determines that the release described in subrule (C) will not reasonably ensure the appearance of the defendant as required, or will not reasonably ensure the safety of the public, the court may order the pretrial release of the defendant on the condition or combination of conditions that the court determines are appropriate including

(1) that the defendant will appear as required, will not leave the state without permission of the court, and will not commit any crime while released, and

(2) subject to any condition or conditions the court determines are reasonably necessary to ensure the appearance of the defendant as required and the safety of the public, which may include requiring the defendant to

(a) make reports to a court agency as are specified by the court or the agency;

(b) not use alcohol or illicitly use any controlled substance;

(c) participate in a substance abuse testing or monitoring program;

(d) participate in a specified treatment program for any physical or mental condition, including substance abuse;

(e) comply with restrictions on personal associations, place of residence, place of employment, or travel;

(f) surrender driver's license or passport;

(g) comply with a specified curfew;

(h) continue to seek employment;

(i) continue or begin an educational program;

(j) remain in the custody of a responsible member of the community who agrees to monitor the defendant and report any violation of any release condition to the court;

(k) not possess a firearm or other dangerous weapon;

(l) not enter specified premises or areas and not assault, beat, molest, or wound a named person or persons;

(m) comply with any condition limiting or prohibiting contact with any other named person or persons. If an order under this paragraph limiting or prohibiting contact with any other named person or persons is in conflict with another court order, the most restrictive

provision of each order shall take precedence over the other court order until the conflict is resolved.

(n) satisfy any injunctive order made a condition of release; or

(o) comply with any other condition, including the requirement of money bail as described in subrule (E), reasonably necessary to ensure the defendant's appearance as required and the safety of the public.

(E) Money Bail. If the court determines for reasons it states on the record that the defendant's appearance or the protection of the public cannot otherwise be assured, money bail, with or without conditions described in subrule (D), may be required.

(1) The court may require the defendant to

(a) post, at the defendant's option,

(i) a surety bond that is executed by a surety approved by the court in an amount equal to 1/4 of the full bail amount, or

(ii) bail that is executed by the defendant, or by another who is not surety approved by the court, and secured by

[A] a cash deposit, or its equivalent, for the full bail amount, or

[B] a cash deposit of 10 percent of the full bail amount, or, with the court's consent,

[C] designated real property; or

(b) post, at the defendant's option,

(i) a surety bond that is executed by a surety approved by the court in an amount equal to the full bail amount, or

(ii) bail that is executed by the defendant, or by another who is not a surety approved by the court, and secured by

[A] a cash deposit, or its equivalent, for the full bail amount, or, with the court's consent,

[B] designated real property.

(2) The court may require satisfactory proof of value and interest in property if the court consents to the posting of a bond secured by designated real property.

(F) [Unchanged.]

(G) Custody Hearing.

(1) Entitlement to Hearing. A court having jurisdiction of a defendant may conduct a custody hearing if the defendant is being held in custody pursuant to subrule (B) and a custody hearing is requested by either the defendant or the prosecutor. The purpose of the hearing is to permit the parties to litigate all of the issues relevant to challenging or supporting a custody decision pursuant to subrule (B).

(2) Hearing Procedure.

(a) At the custody hearing, the defendant is entitled to be present and to be represented by a lawyer, and the defendant and the prosecutor are entitled to present witnesses and evidence, to proffer information, and to cross-examine each other's witnesses.

(b) The rules of evidence, except those pertaining to privilege, are not applicable. Unless the court makes the findings required to enter an order under subrule (B)(1), the defendant must be ordered released under subrule (C) or (D). A verbatim record of the hearing must be made.

(H) [Unchanged.]

(I) Termination of Release Order.

(1) If the conditions of the release order are met and the defendant is discharged from all obligations in the case, the court must vacate the release order, discharge

anyone who has posted bail or bond, and return the cash (or its equivalent) posted in the full amount of the bail, or, if there has been a deposit of 10 percent of the full bail amount, return 90 percent of the deposited money and retain 10 percent.

(2) If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.

(a) The court must mail notice of any revocation order immediately to the defendant at the defendant's last known address and, if forfeiture of bail or bond has been ordered, to anyone who posted bail or bond.

(b) If the defendant does not appear and surrender to the court within 28 days after the revocation date or does not within the period satisfy the court that there was compliance with the conditions of release or that compliance was impossible through no fault of the defendant, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant and anyone who posted bail or bond for an amount not to exceed the full amount of the bail, or if a surety bond was posted an amount not to exceed the full amount of the surety bond, and costs of the court proceedings. If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court.

(c) The 10 percent bail deposit made under subrule (E)(1)(a)(ii)[B] must be applied to the costs and, if any remains, to the balance of the judgment. The amount applied to the judgment must be transferred to the county treasury for a circuit court case, to the treasuries of the

governments contributing to the district control unit for a district court case, or to the treasury of the appropriate municipal government for a municipal court case. The balance of the judgment may be enforced and collected as a judgment entered in a civil case.

(3) If money was deposited on a bail or bond executed by the defendant, the money must be first applied to the amount of any fine, costs, or statutory assessments imposed and any balance returned, subject to subrule (I)(1).

RULE 6.107. GRAND JURY PROCEEDINGS.

(A) [Unchanged.]

(B) Procedure to Obtain Records.

(1) To obtain the part of the record and transcripts specified in subrule (A), a motion must be addressed to the chief judge of the circuit court in the county in which the grand jury issuing the indictment was convened.

(2) The motion must be filed within 14 days after arraignment on the indictment or at a reasonable time thereafter as the court may permit on a showing of good cause and a finding that the interests of justice will be served.

(3) On receipt of the motion, the chief judge shall order the entire record and transcript of testimony taken before the grand jury to be delivered to the chief judge by the person having custody of it for an in camera inspection by the chief judge.

(4) Following the in camera inspection, the chief judge shall certify the parts of the record, including the testimony of all grand jury witnesses that touches on the guilt or innocence of the accused, as being all of the evidence bearing on that issue contained in the record, and have two copies of it prepared, one to be delivered to the attorney for the accused, or to the accused if not

represented by an attorney, and one to the attorney charged with the responsibility for prosecuting the indictment.

(5) The chief judge shall then have the record and transcript of all testimony of grand jury witnesses returned to the person from whom it was received for disposition according to law.

RULE 6.110. THE PRELIMINARY EXAMINATION.

(A) Right to Preliminary Examination. Where a preliminary examination is permitted by law, the people and the defendant are entitled to a prompt preliminary examination. If the court permits the defendant to waive the preliminary examination, it must bind the defendant over for trial on the charge set forth in the complaint or any amended complaint.

(B) Time of Examination; Remedy. Unless adjourned by the court, the preliminary examination must be held on the date specified by the court at the arraignment on the warrant or complaint. If the parties consent, for good cause shown, the court may adjourn the preliminary examination for a reasonable time. If a party objects, the court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment. A violation of this subrule is deemed to be harmless error unless the defendant demonstrates actual prejudice.

(C)-(I) [Unchanged.]

RULE 6.111. CIRCUIT COURT ARRAIGNMENT IN DISTRICT COURT.

(A) If the defendant, the defense attorney, and the prosecutor consent on the record, the circuit court arraignment may be conducted and a plea of not guilty, guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity may be taken by a district

judge in criminal cases cognizable in the circuit court immediately after the bindover of the defendant. Following a plea, the case shall be transferred to the circuit court where the circuit judge shall preside over further proceedings, including sentencing.

(B) Arraignments conducted pursuant to this rule shall be conducted in conformity with MCR 6.113.

(C) Pleas taken pursuant to this rule shall be taken in conformity with MCR 6.301, 6.302, 6.303, and 6.304, as applicable, and, once taken, shall be governed by MCR 6.310.

(D) Each court intending to utilize this rule shall submit a local administrative order to the State Court Administrator pursuant to MCR 8.112(B) to implement the rule.

RULE 6.112. THE INFORMATION OR INDICTMENT.

(A) [Unchanged.]

(B) Use of Information or Indictment. A prosecution must be based on an information or an indictment. Unless the defendant is a fugitive from justice, the prosecutor may not file an information until the defendant has had or waives a preliminary examination. An indictment is returned and filed without a preliminary examination. When this occurs, the indictment shall commence judicial proceedings.

(C) Time of Filing Information or Indictment. The prosecutor must file the information or indictment on or before the date set for the arraignment.

(D) Information; Nature and Contents; Attachments. The information must set forth the substance of the accusation against the defendant and the name, statutory citation, and penalty of the offense allegedly committed. If applicable, the information must also set forth the notice required by MCL 767.45, and the

defendant's Michigan driver's license number. To the extent possible, the information should specify the time and place of the alleged offense. Allegations relating to conduct, the method of committing the offense, mental state, and the consequences of conduct may be stated in the alternative. A list of all witnesses known to the prosecutor who may be called at trial and all res gestae witnesses known to the prosecutor or investigating law enforcement officers must be attached to the information. A prosecutor must sign the information.

(E) [Unchanged.]

(F) Notice of Intent to Seek Enhanced Sentence. A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must be filed within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.

(G)-(H) [Unchanged.]

RULE 6.113. THE ARRAIGNMENT ON THE INDICTMENT OR INFORMATION.

(A) Time of Conducting. Unless the defendant waives arraignment or the court for good cause orders a delay, or as otherwise permitted by these rules, the court with trial jurisdiction must arraign the defendant on the scheduled date. The court may hold the arraignment before the preliminary examination transcript has been prepared and filed. Unless the defendant demonstrates actual prejudice, failure to hold the arraignment on the scheduled date is to be deemed harmless error.

(B)-(C) [Unchanged.]

(D) Preliminary Examination Transcript. The court reporter shall transcribe and file the record of the preliminary examination if such is demanded or ordered pursuant to MCL 766.15.

(E) Elimination of Arraignments. A circuit court may submit to the State Court Administrator pursuant to MCR 8.112(B) a local administrative order that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information.

RULE 6.201. DISCOVERY.

(A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:

(1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial;

(2) any written or recorded statement pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement;

(3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion;

(4) any criminal record that the party may use at trial to impeach a witness;

(5) a description or list of criminal convictions, known to the defense attorney or prosecuting attorney, of any witness whom the party may call at trial; and

(6) a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document, photograph, or other paper, with copies to be provided on request. A party may request a hearing regarding any question of costs of reproduction. On good cause shown, the court may order that a party be given the opportunity to test without destruction any tangible physical evidence.

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;

(3) any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;

(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

(C) Prohibited Discovery.

(1) Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in subrule (2).

(2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely

to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.

(a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in camera inspection, the trial court shall suppress or strike the privilege holder's testimony.

(b) If the court is satisfied, following an in camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.

(c) Regardless of whether the court determines that the records should be made available to the defense, the court shall make findings sufficient to facilitate meaningful appellate review.

(d) The court shall seal and preserve the records for review in the event of an appeal

(i) by the defendant, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense, or

(ii) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense.

(e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide.

(D) [Unchanged.]

(E) Protective Orders. On motion and a showing of good cause, the court may enter an appropriate protective order. In considering whether good cause exists, the court shall consider the parties' interests in a fair trial; the risk to any person of harm, undue annoyance, intimidation, embarrassment, or threats; the risk that evidence will be fabricated; and the need for secrecy regarding the identity of informants or other law enforcement matters. On motion, with notice to the other party, the court may permit the showing of good cause for a protective order to be made in camera. If the court grants a protective order, it must seal and preserve the record of the hearing for review in the event of an appeal.

(F) Timing of Discovery. Unless otherwise ordered by the court, the prosecuting attorney must comply with the requirements of this rule within 21 days of a request under this rule and a defendant must comply with the requirements of this rule within 21 days of a request under this rule.

(G)-(I) [Unchanged.]

(J) Violation. If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. Wilful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court. An order of the court under this section is reviewable only for abuse of discretion.

RULE 6.303. PLEA OF GUILTY BUT MENTALLY ILL.

Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302. In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or (D)(2)(b), the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill at the time of the offense to which the plea is entered. The reports must be made a part of the record.

RULE 6.304. PLEA OF NOT GUILTY BY REASON OF INSANITY.

(A) [Unchanged.]

(B) Additional Advice Required. After complying with the applicable requirements of MCR 6.302, the court must advise the defendant, and determine whether the defendant understands, that the plea will result in the defendant's commitment for diagnostic examination at the center for forensic psychiatry for up to 60 days, and that after the examination, the probate court may order the defendant to be committed for an indefinite period of time.

(C) Factual Basis. Before accepting a plea of not guilty by reason of insanity, the court must examine the psychiatric reports prepared and hold a hearing that establishes support for findings that

(1) the defendant committed the acts charged, and

(2) that, by a preponderance of the evidence, the defendant was legally insane at the time of the offense.

(D) [Unchanged.]

RULE 6.310. WITHDRAWAL OR VACATION OF PLEA.

(A) [Unchanged.]

(B) Withdrawal After Acceptance but Before Sentence. After acceptance but before sentence,

(1) a plea may be withdrawn on the defendant's motion or with the defendant's consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by subrule (C).

(2) the defendant is entitled to withdraw the plea if

(a) the plea involves a prosecutorial sentence recommendation or agreement for a specific sentence, and the court states that it is unable to follow the agreement or recommendation; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or

(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.

(C) Motion to Withdraw Plea After Sentence. The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become

part of the plea proceeding for the purposes of further proceedings, including appeals.

(D) Preservation of Issues. A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

(E) Vacation of Plea on Prosecutor's Motion. On the prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement.

RULE 6.402. WAIVER OF JURY TRIAL BY THE DEFENDANT.

(A) Time of Waiver. The court may not accept a waiver of trial by jury until after the defendant has been arraigned or has waived an arraignment on the information, or, in a court where arraignment on the information has been eliminated under MCR 6.113(E), after the defendant has otherwise been provided with a copy of the information, and has been offered an opportunity to consult with a lawyer.

(B) [Unchanged.]

RULE 6.412. SELECTION OF THE JURY.

(A)-(E) [Unchanged.]

(F) Oath After Selection. After the jury is selected and before trial begins, the court must have the jurors sworn.

RULE 6.414. CONDUCT OF JURY TRIAL.

(A) Before trial begins, the court should give the jury appropriate pretrial instructions.

(B) [Relettered but otherwise unchanged.]

(C) Opening Statements. Unless the parties and the court agree otherwise, the prosecutor, before presenting evidence, must make a full and fair statement of the prosecutor's case and the facts the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a like statement. The court may impose reasonable time limits on the opening statements.

(D) Note Taking by Jurors. The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes and that they should not permit note taking to interfere with their attentiveness. The court also must instruct the jurors to keep their notes confidential except as to other jurors during deliberations. The court may, but need not, allow jurors to take their notes into deliberations. If the court decides not to permit the jurors to take their notes into deliberations, the court must so inform the jurors at the same time it permits the note taking. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded.

(E) Juror Questions. The court may, in its discretion, permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that inappropriate questions are not asked, and that the parties have the opportunity to object to the questions.

(F) View. The court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. During the view, no persons other than, as permitted by the trial judge, the officer in charge of the jurors, or any person appointed by the court to direct the jurors' attention to a particular place or site, and the trial

judge, may speak to the jury concerning a subject connected with the trial; any such communication must be recorded in some fashion.

(G) Closing Arguments. After the close of all the evidence, the parties may make closing arguments. The prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable time limits on the closing arguments.

(H) Instructions to the Jury. Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments, and give any appropriate further instructions after argument. After jury deliberations begin, the court may give additional instructions that are appropriate.

(I)-(J) [Relettered but otherwise unchanged.]

RULE 6.419. MOTION FOR DIRECTED VERDICT OF ACQUITTAL.

(A) Before Submission to Jury. After the prosecutor has rested the prosecution's case-in-chief and before the defendant presents proofs, the court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. The court may not reserve decision on the defendant's motion. If the defen-

dant's motion is made after the defendant presents proofs, the court may reserve decision on the motion, submit the case to the jury, and decide the motion before or after the jury has completed its deliberations.

(B) [Unchanged.]

(C) Bench Trial. In an action tried without a jury, after the prosecutor has rested the prosecution's case-in-chief, the defendant, without waiving the right to offer evidence if the motion is not granted, may move for acquittal on the ground that a reasonable doubt exists. The court may then determine the facts and render a verdict of acquittal, or may decline to render judgment until the close of all the evidence. If the court renders a verdict of acquittal, the court shall make findings of fact.

(D)-(E) [Relettered but otherwise unchanged.]

RULE 6.420. VERDICT.

(A)-(B) [Unchanged.]

(C) Several Counts. If a defendant is charged with two or more counts, and the court determines that the jury is deadlocked so that a mistrial must be declared, the court may inquire of the jury whether it has reached a unanimous verdict on any of the counts charged, and, if so, may accept the jury's verdict on that count or counts.

(D) [Relettered but otherwise unchanged.]

RULE 6.427. JUDGMENT.

Within 7 days after sentencing, the court must date and sign a written judgment of sentence that includes:

(1) the title and file number of the case;

(2) the defendant's name;

(3) the crime for which the defendant was convicted;

(4) the defendant's plea;

(5) the name of the defendant's attorney if one appeared;

(6) the jury's verdict or the finding of guilt by the court;

(7) the term of the sentence;

(8) the place of detention;

(9) the conditions incident to the sentence; and

(10) whether the conviction is reportable to the Secretary of State pursuant to statute, and, if so, the defendant's Michigan driver's license number.

If the defendant was found not guilty or for any other reason is entitled to be discharged, the court must enter judgment accordingly. The date a judgment is signed is its entry date.

RULE 6.428. REISSUANCE OF JUDGMENT.

If the defendant did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys retained or appointed to represent the defendant on direct appeal from the judgment either disregarded the defendant's instruction to perfect a timely appeal of right, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right, the trial court shall issue an order restarting the time in which to file an appeal of right.

RULE 6.429. CORRECTION AND APPEAL OF SENTENCE.

(A) Authority to Modify Sentence. A motion to correct an invalid sentence may be filed by either party. The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law.

(B) Time for Filing Motion.

(1) A motion to correct an invalid sentence may be filed before the filing of a timely claim of appeal.

(2) If a claim of appeal has been filed, a motion to correct an invalid sentence may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within 6 months of entry of the judgment of conviction and sentence.

(4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.

(C) [Unchanged.]

RULE 6.431. NEW TRIAL.

(A) Time for Making Motion.

(1) A motion for a new trial may be filed before the filing of a timely claim of appeal.

(2) If a claim of appeal has been filed, a motion for a new trial may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed within 6 months of entry of the judgment of conviction and sentence.

(4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.

(B)-(D) [Unchanged.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A) [Unchanged.]

(B) Pretrial. The court, on its own initiative or on motion of either party, may direct the prosecutor and the defendant, and, if represented, the defendant's attorney to appear for a pretrial conference. The court may require collateral matters and pretrial motions to be filed and argued no later than this conference.

(C) [Unchanged.]

(D) Arraignment; District Court Offenses.

(1) Whenever a defendant is arraigned on an offense over which the district court has jurisdiction, the defendant must be informed of

(a) the name of the offense;

(b) the maximum sentence permitted by law; and

(c) the defendant's right

(i) to the assistance of an attorney and to a trial;

(ii) (if subrule [D][2] applies) to an appointed attorney; and

(iii) to a trial by jury, when required by law.

The information may be given in a writing that is made a part of the file or by the court on the record.

(2) An indigent defendant has a right to an appointed attorney whenever the offense charged requires on conviction a minimum term in jail or the court determines it might sentence to a term of incarceration, even if suspended.

If an indigent defendant is without an attorney and has not waived the right to an appointed attorney, the court may not sentence the defendant to jail or to a suspended jail sentence.

(3) The right to the assistance of an attorney, to an appointed attorney, or to a trial by jury is not waived unless the defendant

(a) has been informed of the right; and

(b) has waived it in a writing that is made a part of the file or orally on the record.

(4) The court may allow a defendant to enter a plea of not guilty or to stand mute without formal arraignment by filing a written statement signed by the defendant and any defense attorney of record, reciting the general nature of the charge, the maximum possible sentence, the rights of the defendant at arraignment, and the plea to be entered. The court may require that an appropriate bond be executed and filed and appropriate and reasonable sureties posted or continued as a condition precedent to allowing the defendant to be arraigned without personally appearing before the court.

(E) Pleas of Guilty and Nolo Contendere. Before accepting a plea of guilty or nolo contendere, the court shall in all cases comply with this rule.

(1) The court shall determine that the plea is understanding, voluntary, and accurate. In determining the accuracy of the plea,

(a) if the defendant pleads guilty, the court, by questioning the defendant, shall establish support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading, or

(b) if the defendant pleads nolo contendere, the court shall not question the defendant about the defendant's participation in the crime, but shall make the determination on the basis of other available information.

(2) The court shall inform the defendant of the right to the assistance of an attorney. If the offense charged requires on conviction a minimum term in jail, the court shall inform the defendant that if the defendant is indigent the defendant has the right to an appointed attorney. The court shall also give such advice if it

determines that it might sentence to a term of incarceration, even if suspended.

(3) The court shall advise the defendant of the following:

(a) the mandatory minimum jail sentence, if any, and the maximum possible penalty for the offense,

(b) that if the plea is accepted the defendant will not have a trial of any kind and that the defendant gives up the following rights that the defendant would have at trial:

(i) the right to have witnesses called for the defendant's defense at trial,

(ii) the right to cross-examine all witnesses called against the defendant,

(iii) the right to testify or to remain silent without an inference being drawn from said silence,

(iv) the presumption of innocence and the requirement that the defendant's guilt be proven beyond a reasonable doubt.

(4) A defendant or defendants may be informed of the trial rights listed in subrule (3)(b) as follows:

(a) on the record,

(b) in a writing made part of the file, or

(c) in a writing referred to on the record.

If the court uses a writing pursuant to subrule (E)(4)(b) or (c), the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(5) The court shall make the plea agreement a part of the record and determine that the parties agree on all

the terms of that agreement. The court shall accept, reject, or indicate on what basis it accepts the plea.

(6) The court must ask the defendant:

(a) (if there is no plea agreement) whether anyone has promised the defendant anything, or (if there is a plea agreement) whether anyone has promised anything beyond what is in the plea agreement;

(b) whether anyone has threatened the defendant; and

(c) whether it is the defendant's own choice to plead guilty.

(7) A plea of guilty or nolo contendere in writing is permissible without a personal appearance of the defendant and without support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading if

(a) the court decides that the combination of the circumstances and the range of possible sentences makes the situation proper for a plea of guilty or nolo contendere;

(b) the defendant acknowledges guilt or nolo contendere, in a writing to be placed in the district court file, and waives in writing the rights enumerated in subrule (3)(b); and

(c) the court is satisfied that the waiver is voluntary.

(8) The following provisions apply where a defendant seeks to challenge the plea.

(a) A defendant may not challenge a plea on appeal unless the defendant moved in the trial court to withdraw the plea for noncompliance with these rules. Such a motion may be made either before or after sentence has been imposed. After imposition of sentence, the defendant may file a motion to withdraw the plea

within the time for filing an application for leave to appeal under MCR 7.103(B)(6).

(b) If the trial court determines that a deviation affecting substantial rights occurred, it shall correct the deviation and give the defendant the option of permitting the plea to stand or of withdrawing the plea. If the trial court determines either a deviation did not occur, or that the deviation did not affect substantial rights, it may permit the defendant to withdraw the plea only if it does not cause substantial prejudice to the people because of reliance on the plea.

(c) If a deviation is corrected, any appeal will be on the whole record including the subsequent advice and inquiries.

(9) The State Court Administrator shall develop and approve forms to be used under subrules (E)(4)(b) and (c) and (E)(7)(b).

(F) Sentencing.

(1) At the sentencing, the court shall:

(a) require the presence of the defendant's attorney, unless the defendant does not have one or has waived the attorney's presence;

(b) give the defendant's attorney or, if the defendant is not represented by an attorney, the defendant an opportunity to review the presentence report, if any, and to advise the court of circumstances the defendant believes should be considered in imposing sentence; and

(c) inform the defendant of credit to be given for time served, if any.

(2) Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to an attorney, a subsequent charge or sentence may not be enhanced because of this conviction and the

defendant may not be incarcerated for violating probation or any other condition imposed in connection with this conviction.

(G) Motion for New Trial. A motion for a new trial must be filed within 21 days after the entry of judgment. However, if an appeal has not been taken, a delayed motion may be filed within the time for filing an application for leave to appeal.

(H) Arraignment; Offenses Not Cognizable by the District Court. In a prosecution in which a defendant is charged with a felony or a misdemeanor not cognizable by the district court, the court shall

(1) inform the defendant of the nature of the charge;

(2) inform the defendant of

(a) the right to a preliminary examination;

(b) the right to an attorney, if the defendant is not represented by an attorney at the arraignment;

(c) the right to have an attorney appointed at public expense if the defendant is indigent; and

(d) the right to consideration of pretrial release.

If a defendant not represented by an attorney waives the preliminary examination, the court shall ascertain that the waiver is freely, understandingly, and voluntarily given before accepting it.

RULE 6.615. MISDEMEANOR TRAFFIC CASES.

(A) Citation; Complaint; Summons; Warrant.

(1) A misdemeanor traffic case may be begun by one of the following procedures:

(a) Service by a law enforcement officer on the defendant of a written citation, and the filing of the citation in the district court.

(b) The filing of a sworn complaint in the district court and the issuance of an arrest warrant. A citation may serve as the sworn complaint and as the basis for a misdemeanor warrant.

(c) Other special procedures authorized by statute.

(2) The citation serves as a summons to command

(a) the initial appearance of the defendant; and

(b) a response from the defendant as to the defendant's guilt of the violation alleged.

(B) Appearances; Failure to Appear. If a defendant fails to appear or otherwise to respond to any matter pending relative to a misdemeanor traffic citation, the court shall proceed as provided in this subrule.

(1) If the defendant is a Michigan resident, the court

(a) must initiate the procedures required by MCL 257.321a for the failure to answer a citation; and

(b) may issue a warrant for the defendant's arrest.

(2) If the defendant is not a Michigan resident,

(a) the court may mail a notice to appear to the defendant at the address in the citation;

(b) the court may issue a warrant for the defendant's arrest; and

(c) if the court has received the driver's license of a nonresident, pursuant to statute, it may retain the license as allowed by statute. The court need not retain the license past its expiration date.

(C) [Unchanged.]

(D) Contested Cases.

(1) A contested case may not be heard until a citation is filed with the court. If the citation is filed electronically, the court may decline to hear the matter until the citation is signed by the officer or official who issued it,

and is filed on paper. A citation that is not signed and filed on paper, when required by the court, may be dismissed with prejudice.

(2) A misdemeanor traffic case must be conducted in compliance with the constitutional and statutory procedures and safeguards applicable to misdemeanors cognizable by the district court.

RULE 6.620. IMPANELING THE JURY.

(A) Alternate Jurors. The court may direct that 7 or more jurors be impaneled to sit in a criminal case. After the instructions to the jury have been given and the case submitted, the names of the jurors must be placed in a container and names drawn to reduce the number of jurors to 6, who shall constitute the jury. The court may retain the alternate jurors during deliberations. If the court does so, it shall instruct the alternate jurors not to discuss the case with any other person until the jury completes its deliberations and is discharged. If an alternate juror replaces a juror after the jury retires to consider its verdict, the court shall instruct the jury to begin its deliberations anew.

(B) Peremptory Challenges.

(1) Each defendant is entitled to three peremptory challenges. The prosecutor is entitled to the same number of peremptory challenges as a defendant being tried alone, or, in the case of jointly tried defendants, the total number of peremptory challenges to which all the defendants are entitled.

(2) Additional Challenges. On a showing of good cause, the court may grant one or more of the parties an increased number of peremptory challenges. The additional challenges granted by the court need not be equal for each party.

Staff Comment: On March 12, 2002, the Court appointed the Committee on the Rules of Criminal Procedure to review the rules to determine whether any of the provisions should be revised. The committee issued its report on June 16, 2003, recommending numerous amendments to existing rules, plus some new rules. A public hearing on the committee's recommendations was held May 27, 2004.

The Court adopted the committee's recommendations with respect to the amendments of Rules 2.511, 6.102, 6.104, 6.107, 6.112, 6.303, 6.304, 6.310, 6.311, 6.402, 6.412, 6.414, 6.419, 6.420, 6.427, 6.615, and 6.620, and the adoption of a new Rule 6.428.

The Court also adopted, with modifications, recommendations made by the committee and staff to amend other rules. Rule 2.510 was amended to conform to the newly enacted 2004 PA 12 (MCL 600.1332). The Court modified the committee's recommendation concerning Rule 6.001 to include a reference to 6.102 and to limit the application of 6.445 to subrules (A) through (G). The Court adopted the committee's recommendation with regard to Rule 6.004, except that the requirement that "whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice" was retained and inserted into 6.004(A).

The Court adopted the committee's recommendations with regard to Rule 6.005 with the exception of the committee's recommendation that there be a ban on the joint representation of multiple defendants in all cases.

The Court did follow the committee's recommendation that a new Rule 6.006, Video and Audio Proceedings, be adopted and included in the rule most of the committee's recommendations. However, the Court did limit the application of the rule at trial to situations where the parties have consented to the taking of testimony of a witness by use of two-way interactive video technology. The Court also modified the committee's recommendation concerning such testimony at preliminary examinations to conform to the newly enacted 2004 PA 20 (MCL 766.11a).

Staff had recommended that a new 6.106(D)(2)(m) be adopted. The Court modified the recommendation to clarify that "the most restrictive provision of each order shall take precedence over the other court order until the conflict is resolved." Rules 6.106(E) and 6.106(I) were amended to conform to the newly enacted 2004 PA 167 (MCL 765.6) and 2004 PA 332 (MCL 765.28).

The Court modified the committee's recommendation with regard to Rule 6.110 to eliminate the conflict with MCL 766.7. The Court did not adopt the committee's recommendations to amend 6.110(C) and (D).

The committee recommended that the Court adopt a new Rule 6.111, permitting a plea of guilty or nolo contendere to be taken by a district judge in criminal cases cognizable in the circuit court after bindover immediately following the conclusion or waiver of a preliminary examination, with the consent of the defendant, defense attorney, and prosecutor. The Court accepted and expanded upon the committee's recommendation by adopting a new Rule 6.111, Circuit Court Arraignment in District Court. In addition to allowing the district judge to conduct an arraignment and accept a plea of guilty or nolo contendere in such cases, the new rule also permits pleas of not guilty, guilty but mentally ill, or not guilty by reason of insanity. The rule also requires that such arraignment be conducted in conformity with Rule 6.113.

The Court did not adopt the committee's recommendations to strike the current 6.113(D), but instead amended the rule to incorporate the language of MCL 766.15. The committee's recommendation for a new 6.113(D) was instead adopted as a new 6.113(E).

The Court adopted most of the committee and staff recommendations concerning Rule 6.201, except that the Court did not strike the language "except so much of a report as concerns a continuing investigation" in Rule 6.201(B)(2).

Rules 6.429 and 6.431 were amended to provide that if the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence or a motion for a new trial may be filed within 6 months of entry of the judgment of conviction and sentence.

The committee's recommendation that Rule 6.610 be amended was adopted, except for committee's proposal to add a new 6.610(F) providing for discovery in district court.

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

Adopted July 13, 2005, effective immediately (File No. 2003-04)—REPORTER.

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

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A) Plea Requirements. The court may not accept a plea of guilty or nolo contendere unless it is convinced

that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out subrules (B)-(E).

(B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:

(1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;

(2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law;

(3) if the plea is accepted, the defendant will not have a trial of any kind, and so gives up the rights the defendant would have at a trial, including the right:

(a) to be tried by a jury;

(b) to be presumed innocent until proved guilty;

(c) to have the prosecutor prove beyond a reasonable doubt that the defendant is guilty;

(d) to have the witnesses against the defendant appear at the trial;

(e) to question the witnesses against the defendant;

(f) to have the court order any witnesses the defendant has for the defense to appear at the trial;

(g) to remain silent during the trial;

(h) to not have that silence used against the defendant; and

(i) to testify at the trial if the defendant wants to testify.

The requirements of this section may be satisfied by a writing on a form approved by the State Court

Administrator. If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea;

(5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right.

(C)-(F) [Unchanged.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A) [Unchanged.]

(B) Presentence Report; Disclosure Before Sentencing. The court must provide copies of the presentence report to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time before the day of sentencing. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity

to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review.

(C) [Unchanged.]

(D) Sentencing Guidelines. The court must use the sentencing guidelines, as provided by law. Proposed scoring of the guidelines shall accompany the presentence report.

(E) Sentencing Procedure.

(1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:

(a) determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report,

(b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in subrule (E)(2),

(c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence,

(d) state the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled,

(e) if the sentence imposed is not within the guidelines range, articulate the substantial and compelling reasons justifying that specific departure, and

(f) order that the defendant make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate.

(2) Resolution of Challenges. If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

(a) correct or delete the challenged information in the report, whichever is appropriate, and

(b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

(F) Advice Concerning the Right to Appeal; Appointment of Counsel.

(1) In a case involving a conviction following a trial, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a) the defendant is entitled to appellate review of the conviction and sentence,

(b) if the defendant is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and

(c) the request for a lawyer must be made within 42 days after sentencing.

(2) In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a) the defendant is entitled to file an application for leave to appeal,

(b) if the defendant is financially unable to retain a lawyer, the defendant may request appointment of a lawyer to represent the defendant on appeal, and

(c) the request for a lawyer must be made within 42 days after sentencing.

(3) The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be completed and returned to the court within 42 days after sentencing if the defendant wants the court to appoint a lawyer.

(4) When imposing sentence in a case in which sentencing guidelines enacted in 1998 PA 317, MCL 777.1 *et seq*., are applicable, if the court imposes a minimum sentence that is longer or more severe than the range provided by the sentencing guidelines, the court must advise the defendant on the record and in writing that the defendant may seek appellate review of the sentence, by right if the conviction followed trial or by application if the conviction entered by plea, on the ground that it is longer or more severe than the range provided by the sentencing guidelines.

(G) Appointment of Lawyer; Trial Court Responsibilities in Connection with Appeal.

(1) Appointment of Lawyer.

(a) Unless there is a postjudgment motion pending, the court must rule on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the court must rule on the request after the court's disposition of the pending motion and within 14 days after that disposition.

(b) In a case involving a conviction following a trial, if the defendant is indigent, the court must enter an

order appointing a lawyer if the request is filed within 42 days after sentencing or within the time for filing an appeal of right. The court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal.

(c) In a case involving a conviction following a plea of guilty or nolo contendere, the court should liberally grant the request if it is filed within 42 days after sentencing.

(d) Scope of Appellate Lawyer's Responsibilities. The responsibilities of the appellate lawyer appointed to represent the defendant include representing the defendant

(i) in available postconviction proceedings in the trial court the lawyer deems appropriate,

(ii) in postconviction proceedings in the Court of Appeals,

(iii) in available proceedings in the trial court the lawyer deems appropriate under MCR 7.208(B) or 7.211(C)(1), and

(iv) as appellee in relation to any postconviction appeal taken by the prosecutor.

(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) Order as Claim of Appeal; Trial Cases. In a case involving a conviction following a trial, if the defendant's request for a lawyer, timely or not, was made within the time for filing a claim of appeal, the order described in subrules (G)(1) and (2) must be entered on a form approved by the State Court Administrative Office, entitled "Claim of Appeal and Appointment of Counsel," and the court must immediately send to the Court of Appeals a copy of the order and a copy of the judgment being appealed. The court also must file in the Court of Appeals proof of having made service of the order as required in subrule (G)(2). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

RULE 6.445. PROBATION REVOCATION.

(A)-(E) [Unchanged.]

(F) Pleas of Guilty. The probationer may, at the arraignment or afterward, plead guilty to the violation. Before accepting a guilty plea, the court, speaking directly to the probationer and receiving the probationer's response, must

(1) advise the probationer that by pleading guilty the probationer is giving up the right to a contested hearing and, if the probationer is proceeding without legal representation, the right to a lawyer's assistance as set forth in subrule (B)(2)(b),

(2) advise the probationer of the maximum possible jail or prison sentence for the offense,

(3) ascertain that the plea is understandingly, voluntarily, and knowingly made, and

(4) establish factual support for a finding that the probationer is guilty of the alleged violation.

(G) Sentencing. If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report and having complied with the provisions set forth in MCR 6.425(B) and (E).

(H) [Unchanged.]

RULE 6.625. APPEAL.

An appeal from a misdemeanor case is governed by subchapter 7.100.

Staff Comment: On March 12, 2002, the Court appointed the Committee on the Rules of Criminal Procedure to review the rules to determine whether any of the provisions should be revised. The committee issued its report on June 16, 2003, recommending numerous amendments of MCR 6.302 and 6.725. The committee did not recommend any amendments of MCR 6.625. A public hearing on the committee's recommendations was held May 27, 2004.

The Court adopted most of the committee's recommendations regarding Rule 6.302, and modified the rule to conform to the ruling of the United States Supreme Court in *Halbert v Michigan,* 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005).

The Court adopted many of the committee's recommendations concerning MCR 6.425, however the Court eliminated the requirement that "[n]ot later than the date of sentencing, the court must complete a sentencing information report on a form to be prescribed by and returned to the state court administrator" in MCR 6.425(D). The Court also

modified the language of the rule to incorporate the Court's holding in *People v Babcock*, 469 Mich 247 (2003), and to conform to the ruling in *Halbert*.

The Court did not follow the committee's recommendation that MCR 6.625 not be amended, but instead modified the rule to conform to the ruling in *Halbert*.

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

Adopted July 13, 2005, effective January 1, 2006 (File No. 2004-52) —REPORTER.

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

RULE 6.120. JOINDER AND SEVERANCE; SINGLE DEFENDANT.

(A) Charging Joinder. The prosecuting attorney may file an information or indictment 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) 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 amendments, effective January 1, 2006, 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.

SUPREME COURT CASES

WOODARD v CUSTER
WOODARD v UNIVERSITY OF MICHIGAN MEDICAL CENTER

Docket Nos. 124994, 124995. Decided July 12, 2005. On applications by the defendants for leave to appeal and by the plaintiffs for leave to cross-appeal, the Supreme Court, after hearing oral argument on whether the applications should be granted and in lieu of granting leave to the defendants, held that the case cannot proceed to a jury trial on a res ipsa loquitur theory. Rehearing denied 474 Mich 1201. In a separate order, the Supreme Court granted the plaintiffs' application for leave to appeal as cross-appellants.

Johanna Woodard, individually and as next friend of Austin D. Woodard, a minor, and Steve Woodard brought an action in the Washtenaw Circuit Court against Joseph R. Custer, M.D., and others and an action in the Court of Claims against the University of Michigan Medical Center, alleging medical malpractice. The actions were consolidated in the circuit court, and the court, Timothy P. Connors, J., granted the defendants' motion to strike the plaintiffs' proposed expert witness, who is board-certified in pediatrics, on the basis that he was not qualified under MCL 600.2169 to testify against Dr. Custer, who is board-certified in pediatrics and has certificates of special qualifications in pediatric critical care medicine and neonatal-perinatal medicine. The court dismissed the plaintiffs' claim with prejudice. The Court of Appeals, METER, P.J., and TALBOT and BORRELLO, JJ., in an unpublished opinion per curiam and in an unpublished opinion concurring in part and dissenting in part by METER, P.J. (BORRELLO, J., dissenting in a separate opinion), issued October 21, 2003 (Docket Nos. 239868, 239869), affirmed the holding that the plaintiffs' proposed witness was not qualified under § 2169, but reversed the trial court's dismissal and remanded for a trial on the basis that expert testimony was not necessary because of the doctrine of res ipsa loquitur, i.e., an inference of negligence may be drawn from the fact that the infant was admitted to the Pediatric Intensive Care Unit with healthy legs and was discharged from the unit with fractured legs. The defendants sought leave to appeal, and the plaintiffs sought leave to cross-appeal. The Supreme Court heard oral argument on whether to grant the applications or take other peremptory action. 471 Mich 890 (2004).

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

The Court of Appeals erred in holding that expert testimony was not required in this matter. The case cannot proceed to a jury on a res ipsa loquitur theory.

Expert testimony generally is required in medical malpractice cases. However, where the case satisfies the requirements of the doctrine of res ipsa loquitur, the case may proceed to the jury without expert testimony. In order for the doctrine of res ipsa loquitur to apply, the event must be of a kind that ordinarily does not occur in the absence of someone's negligence. The fact that the injury complained of does not ordinarily occur in the absence of negligence must either be supported by expert testimony or must be within the common understanding of the jury. Whether a leg may be fractured in the absence of negligence when placing an arterial line or a venous catheter in a newborn's leg is not within the common understanding of the jury, and, thus, expert testimony is required. Because the Court does not know whether the injury complained of does not ordinarily occur in the absence of negligence, it cannot apply the doctrine of res ipsa loquitur.

Justice CAVANAGH, joined by Justice KELLY, concurring in part and dissenting in part, concurred with the conclusion of the majority that expert witness testimony is necessary in this case. The trial court abused its discretion in not granting the plaintiffs' motion for an extension of time to add a new expert witness. Justice WEAVER correctly states that the appeal and cross-appeal in this matter should not be bifurcated, and should be considered and decided together. Dr. Custer's application should have been granted and the opinion of the Court of Appeals should not be peremptorily reversed.

Entry of final judgment in this case must await the determination of the expert-qualification issue raised in the plaintiffs' application for leave to appeal as cross-appellants.

Justice WEAVER, dissenting, would not have decided the defendants' application for leave to appeal separately from the plaintiffs' cross-application for leave to appeal and without full briefing and argument.

WITNESSES — EXPERT WITNESSES — MEDICAL MALPRACTICE — RES IPSA LOQUITUR.

Expert testimony generally is required in medical malpractice cases; however, where the case satisfies the dictates of the doctrine of res ipsa loquitur, the case may proceed to the jury without expert

> testimony; a case satisfies the requirements of the doctrine by meeting the following four conditions: (1) the event must be of a kind that ordinarily does not occur in the absence of someone's negligence, (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant, (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff, and (4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff.

Nemier, Tolari, Landry, Mazzeo & Johnson, P.C. (by *Craig L. Nemier, Michelle E. Mathieu*, and *Nancy Dembinski*), for the plaintiffs.

Hebert, Eller, Chandler & Reynolds, PLLC (by *Kevin P. Hanbury*), for the defendants.

MARKMAN, J. The question presented to this Court is whether expert testimony is necessary in the circumstances of this case. We conclude that it is.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs' fifteen-day-old son was admitted to the Pediatric Intensive Care Unit (PICU) at the University of Michigan Hospital, where he was treated for a respiratory problem. During his stay in the PICU, he was under the care of Dr. Joseph R. Custer, the Director of Pediatric Critical Care Medicine. When the infant was moved to the general hospital ward, physicians in that ward discovered that both of the infant's legs were fractured. Plaintiffs sued Dr. Custer and the hospital, alleging that the fractures were the result of negligent medical procedures, namely, the improper placement of an arterial line in the femoral vein of the infant's right leg and the improper placement of a venous catheter in the infant's left leg.

Defendant physician is board-certified in pediatrics and has certificates of special qualifications in pediatric

critical care medicine and neonatal-perinatal medicine. Plaintiffs' proposed expert witness, who signed plaintiffs' affidavit of merit, is board-certified in pediatrics, but does not have any certificates of special qualifications.

Before discovery, the trial court denied defendants' motion for summary disposition, concluding that plaintiffs' attorney had a "reasonable belief" under MCL 600.2912d(1) that plaintiffs' proposed expert witness was qualified under MCL 600.2169 to testify against the defendant physician, and, thus, that plaintiffs' affidavit of merit was sufficient. After discovery, the trial court granted defendants' motion to strike plaintiffs' expert witness on the basis that he was not actually qualified under MCL 600.2169 to testify against the defendant physician. The trial court dismissed plaintiffs' claim with prejudice, concluding that plaintiffs could not reach a jury without expert testimony.

The Court of Appeals affirmed the trial court's ruling that plaintiffs' proposed expert witness was not qualified under MCL 600.2169 to testify against the defendant physician (Judge BORRELLO dissented on this issue), but reversed the trial court's dismissal on the basis that expert testimony was unnecessary under the doctrine of res ipsa loquitur, i.e., an inference of negligence may be drawn from the fact that the infant was admitted to the PICU with healthy legs and discharged from the PICU with fractured legs (Judge TALBOT dissented on this issue). Unpublished opinion per curiam, issued October 21, 2003 (Docket Nos. 239868-239869). The case was remanded for trial.

Defendants sought leave to appeal the Court of Appeals decision that res ipsa loquitur applies and that expert testimony was not necessary. Plaintiffs sought leave to cross-appeal the Court of Appeals decision that their proposed expert witness was not qualified under

MCL 600.2169 to testify against the defendant physician. We heard oral argument on whether to grant the applications or take other peremptory action permitted by MCR 7.302(G)(1). 471 Mich 890 (2004). We have granted plaintiffs' application for leave to appeal as cross-appellants.[1] In this opinion, we address only defendants' application for leave to appeal.

II. STANDARD OF REVIEW

This Court reviews de novo decisions on summary disposition motions. *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004).

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[1] That order states:

> On December 9, 2004, the Court heard oral argument on defendants' application for leave to appeal the October 21, 2003, judgment of the Court of Appeals and plaintiffs' cross-application for leave to appeal. Plaintiffs' cross-application for leave to appeal is again considered and it is GRANTED. The parties are directed to include among the issues to be briefed: (1) what are the appropriate definitions of the terms "specialty" and "board certified" as used in MCL 600.2169(1)(a); (2) whether either "specialty" or "board certified" includes subspecialties or certificates of special qualifications; (3) whether MCL 600.2169(1)(b) requires an expert witness to practice or teach the same subspecialty as the defendant; (4) whether MCL 600.2169 requires an expert witness to match all specialties, subspecialties, and certificates of special qualifications that a defendant may possess, or whether the expert witness need only match those that are relevant to the alleged act of malpractice. See *Tate v Detroit Receiving Hosp*, 249 Mich App 212 (2002); and (5) what are the relevant specialties, subspecialties, and certificates of special qualifications in this case.
>
> The American Osteopathic Association's Bureau of Osteopathic Specialists, the Accreditation Council for Graduate Medical Education, and the Council of Medical Specialty Societies 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. [473 Mich 856 (2005).]

III. ANALYSIS

Plaintiffs argue that expert testimony is unnecessary in this case because of the doctrine of res ipsa loquitur. In a medical malpractice case, the plaintiff must establish:

> (1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. [*Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994).]

See MCL 600.2912a. Generally, expert testimony is required in medical malpractice cases. *Locke, supra* at 230.

> This Court has long recognized the importance of expert testimony in establishing a medical malpractice claim, and the need to educate the jury and the court regarding matters not within their common purview. . . . While we have recognized exceptions to this requirement, the benefit of expert testimony, particularly in demonstrating the applicable standard of care, cannot be overstated. [*Id*. at 223-224.]

However, if a medical malpractice case satisfies the requirements of the doctrine of res ipsa loquitur, then such case may proceed to the jury without expert testimony. *Id*. at 230. Res ipsa loquitur is a Latin term meaning, "[t]he thing speaks for itself." Black's Law Dictionary (6th ed).[2]

> [R]es ipsa loquitur . . . entitles a plaintiff to a permissible inference of negligence from circumstantial evidence.

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[2] "Res ipsa loquitur" is the "[r]ebuttable presumption or inference that defendant was negligent, which arises upon proof that the instrumentality causing injury was in defendant's exclusive control, and that the accident was one which ordinarily does not happen in absence of negligence." *Id*.

> The major purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act. . . .
>
> In a proper res ipsa loquitur medical case, a jury is permitted to infer negligence from a result which they conclude would not have been reached unless someone was negligent. [*Jones v Porretta*, 428 Mich 132, 150, 155-156; 405 NW2d 863 (1987).]

In order to avail themselves of the doctrine of res ipsa loquitur, plaintiffs must meet the following conditions:

> "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
>
> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
>
> (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff"; and
>
> (4) "[e]vidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff." [*Id.* at 150-151 (citations omitted).]

With regard to the first condition, this Court has held that "the fact that the injury complained of does not ordinarily occur in the absence of negligence must either be supported by expert testimony or must be within the common understanding of the jury." *Locke, supra* at 231. In this case, whether a leg may be fractured in the absence of negligence when placing an arterial line or a venous catheter in a newborn's leg is not within the common understanding of the jury, and, thus, expert testimony is required. That is, plaintiffs needed to produce expert testimony to support their theory that the infant's injuries were not the unfortunate complication of a reasonably performed medical procedure. As this Court explained in *Jones, supra* at 154:

> [I]n a normal professional negligence case, a bad result, of itself, is not evidence of negligence sufficient to raise an issue for the jury. . . . Something more is required, be it the common knowledge that the injury does not ordinarily occur without negligence or expert testimony to that effect.
>
> In a case where there is no expert evidence that "but for" negligence this result does not ordinarily occur, and in which the judge finds that such a determination could not be made by the jury as a matter of common understanding, a prima facie case has not been made, and a directed verdict is appropriate. [Emphasis in original.]

Whether, "but for" negligence, the newborn's legs would not have been fractured is not a determination that can be made by the jury as a matter of common understanding. As the trial court explained:

> Whether the fractures could have occurred in the absence of someone's negligence is an allegation that must be supported by expert testimony; the procedures [the infant] underwent are not within the common knowledge of a reasonably prudent jury. Furthermore, whether fractures of the kinds suffered by [the infant] are possible complications arising from the types of procedures performed during [his] stay at the Pediatric ICU is knowledge that is exclusively within the expertise of the medical profession.

And, as Judge TALBOT in dissent in the Court of Appeals explained, "[a]ssuming that the fractures may have been caused by the placement of the lines in the infant's legs, the risks associated with the placement of arterial lines or venous catheters in a newborn infant, and whether fractures ordinarily do not occur in the absence of negligence, are not within common knowledge of a reasonably prudent fact finder." Slip op at 9. Because we do not know whether the injury complained of does not ordinarily occur in the absence of negligence, we cannot properly apply the doctrine of res ipsa loquitur.

Plaintiffs argue that, even if res ipsa loquitur does not apply, expert testimony is not required because the alleged negligence was within the common understanding of the jury. For the same reason that we conclude that res ipsa loquitur does not apply here—whether a leg may be fractured in the absence of negligence when placing an arterial line or a venous catheter in a newborn's leg is not within the common understanding of the jury—we conclude that this latter exception to the requirement of expert testimony also does not apply.[3]

IV. CONCLUSION

Expert testimony is required because whether a leg may be fractured in the absence of negligence when placing an arterial line or a venous catheter in a newborn's leg is not within the common understanding of a jury. We have granted plaintiffs' application for leave to appeal as cross-appellants, and will determine whether plaintiffs' expert is qualified, within the meaning of MCL 600.2169, to testify against the defendant physician. Accordingly, while we now hold that this case

[3] Our dissenting colleagues criticize us for deciding defendants' application for leave to appeal separately from plaintiffs' cross-application for leave to appeal. However, it is only logical to determine whether expert testimony is required, the issue raised in defendants' application for leave to appeal, *before* determining whether plaintiffs' proposed expert is qualified to testify, the issue raised in plaintiffs' cross-application for leave to appeal. If we were to determine that expert testimony was *not* required, there would be no need to determine whether plaintiffs' expert is qualified to testify. Because we have determined in this opinion that expert testimony *is* required, we must next determine whether plaintiffs' proposed expert is qualified to testify. Because of the complexities and the importance of the latter issue, we have granted plaintiffs' cross-application for leave to appeal. However, because we have already reached a decision on the former issue, and because we believe that the Court of Appeals erred in its analysis of the res ipsa loquitur doctrine, we issue our opinion on this former issue today.

cannot proceed to a jury on a res ipsa loquitur theory, the entry of final judgment in this case must await our determination of the expert-qualification issue.[4]

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

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur with the majority's conclusion that expert witness testimony is necessary in this case because I agree that the medical procedures at issue are not within the common understanding of a jury. I also concur with Justice WEAVER that defendant's[1] appeal and plaintiffs' cross-appeal should not be bifurcated, but should be considered and decided together. Like Justice WEAVER, I would have granted defendant's application rather than peremptorily reversing the Court of Appeals. I write separately because I find that although expert testimony is required in this case, the trial court abused its discretion in not granting plaintiffs' motion for an extension of time to add a new expert witness.

As noted by the Court of Appeals, some of the procedural aspects of this case are not definitively clear on the existing record, which may lead one to question which of the parties' multiple motions were the impetus for the trial court's ultimate dismissal of plaintiffs' claims. After discovery, defendants University of Michigan Medical Center and Dr. Custer moved to strike plaintiffs' expert witness as unqualified. They also

[4] Justice CAVANAGH concludes that "the trial court abused its discretion in not granting plaintiffs' motion for an extension of time to add a new expert witness." *Post* at 10. Because plaintiffs have not appealed the trial court's decision denying plaintiffs' motion for an extension of time to add a new expert witness, we do not address this issue.

[1] The singular "defendant" refers to Joseph R. Custer, M.D.

moved for summary disposition under MCR 2.116(C)(10) on *other* bases, including allegations that a claim for respondeat superior did not lie and that plaintiffs' testimony did not support a claim for negligent infliction of emotional distress. In response to defendants' claim that plaintiffs' expert was not qualified, plaintiffs alleged that they did not need an expert witness at all because the matters to be decided were within the common understanding of a jury.

At the hearing on these motions, the trial court granted defendants' motion to strike plaintiffs' expert, but did not address whether expert testimony was required. Defendants then moved to enter an order of dismissal, presumably because they assumed that an expert was required. Plaintiffs objected to the order, requested a determination whether expert testimony was needed, and moved to "extend time" to add an expert witness. The trial court determined that expert testimony was necessary, denied the motion to add an expert, and, as a result, entered an order dismissing plaintiffs' claims with prejudice.

While plaintiffs' appellate challenges to the trial court's dismissal have focused primarily on plaintiffs' claim that their expert was qualified or, in the alternative, that expert testimony was not required, the trial court's order denying plaintiffs' motion to add an expert was inextricably intertwined with its decision to dismiss the case. In other words, the trial court's denial of plaintiffs' motion to add an expert and its grant of defendants' motion to strike plaintiffs' expert were equally dispositive of plaintiffs' claims. Thus, by virtue of opposing defendants' application for leave to appeal and mounting their own challenges to the trial court's dismissal, plaintiffs are necessarily, albeit somewhat indirectly, challenging the trial court's denial of their

motion to add an expert. Contrary to the majority's position, *ante* at 10 n 4, I believe that the ruling on the motion to add an expert is fairly encompassed in the issues this Court is addressing.

Thus, having found that plaintiffs needed expert witness testimony, I would then find that the trial court abused its discretion by denying plaintiffs' motion for an extension of time to add an expert witness and dismissing the case with prejudice. A trial court's decision whether to allow a plaintiff to add an expert witness is reviewed for abuse of discretion, as is a trial court's ruling on adjournment. See *Klabunde v Stanley*, 384 Mich 276, 281; 181 NW2d 918 (1970); *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992). MCR 2.401(I)(2) states that if a party fails to list a witness by the time designated by the trial court, "[t]he court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." Thus, in considering a motion to amend a witness list, the trial court should determine whether the party seeking the amendment demonstrated good cause. Similarly, considerations for a motion to adjourn or extend time include whether the requesting party has sought numerous past continuances, whether the party has exercised due diligence, and the "lack of any injustice to the movant." *Tisbury*, *supra* at 20.

Another important consideration, though, is our legal system's preference for disposition of litigation on the merits. See *Wood v Detroit Automobile Inter-Ins Exchange*, 413 Mich 573, 581; 321 NW2d 653 (1982). Thus, if denying a motion to extend time to add an expert witness extinguishes a plaintiff's cause of action, that factor should be given due weight. See *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). A trial

court should recognize that it has other, less drastic, measures available to it by which to ameliorate any inconvenience caused to the opposing party. *Id.* For example, the trial court could require the plaintiff to pay any deposition or other costs, including attorney fees, associated with the delay caused by the plaintiff's failure to timely name the witness. In addition, the trial court should have carefully weighed the available options and expressed reasons why dismissal with prejudice was preferable over other alternatives. *Id.* at 32-33.

In this case, plaintiffs moved for an extension of time to add an expert witness directly after the trial court struck the expert witness that plaintiffs timely presented. The controversy surrounding plaintiffs' named expert pertained to problematic language in MCL 600.2169, language that this Court had not then, and has not yet, fully construed. In fact, whether plaintiffs' original expert witness was qualified to testify in this case is the subject of plaintiffs' yet to be decided cross-appeal. A look at this Court's order granting plaintiffs' cross-application for leave to appeal, 473 Mich 856 (2005), which contains a list of unanswered questions regarding what qualifications an expert witness in a medical malpractice case must have, is illustrative of the unsettled nature and complexity of MCL 600.2169.

Clearly, then, there are apparent difficulties in interpreting exactly what qualifications are required of a medical malpractice expert witness. Where this Court has not agreed on the proper construction of the statute,[2] and has expressly left for another day several of the precise questions at the core of the qualifications debate in this case,[3] a plaintiff who has made a good-

[2] See, e.g., *Halloran v Bhan*, 470 Mich 572; 683 NW2d 129 (2004), and *Grossman v Brown*, 470 Mich 593; 685 NW2d 198 (2004).

[3] *Halloran*, *supra* at 577 n 5; *Grossman*, *supra* at 600 n 7.

faith effort to satisfy unconstrued statutory criteria should not be penalized for ostensibly failing to meet the criteria with the ultimate sanction of dismissal with prejudice.[4] Rather, I would hold that where the trial court determined that the requirements of MCL 600.2169 had not been met, it should also have found that plaintiffs demonstrated good cause to seek additional time to add a new expert. Further, the court should have found that disposition on the merits outweighed any prejudice a short delay might have caused defendants. And as noted, the trial court could still have maintained sufficient control over its docket by, for example, setting a deadline by which plaintiffs had to present their new expert and invoking other measures to mitigate any harm to defendants.

On that basis alone, I would hold that the trial court, having found that plaintiffs' expert did not meet the criteria contained in the statute, should have granted plaintiffs additional time to procure another expert instead of dismissing plaintiffs' claim with prejudice and permanently depriving plaintiffs of a cause of action. Because trial was still two months away, any delay would have been minimal and containable. Plaintiffs had sought no previous continuances, and their request was not the result of a lack of due diligence.[5]

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[4] I make no conclusions regarding whether plaintiffs' expert was indeed qualified for trial purposes. Because a majority of this Court insists on deciding this portion of the case today and the expert witness portion of the case at a later date, I will assume for purposes of this opinion that plaintiffs at least had a good-faith belief that their expert complied with the statutory mandates. This admittedly awkward position is the direct result of the majority's refusal to address these interconnected issues at the same time.

[5] To the extent defendant argues that plaintiffs were on notice that defendant would challenge their expert's qualifications, I find the argument without merit. It is not unusual for a defendant in a medical malpractice suit to launch a challenge of that type. And on defendants'

For these reasons, I dissent from the majority opinion granting peremptory reversal to defendant.

KELLY, J., concurred with CAVANAGH, J.

WEAVER, J. (*dissenting*). While I would likely agree with the majority conclusion that expert testimony is necessary in the circumstances of this case, I dissent from the majority decision, because I would not decide defendants' application for leave to appeal separately from plaintiffs' cross-application for leave to appeal and without full briefing and argument. Plaintiffs' cross-application was granted at 473 Mich 856 (2005).

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first challenge to the expert, which occurred directly after plaintiffs filed their complaint and affidavit of merit, the trial court found that the expert met the threshold requirements for purposes of the affidavit of merit. The mere fact that the trial court reserved for a later date the question whether the expert could offer trial testimony does not, in my view, compel a finding that plaintiffs should have automatically sought a replacement expert at that juncture, as defendant implies.

GHAFFARI v TURNER CONSTRUCTION COMPANY

Docket Nos. 124786, 124787. Argued April 14, 2005 (Calendar No. 10). Decided July 12, 2005.

Louis Ghaffari, who worked as an employee of an electrical contractor at a theater under construction, brought an action in the Wayne Circuit Court against Turner Construction Company (the general contractor), various subcontractors, including Hoyt, Brum & Link and Guideline Mechanical, Inc., and others, seeking damages for injuries sustained when he slipped and fell on pipes lying on the floor of a storage area. The court, Wendy M. Baxter, J., granted summary disposition in favor of Turner, Hoyt, and Guideline on the basis that the hazard was open and obvious. The court also granted summary disposition to Guideline on the additional ground that no evidence indicated that the pipes belonged to Guideline. The Court of Appeals, OWENS, P.J., and GRIFFIN and SCHUETTE, JJ., affirmed. 259 Mich App 608 (2003). The Supreme Court granted the plaintiff's application for leave to appeal and directed the parties to address whether the "open and obvious" doctrine has any application in a claim brought under the "common work area" doctrine and, if so, how the open and obvious doctrine could be reconciled with *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29 (1992), in which the Court concluded that the goal of safety in the workplace would be enhanced by the application of principles of comparative negligence. 471 Mich 915 (2004).

In a unanimous opinion by Justice MARKMAN, the Supreme Court *held*:

The open and obvious doctrine does not have any application in a claim brought under the common work area doctrine. The two doctrines are incompatible. Different duties are owed under each doctrine and the legal analyses employed in the two contexts in which they apply are distinct. The open and obvious doctrine serves as an integral part of the definition of the duty a premises possessor owes invitees, while the common work area doctrine is an exception to the general rule of nonliability by general contractors for the negligent acts of independent subcontractors and their employees.

The trial court erred in granting summary disposition in favor of the defendants on the basis that the pipes were an open and obvious hazard. The decision of the Court of Appeals must be reversed. The matter must be remanded to the Court of Appeals to consider whether a genuine issue of material facts exists regarding Guideline's ownership of the pipes and then for further action as needed and in accordance with the Supreme Court opinion.

Reversed and remanded.

NEGLIGENCE — PREMISES LIABILITY — OPEN AND OBVIOUS DANGERS — COMMON WORK AREAS.

The open and obvious doctrine has no application to a claim brought under the common work area doctrine.

Marshall Lasser for the plaintiff.

Moffett & Dillon, P.C. (by *Donald R. Dillon*), for Turner Construction Company.

Harvey Kruse, P.C. (by *James E. Sukkar, Barry B. Sutton*, and *Julie Nichols*), for Hoyt, Brum & Link.

Amici Curiae:

Plunkett & Cooney, P.C. (by *Mary Massaron Ross* and *Kristen M. Tolan*), for Michigan Defense Trial Counsel.

Thomas M. Keranen & Associates, P.C. (by *Thomas M. Keranen, Gary D. Quesada*, and *Peter J. Cavanaugh*), for Associated General Contractors of America Greater Detroit Chapter, Inc., and Michigan Chapter Associated General Contractors of America, Inc.

MARKMAN, J. The question presented is whether the "open and obvious" doctrine has any application in a claim brought under the "common work area" doctrine. We conclude that it does not.

I. FACTS AND PROCEDURAL HISTORY

This case arises out of a slip and fall incident that occurred during construction of an IMAX theater at

Henry Ford Museum in Dearborn. The premises were owned by the Edison Institute, better known as the Henry Ford Museum and Greenfield Village (Edison). Edison signed a construction contract with defendant Turner Construction Company (Turner), whereby Turner agreed to act as the construction manager for the project. Pursuant to this contract, Turner then negotiated trade contractor agreements with subcontractors on behalf of Edison, and administered them as the construction manager.

Plaintiff, an employee of electrical subcontractor Conti Electric, Inc., was injured on the construction site when he tripped on pipes left on the floor of a storage area that he alleged had served as a passageway. Plaintiff further alleged that the pipes were owned by one of two other subcontractors: either defendant Guideline Mechanical, Inc. (Guideline), the pipefitting subcontractor, or defendant Hoyt, Brum & Link (Hoyt), the plumbing subcontractor.

Plaintiff testified that he had rounded a corner and walked through an archway that, until recently, had been covered with plywood. Plaintiff claimed that he slipped on the pipes as he entered the storage area from behind gangboxes that stood in the walkway. He testified that other pipes closer to eye level distracted his vision as he rounded the gangboxes.

The trial court granted defendants' motion for summary disposition on the ground that the hazard was open and obvious, citing this Court's then-recent decision in *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001). The trial court also granted summary disposition to Guideline on the additional ground that no evidence was presented to indicate that the pipes in question belonged to Guideline. The Court of Appeals affirmed in an unpublished per curiam opinion,

which was later published at defendants' request. *Ghaffari v Turner Constr Co*, 259 Mich App 608; 676 NW2d 259 (2003).

We granted leave to appeal and directed the parties to address whether the open and obvious doctrine has any application in a claim under the common work area doctrine described in *Ormsby v Capital Welding, Inc*, 471 Mich 45, 54; 684 NW2d 320 (2004), and, if so, how the open and obvious doctrine could be reconciled with *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982), in which this Court concluded that the goal of safety in the workplace would be enhanced by the application of principles of comparative negligence. See *Ghaffari v Turner Constr Co*, 471 Mich 915 (2004).

II. STANDARD OF REVIEW

This case requires that we consider whether the open and obvious doctrine is applicable in the construction setting. The applicability of a legal doctrine is a question of law that we review de novo. *People v Thousand*, 465 Mich 149, 156; 631 NW2d 694 (2001). We also review de novo a circuit court's grant of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

III. ANALYSIS

The question presented is whether a general contractor,[1] when confronted with potential liability for a job

[1] Although, under the terms of its contract with the premises owner, Turner was in fact a "construction manager," and not a "general contractor," the distinction is one without a difference for purposes of our analysis in this case. Because our common work area jurisprudence has heretofore referred to "general contractors," we will continue to use that term.

site injury suffered by the employee of a subcontractor, may avoid liability on the basis that the condition giving rise to the injury was open and obvious. In order to answer this question, we must first examine two relevant common-law doctrines: the common work area doctrine and the open and obvious doctrine.

A. THE COMMON WORK AREA DOCTRINE

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 v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), this Court departed from this traditional framework and set forth an exception to the general rule of nonliability in cases involving construction projects:

> 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. [Emphasis added.]

We also articulated several practical considerations that supported this exception:

> Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.
>
> [A]s a practical matter in many cases only the general contractor is in a position to coordinate work or provide expensive safety features that protect employees of many or all of the subcontractors. * * * [I]t must be recognized

> that even if subcontractors and supervisory employees are aware of safety violations they often are unable to rectify the situation themselves and are in too poor an economic position to compel their superiors to do so. [*Id.* (internal citation and quotation marks omitted).]

In *Ormsby, supra* at 54, we listed the elements of what had become known since *Funk* as the common work area doctrine:

> 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. [Emphasis added.]

We made clear in *Ormsby* that only when this test is satisfied may a general contractor be held liable for the alleged negligence of the employees of independent subcontractors with respect to job site safety. *Id.* at 55-56. The failure to satisfy any one of these elements is fatal to a *Funk* claim. *Id.* at 59.

B. THE OPEN AND OBVIOUS DOCTRINE

In general, a premises possessor must exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, this duty does not generally require the removal of open and obvious dangers. In *Lugo, supra* at 516-517, we rearticulated the open and obvious doctrine:

> "[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn

> the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee."
>
> * * *
>
> In sum, the general rule is that a *premises possessor is not required to protect an invitee from open and obvious dangers*, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk. [Internal citations omitted; emphasis added.]

We also stated that the open and obvious doctrine should not be viewed as "some type of 'exception' to the duty generally owed invitees," but rather viewed "as an integral part of the definition of that duty." *Id.* at 516.

C. COMPATIBILITY OF THE TWO DOCTRINES

Defendants urge us to find that the two doctrines—the common work area doctrine and the open and obvious doctrine—are compatible and can be applied harmoniously. However, as noted above, for a general contractor to be held liable under the common work area doctrine, a plaintiff must show that the general contractor has failed "to guard against readily observable and avoidable dangers . . . ." *Ormsby*, *supra* at 54. Yet, one could replace the phrase "readily observable and avoidable" as used in *Ormsby* with the phrase "open and obvious" without significantly changing the meaning of this passage. Thus, an irreconcilable conflict immediately arises: one doctrine (common work area) imposes an affirmative duty to protect against hazards that are open and obvious, while the other (open and obvious) asserts that *no* duty exists if the hazards are

open and obvious.[2] Because of this logical conflict, we have no difficulty in concluding that the open and obvious doctrine and the common work area doctrine are incompatible.

The Court of Appeals recognized in this case that Michigan courts have not expanded the open and obvious doctrine into a general-contractor liability context. *Ghaffari, supra* at 614. However, the Court then proceeded to conclude that "there is nothing in the history of the open and obvious danger doctrine . . . to suggest that the doctrine should not apply in other contexts." *Id*. With this conclusion, we respectfully disagree.

In addition to the logical conflict noted above, we recognize that there are several critical distinctions between the two doctrines that demonstrate that they serve different objectives. First, our jurisprudence makes clear that the two doctrines are applicable in entirely different contexts. The open and obvious doctrine is specifically applicable to a premises possessor. *Lugo, supra* at 516-517. The common work area doctrine, meanwhile, is not applicable to the premises possessor, but rather to a general contractor whose responsibility it is to coordinate the activities of an array of subcontractors. See, generally, *Funk* and *Ormsby*.

In *Perkoviq v Delcor Homes—Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002), this Court recognized the distinction inherent in these two contexts. In *Perkoviq*, the plaintiff worker was injured when he fell from the roof while painting a partially constructed house. He brought suit against the defendant, the owner and general contractor of the subdivision development, on both premises liability and contractor liabil-

[2] At least, absent "special aspects." *Lugo, supra* at 517-518.

ity theories. In reversing the Court of Appeals conclusion that genuine issues of material fact existed regarding the plaintiff's premises liability claim, we observed:

> The Court of Appeals seems to have confused general contractor liability with the liability of a possessor of premises. In explaining its conclusion that defendant could be liable on a premises liability theory, the Court used analysis that was irrelevant to that theory and would be applicable only to a claim against a general contractor. . . .
>
> The fact that defendant may have additional duties in its role as general contractor, however, does not alter the nature of the duties owed by virtue of its ownership of the premises. [*Id.* at 19.]

Thus, contrary to the Court of Appeals analysis, *Perkoviq* makes clear that different duties are owed under each doctrine, and that the legal analyses employed in the two contexts are distinct.

Moreover, *Ormsby* itself implicitly recognized the fundamental difference between these two contexts. While a premises owner who hires an independent contractor is generally not liable for injuries that the contractor negligently causes,[3] we noted in *Ormsby* that a premises owner may still be liable for injuries to workers under limited circumstances. Where the premises owner retains sufficient control over the construction project, the owner "steps into the shoes of the general contractor and is held to the same degree of care as the general contractor." *Ormsby*, *supra* at 49. In such a case, the owner would face liability under the "retained control doctrine," which we described as standing for the proposition

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[3] See, e.g., *DeShambo v Anderson*, 471 Mich 27, 31; 684 NW2d 332 (2004).

> 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*. [*Id*. (emphasis added).]

Ormsby made clear that the owner's liability in such a situation would stem not from the owner's status as the premises *possessor*, but from his or her status as the de facto *general contractor*. In making such a distinction, *Ormsby* recognized the distinction between the duties a premises possessor owes by virtue of his or her status as a possessor, and the duties owed by virtue of retaining control as a contractor over a common work area. Because these duties—articulated in the open and obvious doctrine and the common work area doctrine, respectively—are distinct, so too must be the doctrines that articulate such duties.[4]

A second distinction between the two doctrines that our cases make apparent concerns the issue of worker safety.[5] We note that the application of the open and obvious doctrine in the construction setting would

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[4] We note that the retained control doctrine is not implicated in the instant case, because none of the remaining defendants is the premises owner. We refer to that doctrine only to point out its recognition that the nature of the liability faced by one who possesses premises, and by one who controls premises during their construction, are distinct.

[5] While the foundational consideration underlying the common work area doctrine is one of job site safety, safety concerns of course are not limited to the construction setting. While our opinion today distinguishes the common work area doctrine from the open and obvious doctrine, we emphasize our view that the latter doctrine also promotes safety concerns, albeit in a different manner. As is apparent from our discussion later in this opinion of the hazards typically found in a construction site,

conflict with the reasoning underlying this Court's holding in *Hardy,* because it would largely nullify the doctrine of comparative negligence in the construction setting, and effectively restore the complete bar to a contractor's liability abolished when *Hardy* eliminated contributory negligence in that setting.

In *Hardy*, *supra* at 39, this Court addressed "whether the *Funk* policy of promoting safety in the workplace would be undermined or enhanced by the application of the principles of comparative negligence." In adopting comparative negligence, we observed:

> In *Funk*, this Court found the total bar of contributory negligence to be inconsistent with the public policy of promoting safety in the workplace. The Court refused to allow a general contractor and a landowner to "avoid" liability "by pointing to the concurrent negligence of the injured worker in using the [unsafe] equipment." Before *Funk*, the contractor could entirely avoid liability by convincing the finder of fact that the plaintiff was even 1% negligent. Apparently it was feared that some contractors might succumb to the temptation of employing skilled defense counsel instead of adequate safety devices. . . .
>
> "To allow defendants in this case to invoke the protection of the contributory negligence doctrine would be tantamount to subverting the very safety concerns that the . . . *Funk* court[] extolled as of paramount importance. Such a position might allow a manufacturer to escape its duty of due care . . . ."
>
> * * *
>
> In stark contrast, the defense of comparative negligence never allows a contractor to entirely "avoid" liability and thus "escape" the duty of due care. Under *Placek* [*v*

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what constitutes "ordinary care" in a premises liability setting may differ substantially from what constitutes "ordinary care" in the construction setting.

> *Sterling Hts*, 405 Mich 638; 275 NW2d 511 (1979)], the defendant must pay the full percentage of damages caused by his negligence. [*Id.* at 39-40 (citations omitted).]

The adoption of the open and obvious doctrine in the general contractor setting would tend to thwart the goals of workplace safety advanced by our decisions in *Funk* and *Hardy*. If we were to adopt the rule set forth below by the Court of Appeals, we would effectively return to a contributory negligence regime. In such a case, no matter how negligent the general contractor was in creating or failing to ameliorate the hazard, the employee would be barred from recovery because the hazard was open and obvious.

Hardy recognized that such bars to recovery "provide a strong financial incentive for contractors to breach the duty to undertake reasonable safety precautions." *Id.* at 41. Indeed, such a rule might lead to a paradoxical result—the more egregious (i.e., obvious) the safety violation, the less incentive the contractor would have to ameliorate the hazard, because of the knowledge that obviousness of the hazard would bar the contractor's liability for the resulting injury. Instead, *Hardy* adopted a comparative negligence rule on the grounds that such a rule retains a strong incentive for general contractors to maintain workplace safety.[6] Accordingly, we believe that *Hardy* supports the conclusion that the open and obvious doctrine should remain distinct from the common work area doctrine.

As a third distinction between the two doctrines, we offer a final observation grounded in the nature of the different harms confronted in the realms in which each

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[6] In addition, such a rule also ensures that the *worker* also bears responsibility for his or her own conduct. A comparative negligence regime "enhances the goal of safety in the workplace under these conditions . . . ." *Hardy*, *supra* at 41.

doctrine is applicable. In particular, there exist unique and distinct attributes of the construction setting that would make the rules applicable in the typical premises liability setting inappropriate.

Construction sites typically involve the comings and goings of multiple subcontractors and their materials, a physical venue that is constantly being subjected to alteration, with any number of open hazards that are evolving by the moment. The hazards existing at construction sites are numerous and may typically come from any one of three dimensions, including from above. These hazards may often be in motion. Loud and sudden noises may surround and distract the construction worker, with many of these noises emanating from the dangerous activities carried out by fellow workers who may be near. Nonetheless, at the same time that he or she is confronted with such an environment, the construction worker must move at a business-like pace in order to carry out his or her job—one that may require considerable physical exertion, and require attention to detail and compliance with demanding professional standards—in a timely manner. This is in contrast to the typical premises liability case in which the open and obvious hazard is found on or near ground level, and in which distractions, although they may sometimes exist, are of a considerably less urgent and persistent character than those faced by the construction worker. While the construction worker still bears the responsibility of carrying out his or her work in a reasonable and prudent manner, the worker will typically encounter more dangers of a more diverse character, and more distractions coming from more directions, than will persons shopping in retail establishments or walking in parking lots or visiting the residences of others, and will generally be less able to avoid a given

hazard than the typical invitee or licensee, even if the hazard may be seen after the fact as open and obvious.

It is the general contractor who has the coordinating power and supervisory authority to ensure that this unusual array of physical risks does not devolve into chaos, and it is the general contractor upon whom ultimate responsibility for the safe completion of a project rests. As the overall coordinator of this activity, the general contractor is best situated to ensure workplace safety at the least cost. Because of this position, the duty to keep common work areas safe reasonably falls on the general contractor.

As our analysis today attempts to make clear, the two doctrines at issue are independent of and distinct from one another. The open and obvious doctrine serves as an "integral part of the definition" of the duty a premises possessor owes invitees, *Lugo*, *supra* at 516, while the common work area doctrine "is an exception to the general rule of nonliability for the negligent acts of independent subcontractors and their employees," under which "an injured employee of an independent subcontractor [may] sue the general contractor . . . ." *Ormsby*, *supra* at 49. The two doctrines involve completely distinct sets of plaintiffs and defendants, and therefore, as noted in *Perkoviq*, different sets of duties.

Thus, contrary to the Court of Appeals conclusion, this Court's cases have not suggested that the two doctrines are compatible, but rather have made clear that the rationale and practical considerations underlying the open and obvious doctrine are separate and distinct from those that underlie the common work area doctrine. Because we reaffirm that the two doctrines are, in fact, distinct, we hold that the open and obvious doctrine has no applicability to a claim under the common work area doctrine, and therefore the trial

court erred in granting summary disposition in favor of defendants on the basis that the pipes at issue were an open and obvious hazard.

D. SUBCONTRACTOR LIABILITY

The question remains regarding the liability of the defendant subcontractors, Hoyt and Guideline. Plaintiff argues that summary disposition should not have been granted because a question of fact existed with regard to "whether defendants negligently performed their contractual obligations to clean up and remove safety hazards." Plaintiff and defendant Hoyt disagree regarding the relevance of our decision in *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004).

Moreover, with respect to defendant Guideline, besides granting summary disposition because the condition was open and obvious, the trial court granted summary disposition on the additional ground that no evidence was presented to indicate that the pipes in question belonged to Guideline. Plaintiff argues to this Court, as he did to the Court of Appeals, that summary disposition was inappropriate with regard to Guideline, because a genuine issue of material fact was presented concerning whether it owned the pipes that caused plaintiff's fall. However, in light of its conclusion that the open and obvious doctrine barred plaintiff's claim, the Court of Appeals never addressed this alternate ground for summary disposition.

Because our decision in *Fultz* was released nine months after the Court of Appeals decision in this case, and because the Court did not address the matter of Guideline's ownership of the pipes, remand to the Court of Appeals is necessary for resolution of these issues. On remand, the Court shall first consider whether a genu-

ine issue of material fact exists regarding Guideline's ownership of the pipes. If it concludes that no such issue exists, then it shall affirm the trial court's grant of summary disposition for Guideline on that ground. Should the Court conclude that an issue of fact does exist, then the Court shall consider if Guideline, along with Hoyt, owed plaintiff any duty under *Fultz*.

If the Court concludes that Hoyt, Guideline, or both owed plaintiff a duty under *Fultz*, the Court shall then remand to the trial court for further proceedings against the relevant subcontractor(s) and Turner. However, should the Court conclude that the subcontractor(s) owed plaintiff no contractual duty, then it shall dismiss Hoyt and Guideline from the suit and remand for further proceedings against Turner only.[7]

IV. CONCLUSION

The open and obvious doctrine has no applicability to a claim brought under the common work area doctrine. The two doctrines are conceptually distinct, and our case law has treated them as such. Accordingly, the decision of the Court of Appeals is reversed.

However, because the Court of Appeals declined, on the basis of its findings regarding the applicability of

[7] While we decline to review plaintiff's contract-based claim of liability in advance of the Court of Appeals, we note in passing that the subcontractors face no liability under the other theories addressed in this opinion. No liability could attach under a premises liability theory, because the subcontractors were not the premises possessors. See *Lugo, supra* at 516-517. Nor can the subcontractors face liability under the common work area doctrine, because they did not have control of the work area. We recognized in *Ormsby*, *supra* at 56-57, that the common work area doctrine is only applicable to a general contractor or to a property owner who retains sufficient control of the work so as to act in a superintending capacity (under the "retained control" doctrine). Here, the subcontractors acted as neither. Thus, neither of these doctrines serves as a basis for imposing liability on Hoyt or Guideline.

the open and obvious doctrine, to review the alternate ground for summary disposition given with respect to defendant Guideline, and because our decision in *Fultz* was released after the Court of Appeals decision in the instant case, we remand to that Court to determine the outstanding questions concerning the liability of the subcontractors. Once it has resolved these questions, the Court of Appeals is instructed to further remand to the trial court for further proceedings consistent with this opinion with regard to Turner and, if applicable, Hoyt and Guideline.

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

BLACKHAWK DEVELOPMENT CORPORATION
v VILLAGE OF DEXTER

Docket No. 126036. Decided July 13, 2005. On application by the plaintiffs for leave to appeal, the Supreme Court, after hearing oral argument on whether the application should be granted and in lieu of granting leave, reversed the judgment of the Court of Appeals and remanded the case to the circuit court for further proceedings.

Blackhawk Development Corporation and Dexter Crossing, L.L.C., the owners of a parcel of land that was purchased from the Kingsley Trust and that contained a portion subject to an easement in favor of the village of Dexter for the purposes of relocating, establishing, opening, and improving Dan Hoey Road, brought an action in the Washtenaw Circuit Court against the village and Dexter Development, alleging that proposed developments on that portion of the land encumbered by the easement exceeded the scope of the easement. The court, David S. Swartz, J., granted summary disposition in favor of the defendants on the basis that the developments, which consist of access roads, light poles, trees, landscaping, pond grading, sidewalks, pipes, conduit, sewer lines, and water lines, were for the benefit of the public and were thus within the scope of the easement. The plaintiffs appealed, alleging that the developments, to be undertaken by Dexter Development at its own behest to assist it, a private property owner, in developing its neighboring property, exceeded the scope of the easement. The Court of Appeals, SAWYER, P.J., and GRIFFIN, J. (SMOLENSKI, J., dissenting), affirmed on the basis that the proposed developments were within the scope of the easement because they benefited the public. Unpublished opinion per curiam, issued January 27, 2004 (Docket No. 240790). The plaintiffs sought leave to appeal in the Supreme Court, which ordered that oral argument be conducted with regard to the application. 471 Mich 905 (2004).

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

The use of an easement must be confined strictly to the purposes for which it was granted or reserved. An easement owner

may not make improvements to the servient estate if such improvements are unnecessary for the effective use of the easement or they unreasonably burden the servient estate. The proposed developments in this case exceed the scope of the easement. The judgment of the Court of Appeals must be reversed and the case must be remanded to the trial court for entry of a declaratory judgment and a grant of injunctive relief in favor of the plaintiffs and for further proceedings on the plaintiffs' claim for damages for trespass.

1. The easement was granted for the express purpose of relocating, establishing, opening, and improving Dan Hoey Road. The village, in authorizing developments to the land subject to its easement that are unrelated to the relocation, establishment, opening, or improvement of Dan Hoey Road, improperly altered the easement without the plaintiffs' consent and materially increased the burden on the servient estate.

2. The language of the instrument granting the easement is not ambiguous. The trial court therefore erred in considering language extrinsic to the express easement grant.

3. The facts that a public entity holds the easement and the easement is related to a public road do not alter the nature or the scope of the easement granted.

Justice YOUNG, concurring, wrote separately to emphasize that the majority does not suggest that the motivations of the developer are not dispositive of the village's motivations. Because the village failed to show that the proposed developments were initiated for the purpose of improving Dan Hoey Road, a purpose within the scope of the easement, the developments are not objectively within the scope of the easement and are outside its scope as a matter of law.

Reversed and remanded to the circuit court.

Justice KELLY, dissenting, stated that the projects in question fall within the scope of the easement. The easement was granted for the purpose of opening and improving Dan Hoey Road, and the circumstances surrounding the easement grant confirm that the parties who created the easement intended that it could be used for projects such as those proposed by Dexter Development. The subjective motivation for the projects is immaterial to the question whether a particular use is within the scope of the easement, and the majority erroneously relies on subjective motivation in concluding that the proposed projects are not within the scope of the easement in this case. Finally, the proposed projects do not

unreasonably burden the servient estate. The decisions of the Court of Appeals and the trial court should be affirmed.

1. EASEMENTS — USE.

The use of an easement must be confined strictly to the purposes for which it is granted or reserved; an easement holder may not make improvements to the servient estate where such improvements are unnecessary for the effective use of the easement or they unreasonably burden the servient tenement.

2. EASEMENTS — JUDICIAL CONSTRUCTION.

A court may examine evidence extrinsic to an instrument granting an easement to determine the scope of the easement only where the language in the instrument is ambiguous.

3. EASEMENTS — ALTERATIONS.

Neither party to an instrument that grants an easement may alter the easement without the consent of the other party.

Berry Reynolds & Rogowski, PC (by *Ronald E. Reynolds*), for the plaintiffs.

Dykema Gossett PLLC (by *Bradley L. Smith*) for the village of Dexter.

Conlin, McKenney & Philbrick, PC (by *Allen J. Philbrick*), for Dexter Development.

CAVANAGH, J. Plaintiffs sought leave to appeal from the Court of Appeals decision affirming the trial court's grant of summary disposition to defendants village of Dexter and Dexter Development. Rather than grant leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings.

I. INTRODUCTION

This case requires us to examine the scope of an easement granted by a private party to a public entity. Specifically, we must determine whether allowing a

private property owner to construct access roads and related amenities on property subject to an easement that was granted to a municipality for the express purpose of relocating and improving a public road is within the scope of that easement. Because there is no evidence in the record that the proposed developments fall within the scope of the express easement, we hold that the trial court erred by holding otherwise. Thus, we reverse the decision of the Court of Appeals and remand this case for further proceedings.

II. BACKGROUND

In 1990, defendant village of Dexter ordered approximately one acre of a portion of land owned by the Kingsley Trust, which was administered by John Kingsley, condemned. The village intended to use the land to improve Dan Hoey Road, which was, at the time, a gravel road that intersected with Dexter-Ann Arbor Road in an unsafe manner. The village planned to pave and widen Dan Hoey Road, as well as move it slightly south.

In lieu of condemning the land, the village and the Kingsley Trust entered into a settlement agreement through which the trust granted the village an easement to a portion of approximately one acre in size. The settlement agreement stated that the trust would transfer "an easement for public roadway purposes . . . ." The easement grant read that the trust granted "an easement for the purposes of relocating, establishing, opening and improving Dan Hoey Road . . . ."

The village relocated Dan Hoey Road and completed its project, but the project did not consume the entire area subject to the easement. Eventually, the trust sold the burdened parcel to plaintiff Blackhawk Develop-

ment Corporation, which then developed a commercial complex, plaintiff Dexter Crossing, L.L.C., on a portion of the property.[1] The portion subject to the easement was not developed.

Thereafter, John Kingsley, through his corporation, defendant Dexter Development, purchased additional land that adjoined the old Dan Hoey Road but was separated from the new Dan Hoey Road by land subject to the easement. Kingsley then submitted a proposal for developing his land to the village. However, Kingsley's plan included using portions that were subject to the village's easement for the purpose of constructing access drives, building a pond, and making other developments on that parcel.

The village informed Kingsley that he would have to buy the affected land before it would approve the development, but plaintiff rejected Kingsley's purchase offers. Consequently, Kingsley's attorney advised Kingsley to revise his proposal by removing from the plans affecting plaintiff's parcel anything that could be construed as a "private" development, but leaving developments such as utilities, sidewalks, and access roads. Kingsley resubmitted his revised plan and proposed to "dedicate" the developments on the affected parcel to the village for public use. In other words, Kingsley proposed to create purportedly "public" developments on plaintiff's land, which the village could then justify by way of its easement.

The village authorized the proposal, giving Kingsley permission to construct developments on the subject property, including two access roads, light poles, trees, landscaping, pond grading, sidewalks, pipes, conduit, sewer lines, and water lines. The access roads would use

[1] For convenience, the singular "plaintiff" will refer to Blackhawk Development Corporation.

the land subject to the easement to transect plaintiff's property and connect Kingsley's property to the new Dan Hoey Road. As part of their agreement, Kingsley indemnified the village against legal action.

Neither the village nor Kingsley informed plaintiff of their arrangement, leaving plaintiff to discover it when construction began. After plaintiff's objections to the village and to Kingsley proved unsuccessful, plaintiff sued for injunctive relief, declaratory judgment, and trespass.

Among the facts that emerged during discovery were the following. In a memorandum addressing the matter, village zoning officer Janet Keller wrote that because Kingsley's land was "landlocked," the village might be "in jeopardy" if it did not approve the access road. Kingsley, however, acknowledged that his land was not landlocked because of two ingress and egress points at Dexter-Ann Arbor Road. Further, Kingsley testified that he could have built his commercial development without using the land covered by the easement, but that he never submitted plans that did not include land covered by the easement. He also testified that the access drives served no other purpose than access to the commercial development and that he only built the west driveway because he believed the village required it.

Zoning officer Keller testified that the village did not request either road, but after reviewing where Kingsley proposed to place the roads, the village asked Kingsley to align the center road with an opposing road to form a four-way intersection. Keller stated that the village was never presented with a plan that did not include the roads and that she did not know why the development could not proceed without them. Keller testified that the access roads were not an "improvement" to Dan Hoey Road. However, both she and other village officials

agreed that the access roads contributed to the safety of the area and that Kingsley's development as a whole contributed to the general public good.

Evidence from the village planner showed that the access roads did not meet public road standards and that the entrances were designed to meet commercial standards. Moreover, the village attorney testified that when Dan Hoey Road was realigned in 1990, all four of the purposes stated in the easement grant, "relocating, establishing, opening, and improving Dan Hoey Road," were fulfilled. According to the testimony, village officials had no intention to further utilize the easement in the foreseeable future.

Defendants moved for summary disposition under MCR 2.116(C)(10),[2] arguing that the proposed developments were within the scope of the village's easement because the access roads promoted public safety and welfare. Defendants also argued that the utilities were permissible because the permissible uses of a public road easement encompass more than mere surface travel. Further, defendants contended that the use of the land covered by the easement would serve primarily public, rather than private, purposes.

The trial court granted defendants' motion for summary disposition, ruling that the terms "roadway purposes" in the settlement agreement and "improvement" in the actual easement grant were ambiguous. However, it found that the developments benefited the public and were thus within the scope of the easement.

Plaintiffs appealed the trial court's ruling. In a split decision, the Court of Appeals majority held that the trial court reached the correct result, albeit for the

[2] Defendant Dexter Development filed the initial motion and supporting brief, and defendant village of Dexter filed a concurring statement.

wrong reason. *Blackhawk Dev Corp v Village of Dexter*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2004 (Docket No. 240790). The majority held that the language at issue was not ambiguous, but that the proposed developments were within the scope of the easement because they benefited the public. Notably, the Court of Appeals examined the language of both the easement grant and the settlement agreement. The dissenting judge agreed that there was no ambiguity in the language, but he believed that the changes were not "improvements" to Dan Hoey Road and, thus, were outside the scope of the easement. Plaintiffs' motion for reconsideration was denied, and plaintiffs sought leave to appeal in this Court. In lieu of granting plaintiffs' application for leave to appeal, we ordered oral argument on the application. 471 Mich 905 (2004).

III. STANDARD OF REVIEW

The extent of a party's rights under an easement is a question of fact, and a trial court's determination of those facts is reviewed for clear error. *Unverzagt v Miller*, 306 Mich 260, 266; 10 NW2d 849 (1943), citing *Harvey v Crane*, 85 Mich 316, 322; 48 NW 582 (1891). A trial court's dispositional ruling on equitable matters, however, is subject to review de novo. *Stachnik v Winkel*, 394 Mich 375, 383; 230 NW2d 529 (1975). The decision to grant or deny summary disposition is also reviewed de novo. *Stewart v Michigan*, 471 Mich 692, 696; 692 NW2d 376 (2004).

IV. ANALYSIS

This case presents the straightforward question whether Dexter Development's desired developments fall within the scope of the village of Dexter's easement.

The inquiry does not center, as defendants seem to suggest, on whether defendants' proposed developments afford the public at large some general benefit. Further, the analysis of this issue is not affected by the fact that a private developer instituted the proposed developments. Rather, this Court must analyze simply whether the developments are within the scope of the granted easement.

The existence of an easement necessitates a thoughtful balancing of the grantor's property rights and the grantee's privilege to burden the grantor's estate. And while the easement holder's rights are ultimately " ' "paramount . . . to those of the owner of the soil," ' " the latter's rights are subordinate only to the extent stated in the easement grant. *Cantieny v Friebe*, 341 Mich 143, 146; 67 NW2d 102 (1954), quoting *Hasselbring v Koepke*, 263 Mich 466, 475; 248 NW 869 (1933), quoting *Harvey, supra* at 322. Consequently, "[t]he use of an easement must be confined strictly to the purposes for which it was granted or reserved." *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957).

A fundamental principle of easement law is that the easement holder—here, the village—cannot "make improvements to the servient estate if such improvements are unnecessary for the effective use of the easement or they unreasonably burden the servient tenement." *Little v Kin*, 468 Mich 699, 701; 664 NW2d 749 (2003), citing *Crew's Die Casting Corp v Davidow*, 369 Mich 541; 120 NW2d 238 (1963), *Unverzagt*, *supra* at 265, and *Mumrow v Riddle*, 67 Mich App 693, 700; 242 NW2d 489 (1976). Stated differently, " 'It is an established principle that the conveyance of an easement gives to the grantee all such rights as are incident or necessary to the reasonable and proper enjoyment of

the easement.' " *Unverzagt*, *supra* at 265, quoting 9 RCL, p 784. And "[t]he use exercised by the holders of the easement must be reasonably necessary and convenient to the proper enjoyment of the easement, with as little burden as possible to the fee owner of the land." *Id.*

From these principles evolves a two-step inquiry: whether the proposed developments are necessary for the village's effective use of its easement and, if the developments are necessary, whether they unreasonably burden plaintiffs' servient estate. *Id.* Of course, the need to answer the second question is obviated where the first question is answered in the negative.

The answers to these inquiries originate in the language or express reservations of the grant. See *id.* at 266-267. The task of determining the parties' intent and interpreting the limiting language is strictly confined to the "four corners of the instrument" granting the easement. *Hasselbring*, *supra* at 477. Only where the language in the granting instrument is ambiguous may this Court examine evidence extrinsic to the document to determine the meaning within it. *Little*, *supra* at 700.

Thus, our first task is to determine whether the language of the granting instrument is ambiguous. The instrument states that the grantor grants to the village of Dexter "an easement for the purposes of relocating, establishing, opening and improving Dan Hoey Road in the Village of Dexter, Washtenaw County, Michigan . . . ." The only document incorporated by reference is the document that sets forth the legal description of the land subject to the easement. As such, our interpretation focuses on the language, "relocating, establishing, opening and improving Dan Hoey Road . . . ." The

parties seem to agree that out of the four terms, the term "improving" is of paramount relevance.[3]

There is nothing technical or unique about the word "improving" in this context that would require us to rely on anything other than its common sense meaning. But the question is not so much whether defendant Dexter Development has proposed "improvements" in the sense of developments that help "improve" something, for certainly these developments could be considered "improvements" in the general sense of the word. The more refined question is whether the developments "improve" Dan Hoey Road.[4] A close examination of the record reveals no evidence supporting defendants' claim that the proposed developments are within the scope of the express easement.

According to zoning officer Keller, Kingsley's revised development plan included two access roads across the land covered by the easement, and sidewalks, utilities, trees, and "general public improvements" on that land. Clearly, the access roads served to connect the commercial complex to Dan Hoey Road rather than to complement Dan Hoey Road itself. The utility, water, and sewer lines served to connect Kingsley's development to main utility, water, and sewer lines. The sidewalks and

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[3] Notably, defendants do not argue that the developments purport to "open" Dan Hoey Road, which undermines the dissent's attempt to argue otherwise.

[4] The dissent reads too much into the comment that the installations could, on some general level, be considered "improvements." See *post* at 55. If the debate were truly over whether roads, sidewalks, and grading are "improvements," certainly there would be as many countering views as supportive ones. But our task is not simply to determine whether the proposed installations are "improvements," but whether, as we clearly state, the installations improve *Dan Hoey Road*. Likewise, dictionary definitions of "improvement" do nothing to resolve whether sidewalks, utilities, and lighting improve *Dan Hoey Road*, so the dissent's citation of the dictionary is ineffective. See *post* at 55.

lighting on the land covered by the easement were not sidewalks and lighting for Dan Hoey Road, but sidewalks and lighting for the private commerce center and surrounding area. Not one of these developments could be said to be for the purpose of improving Dan Hoey Road.[5] Without question, Kingsley's planned use of the land covered by the easement served the exclusive purpose of furthering and enhancing his private complex.[6]

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[5] Kingsley claims he believed that the village "required" one of the access roads on his site plan, but the evidence shows only that the village asked Kingsley to align the road–which appeared on Kingsley's original site plan and every one thereafter–with an opposing road so as to create a four-way intersection. Indeed, village zoning officer Keller could point to nothing that required the road, and she testified that Kingsley's two other access roads by way of Dexter-Ann Arbor Road were sufficient for ingress and egress purposes. As such, to the extent defendant Dexter Development argues that public safety reasons compelled its use of the land subject to the easement, we find that argument unpersuasive.

Moreover, the fact that Kingsley offered to dedicate the developments to the public does not change the analysis. See *post* at 53 n 1. While it is of course true that the village can open streets, install sidewalks, and landscape, see *post* at 59, that says nothing about whether a village can undertake those projects under an easement it holds. Regardless of who initiates the project, the analysis is the same. For example, had the village endeavored to construct these developments, we would conduct the same analysis conducted in this case to determine whether the proposed developments are within the easement's scope. It is unclear why the dissent insists that our analysis hinges on who proposed the developments and on subjective motivations. See *post* at 58-59.

[6] The dissent proffers that *Unverzagt*, *supra,* supports its conclusion that consistent with the parties' intent, the proposed developments here are reasonably necessary to improve and open Dan Hoey Road. *Post* at 55-57. In *Unverzagt*, this Court resolved the question of reasonableness of use against the grantor of an easement where the question was whether the grantor could preclude the easement holders' invitees from using the easement to deliver goods to the easement holders. This Court held that use by the invitees was incidental and necessary. *Unverzagt*, *supra* at 265-266.

The dissent's simplistic comparison disregards several critical differences between *Unverzagt* and the case at hand. First and foremost, the

Critical to our analysis is that village agents testified that the proposed access roads were not "improvements" to Dan Hoey Road and that none of the proposed developments was necessary with regard to Dan Hoey Road. Village zoning officer Keller testified that the village had no reason to construct any of Kingsley's proposed developments. Clearly, the evidence fails to establish that the proposed developments fell within the scope of the village's limited property interest—an easement for the express purpose of improving Dan Hoey Road. In fact, the developments are so clearly unrelated to "improving" Dan Hoey Road–in both con-

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village holds the easement in question here, not Dexter Development. Thus, the commercial traffic will not serve the easement holder as the delivery traffic did in *Unverzagt*. In that sense alone, the commercial traffic is not "incidental" to the easement. Moreover, this Court crafted its opinion in *Unverzagt* restrictively:

> This does not mean that any and all invitees of a cottage owner may have the right to use the streets. To so hold, would mean that a cottage owner might invite the use of the streets by conventions, picnics, assemblies in general. Such use would defeat the purpose as well as the desires of all parties. Nor do we go to the extent of holding that hawkers and peddlers of goods, wares and merchandise may use the private streets in the park for their own purposes, even at the invitation of cottage owners. [*Id.* at 266.]

Thus, this Court clearly recognized, as we must here, that permitted easement use is not unlimited but must conform to the purposes set forth by the parties in the easement grant.

Further, the dissent cursorily concludes, without record support or analysis, that "landscaping and drainage ponds reasonably could improve Dan Hoey Road . . . ," and "[a]ccess drives and sidewalks would 'improve' and 'open' the road . . . ." *Post* at 55. We disagree. First, Dan Hoey Road was already "opened," according to the village. Second, the dissent asserts that landscaping and drainage ponds "control[] rainwater runoff, thereby enhancing the safety and life of the road." *Post* at 55. Limiting the amount of vehicles on Dan Hoey Road might enhance the safety and life of the road as well, but not every conceivable effect on Dan Hoey Road renders it an "improvement." We decline to read the word "improve" that broadly.

cept and physical proximity–that they cannot be said to fall within the scope of the village's easement, which was secured to improve not the general surrounding area and corporate development, but Dan Hoey Road itself.[7]

Where the rights to an easement are conveyed by grant, neither party can alter the easement without the other party's consent.[8] *Douglas v Jordan*, 232 Mich 283,

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[7] Despite defendant Dexter Development's heavy emphasis on its theory that the two access roads across the land covered by the easement are necessary for the general safety of the area, we need not address that contention. Officer Keller testified that having only one access point into Kingsley's development created additional traffic concerns on Dexter-Ann Arbor Road. However, the need to alleviate traffic or congestion concerns on Dexter-Ann Arbor Road does not broaden the scope of the village's easement. Further, the mere fact that the village asked Kingsley to alter his plan to align one of the access roads with an opposing road does not speak to whether the access road was for the *purpose* of improving Dan Hoey Road. Thus, the public safety arguments advanced by Dexter Development are misplaced.

[8] We have no quarrel with the proposition that an easement is a permanent interest in land, see *post* at 60, and we do not hold otherwise. But the permanency of the grant does not control or even speak to the *way* in which the easement may be used. The dissent states that plaintiffs "may not be heard to complain that Dexter Development's proposed uses involve more land than previously was in service." *Id.* But again, the dissent misses a finer point. Plaintiff complains not about geography, but about purpose. The dissent finds that the easement "contains no language preventing use of an increased amount of the land encompassed within it." *Id.* As such, it concludes that it can "infer that the parties intended to allow the area used in the easement to expand over time to maintain the easement's utility." *Id.* at 60-61.

The dissent reads its cited Restatement passage too loosely. See *post* at 60-61. The Restatement does not allow for haphazard inferences of parties' intent. It states, "The determination [of an easement's scope] is primarily one of fact, based on inferences that may be drawn from the language and circumstances, but the outcome in any particular case may be affected by the level of generality with which the purpose is defined." 1 Restatement Property, 3d, § 4.10, comment *d*, p 595. The comment goes on to explain that, for instance, if an easement grants "access," the word "access" may be interpreted more broadly than if the words

287; 205 NW 52 (1925), citing *Powers v Harlow*, 53 Mich 507; 19 NW 257 (1884). When the village, as the dominant estate, authorized developments on the servient land for the benefit of another parcel of land, the village improperly altered the easement without plaintiff's consent. By so doing, the village materially increased the burden on plaintiff's servient estate by imposing new burdens that were not contemplated at the time of the easement grant, contrary to general easement principles.[9] See *Delaney*, *supra* at 687; *Barbaresos v Casaszar*, 325 Mich 1; 37 NW2d 689 (1949). The easement was not procured for the benefit of

"ingress and egress to people and vehicles" had been used. Thus, rather than permitting a court to guess, the Restatement advises that where words are more general, the intent will be determined accordingly. Here, the task is made simpler by the fact that we need not determine what the parties meant by the general word "improve," but rather what they meant by the more specific parameter "improve Dan Hoey Road." The phrase "improve Dan Hoey Road" is self-limiting and must be given its ordinary meaning. We disagree that the fact that the phrase was not further elaborated on permits unlimited use of the burdened land.

[9] The dissent somewhat puzzlingly concludes that the developments fall within the scope of the easement because where there were once four residential driveways, there would now be "only" two commercial access roads. *Post* at 60. Ignoring for a moment that the proposed access road across the parcel subject to the easement does nothing to *improve Dan Hoey Road*, it is difficult to understand how one would conclude that a burden lessens, rather than increases, when in lieu of four residential driveways, there are instead two roads to a large commercial complex. Not only is the dissent's conclusion odd, it is also devoid of record support. Another strange conclusion by the dissent is that because plaintiff was unable to build on the parcel, "Blackhawk's quiet enjoyment of the parcel would not be impermissibly disturbed by increased traffic whether on the new access drives or on several lanes of through traffic." *Post* at 60 The fact that plaintiff could not develop its parcel seems to us to doubly support a conclusion that where that parcel is commercially developed by a commercial neighbor, quiet enjoyment is vastly disturbed. And the fact that plaintiffs did not "question" the easement when they purchased their land does not extinguish their right to contest improper uses of the easement.

Kingsley's property, nor was it procured for developments unrelated to Dan Hoey Road that may arise in the future. This is not to say that once the village relocated Dan Hoey Road, it had no further rights to impose further developments *in relation to* the road. But while the village's easement is unlimited in duration, it is not unlimited in scope. Thus, the village was and remains obliged to ensure that any use of the land covered by the easement strictly comports with the purpose of the easement as originally granted: relocating, establishing, opening, and improving *Dan Hoey Road*.

Defendants argue that our inquiry regarding the scope of the easement should extend to the language found in the settlement agreement that was reached between Kingsley, as a predecessor in interest to the servient estate, and the village. The settlement agreement referred to the easement as one for "public roadway purposes." Defendants argue that this language broadens the scope of the easement beyond general private easement principles because it references a "public roadway." The effect, according to defendants, is essentially that the land subject to the easement can be used for any purpose the village desires as long as the purpose can be said to confer some general benefit to the public. Thus, defendants argue, because the access roads, utilities, sidewalks, and commerce center generally benefit the public as a whole, they are permissible uses of the land covered by the easement.

It is true that "[i]f the text of the easement is ambiguous, extrinsic evidence may be considered by the trial court in order to determine the scope of the easement." *Little*, *supra* at 700. It is also true that where an ambiguity exists, "the courts will try to arrive

at the intention of the parties and in accordance therewith . . . ." *Farabaugh v Rhode*, 305 Mich 234, 240; 9 NW2d 562 (1943). However, considering extrinsic evidence in the absence of ambiguous language is "clearly inconsistent with the well-established principles of legal interpretation . . . and is thus incorrect." *Little*, *supra* at 700 n 2. We find nothing ambiguous about the easement grant's limiting language. Thus, the trial court erred by considering language extrinsic to the express easement grant.

As a corollary, defendants further argue that because a public entity holds the easement, the scope of permissible uses is broader, and the easement can be used for any public purpose. For this proposition, defendants rely on *Eyde Bros Dev Co v Eaton Co Drain Comm'r*, 427 Mich 271; 398 NW2d 297 (1986), and *Village of Grosse Pointe Shores v Ayres*, 254 Mich 58; 235 NW 829 (1931). We held in *Eyde* that "a public easement in a highway dedicated by user is not limited to surface travel, but includes those uses, such as the installation of sewers, contemplated to be in the public interest and for the public benefit." *Eyde*, *supra* at 286. But as correctly noted by the dissenting Court of Appeals judge in this case, neither *Eyde* nor *Grosse Pointe Shores* involved "a situation where the proposed improvements ran across or under land that was owned in fee simple by a private party and was not established as, or being used as, a public roadway." Slip op at 2. Rather, those cases, at most, stand for the proposition that an easement for roadway purposes includes all appropriate purposes to which roads and streets are actually devoted, *provided* that they occur on or under the surface of the roadway itself.[10] This comports with the statutory

[10] In *Grosse Pointe Shores, supra* at 64, we first rejected, as a matter of public policy, certain conditions that the defendants had attached to their

grant for the laying of utilities "upon, over, across, or under" public roads. See MCL 247.183(1).

However, as the dissenting Court of Appeals judge stated in this case, "the 'improvements' sought by defendants do not merely affect the surface or subsurface of Dan Hoey Road," but they also affect the unimproved portion of plaintiff's property that was subject to the easement. Slip op at 2. Plaintiffs have not dedicated fee simple property to a public entity for a public road. Rather, the village holds a more limited property interest—an express easement for the express purpose of improving Dan Hoey Road, and nothing else. That a public entity holds an easement and the easement is for a public road transforms neither the nature nor the scope of the granted easement, contrary to the dissent's attempt to do so. See *post* at 55. "Public interest" and "public benefit" are not valid reasons to allow the municipality to obtain more property rights than were granted. Thus, both *Eyde* and *Grosse Pointe Shores* are inapplicable.

V. CONCLUSION

The express language of the easement grant in this case is not ambiguous, and there is no evidence in the record that the proposed developments were within the

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dedication of land for roadway purposes that would have placed restrictions on the installation of sidewalks, utilities, and sewer lines and on paving or widening the road. After finding the conditions invalid, we outlined what types of improvements to a highway dedicated by user were permissible. We noted that the improvements at issue were "in territory which *had been and continued to be part of the street*." (Emphasis added.) In *Eyde, supra* at 296, we addressed the "issue of compensation for new uses of public easements *within streets* dedicated by statute." (Emphasis added.) Thus, improvements made pursuant to a public easement are limited to those uses that fall within the right-of-way of the roadway itself.

scope of the easement. As such, the village improperly authorized the use of its easement for purposes that were unrelated to the improvement of Dan Hoey Road. For these reasons, we reverse the judgment of the Court of Appeals and remand this case for further proceedings. On remand, the trial court should enter a declaratory judgment and grant injunctive relief in plaintiffs' favor and conduct further proceedings on plaintiffs' claim for trespass damages. We do not retain jurisdiction.

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

YOUNG, J. (*concurring*). I fully concur with the majority opinion. I write separately, however, in response to the dissent's contrary assertion, to emphasize that the majority opinion does not suggest that John Kingsley's motivations are dispositive of the village's motivations. The majority opinion merely provides a complete recitation of the background information for the purpose of providing a full understanding of the transaction. Because he is a third party who enjoys no cognizable interest in the property burdened by the easement, Kingsley's purposes in proposing, initiating, designing, or financing the improvements to the easement are absolutely irrelevant in determining whether the easement holder may lawfully make the proposed developments to the easement.

Thus, as a threshold matter, the easement holder must assert that the proposed improvements to the easement are within the scope of the easement. Secondly, the developments to the easement must be *objectively* congruent with the purpose permitted in the easement. In this case, the scope of the easement is to "improv[e] Dan Hoey Road . . . ." The village does not

maintain that the purpose behind the proposed developments is to "improve Dan Hoey Road." Because the village failed to make the initial showing that the developments were initiated for the purpose of improving Dan Hoey Road, there is no basis to conclude that the desired developments are objectively within the scope of the easement. Thus, the proposed developments are outside the scope of the easement as a matter of law.

KELLY, J. (*dissenting*). Defendant village of Dexter obtained the easement that is under scrutiny in this case to improve Dan Hoey Road. Defendant Dexter Development proposed to install utility lines, street lighting, sidewalks, and landscaping on the property subject to the easement and dedicate them to the village. It also proposed to widen one private access drive on the property and consolidate into one three other private access drives that connect Dan Hoey Road with the adjacent private parcel.

The majority holds that these projects are not within the scope of the easement. To reach this conclusion, it erroneously relies on the subjective motivation for the projects. But the motivation should be irrelevant in determining whether a proposed use lies within the scope of an easement.

Because I believe that the projects in question open and improve Dan Hoey Road, they fall within the scope of the easement. Hence, I would affirm the decisions of the trial court and the Court of Appeals in favor of defendants.

FACTUAL BACKGROUND

The village obtained an "easement for the purposes of relocating, establishing, opening and improving Dan Hoey Road" from Dexter Development, which owned

the land. The village used the easement to relocate the road to the south and to widen it.

The property to the north of the road had been divided into four parcels. Each had direct access to the old road. To create access for them to the new Dan Hoey Road, the village installed four new access drives. The old and the new roads together with the old and new access drives are on the land that is subject to the easement. Dexter Development did not object. Moreover, plaintiff Blackhawk Development had not objected to continued use of the drives when it bought the land over which the easement runs.

Dexter Development later acquired the four parcels to the north of the road in the hope of developing them. It wished to have three of the four access roads consolidated into one, the fourth widened, and street lighting, landscaping, sidewalks, and underground utilities installed on the easement property. Eventually, it obtained a license from the village to make the improvements on the easement property itself. In its brief, Dexter Development indicated that it promised to dedicate the improvements to public use.[1]

Plaintiff Blackhawk Development, which had refused to sell to Dexter Development the parcel over which the easement runs, filed suit to enjoin construction of the improvements. Plaintiffs contended that the projects were not to improve Dan Hoey Road.

ANY PROPOSED USE OF AN EASEMENT IS REQUIRED TO BE WITHIN THE EASEMENT'S SCOPE

The purpose of an easement is determined by the parties and ascertained by applying principles similar to

[1] I do not represent that Dexter Development or its owner acted as the village's agent. *Ante* at 44 n 5. Rather, Dexter Development attempted to do what the village could have done with the intention of dedicating the improvements to the public.

those used when contracts are construed. 1 Restatement Property, 3d, § 4.1, comment *d*, p 499 (2000). The terms of the easement conveyance are given their ordinary meaning in light of the surrounding circumstances. *Newaygo Mfg Co v Chicago & W M R Co,* 64 Mich 114, 122-123; 30 NW 910 (1887); 25 Am Jur 2d, § 18, p 516, § 73, p 571; 1 Restatement Property, 3d, § 4.1, comment *d*, p 499. If a specific use is not enumerated in the easement conveyance, the surrounding circumstances may be considered to ascertain the intent of the parties. *Newaygo* at 122-123, 1 Restatement Property, 3d, § 4.10, comment *a*, p 592, and comment *d*, p 595. See also *Thies v Howland,* 424 Mich 282, 293; 380 NW2d 463 (1985).

The majority agrees with the principle enunciated by this Court in *Unverzagt v Miller*[2] that " '[t]he use exercised by the holders of the easement must be reasonably necessary and convenient to the proper enjoyment of the easement, with as little burden as possible to the fee owner of the land.' " *Ante* at 42, quoting *Unverzagt* at 265.

In *Unverzagt*, the defendant granted the plaintiffs an easement to use the private streets of the subdivision to gain access to their cottages. The plaintiffs wanted local merchants to be able to deliver goods to them. The defendant claimed that the easement did not permit others, not social guests of the plaintiffs, to use the streets without the defendant's permission.

This Court held that the condition laid down by the defendant unreasonably restricted the right of the plaintiffs. The proper test, we ruled, is whether it was reasonably necessary for the use and enjoyment of the

[2] 306 Mich 260; 10 NW2d 849 (1943).

easement that plaintiffs could invite nonsocial guests to use the private streets. We held that holders of the easement had the right to use it limited only by what was necessary to and reasonable in its use. This included allowing nonsocial guests to make deliveries over it. It did not include use by the general public. *Unverzagt* at 265-267.

In this case, the easement is "for . . . opening and improving Dan Hoey Road." Sidewalks, utilities and lighting systems are improvements to highways. Black's Law Dictionary (6th ed), p 757. Despite implications to the contrary,[3] the majority opinion concedes that Dexter Development's proposed projects are improvements. *Ante* at 43.[4]

It is readily apparent that landscaping and drainage ponds reasonably could improve Dan Hoey Road by controlling rainwater runoff, thereby enhancing the safety and life of the road. Access drives and sidewalks would "improve" and "open" the road by facilitating public access to and from it by vehicles and pedestrians on the north. By granting Dexter Development permission to install these improvements, the village authorized the improvement and opening of Dan Hoey Road.

The majority opinion's factual comparison of this case with *Unverzagt* shows that there are limits to *Unverzagt's* application here. *Ante* at 44-45 n 6. The easement in that case was private and the issue concerned use of an easement by invited guests of the easement holders. Here, the easement is held by a government entity and is for a road used by the general

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[3] *Ante* at 44 n 5, 45 n 6.

[4] See also *Warren v Grand Haven,* 30 Mich 24, 27-28 (1874) (dedication of land to a roadway includes constructing sewers), *Village of Grosse Pointe Shores v Ayres*, 254 Mich 58, 64; 235 NW 829 (1931) (sewer, water, gas, lighting, and telephone systems are highway improvements).

public. An easement to improve and open a public road is by its terms more expansive than an easement to access a private road.

The Court's decision in *Unverzagt* to prohibit general public use was necessary to fulfill the parties' intentions to create a private easement to allow access to certain cottages. The ruling disallowed use of the easement for purposes other than access, such as picnics, because they would defeat the purpose of the easement.

In the case before us, the property owner granted an easement for public purposes to a governmental entity. The parties intended to create an easement that inherently encompassed broader uses than those allowed in *Unverzagt*.[5]

The surrounding circumstances confirm that the parties who created the easement intended that it could be used for projects such as those proposed by Dexter Development. The grantor's view of the scope of the easement is more persuasive of the scope than the view of a later purchaser of the burdened estate. *Crew's Die Casting Corp v Davidow,* 369 Mich 541, 546; 120 NW2d 238 (1963).[6] A party may not unilaterally change the scope of an easement once conveyed. *Schadewald v*

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[5] The majority's discussion of *Eyde Bros Dev Co v Eaton Co Drain Comm'r*, 427 Mich 271; 398 NW2d 297 (1986), and *Ayres, supra*, does not support its determination of the scope of this easement. *Ayres* involved an express grant and *Eyde Bros* involved a highway created for public use. Both easements were geographically limited to the roadways involved.

In this case, there is no requirement that the proposed improvements be on or under the existing roadway. This easement explicitly encompasses a much larger area. As in *Ayres,* the improvements would be on the portion subject to the easement, and they would directly affect the road. They would open it in the case of the access drives and improve it in the case of the lighting, sidewalks, driveways, and landscaping.

[6] See also *Schumacher v Dep't of Natural Resources*, 256 Mich App 103, 107; 663 NW2d 921 (2003), citing *Tobias v Dailey*, 196 Ariz 418, 421; 998

Brulé, 225 Mich App 26, 36; 570 NW2d 788 (1997), citing *Douglas v Jordan,* 232 Mich 283, 287; 205 NW 52 (1925). See also *Schumacher v Dep't of Natural Resources*, 256 Mich App 103, 106; 663 NW2d 921 (2003).

The village obtained an easement over the whole parcel rather than merely over the new roadbed. The Court of Appeals wrote that the village's attorney testified

> the crescent-shaped piece of land . . . was meant to be used to provide rights of way to the north residences that were separated from the road. [Unpublished opinion per curiam of the Court of Appeals, issued January 27, 2004 (Docket No. 240790).]

Dexter Development was owned by the grantor of the easement. His failure to object to the access drives when he granted the easement suggests that the parties who created it understood that opening the road included building access roads.

The majority opinion fails to take proper account of the factual circumstances of this case. I would hold that, because Dexter Development's activities will improve and open Dan Hoey Road, they are within the scope of the easement.

THE SUBJECTIVE MOTIVATION TO USE AN EASEMENT IS IRRELEVANT

Motive, in the strict sense, is distinct from purpose. Motive has been described as the desire that prompts a person to act, whereas purpose is the result to be obtained. *Hudson v American Oil Co,* 152 F Supp 757, 770 (ED Va, 1957). Courts do not normally inquire into

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P2d 1091 (Ariz App, 2000); *Tungsten Holdings, Inc v Kimberlin*, 298 Mont 176, 182; 994 P2d 1114 (2000); *Thompson v Whinnery*, 895 P2d 537, 541-542 & n 8 (Colo, 1995).

the motive behind the exercise of a right. *Burke v Smith,* 69 Mich 380, 388; 37 NW 838 (1888).

The majority opinion asserts that its analysis does not consider that these improvements were initiated by a private developer. *Ante* at 41. But the majority's subsequent focus on the fact that the improvements in question are being proposed at the behest of a private developer belies this assertion. The opinion states, "[Dexter Development's] planned use of the land covered by the easement served the exclusive purpose of furthering and enhancing [its] private complex." *Ante* at 44. The majority asserts that defendant Dexter Development sought to use the village's easement to accomplish something it could not accomplish otherwise. *Ante* at 37.

These considerations are improper. The Court's examination of the terms of the conveyance and the surrounding circumstances should be an objective inquiry. The subjective motivations of the interested parties are irrelevant. The pertinent question is whether the improvements fulfill the easement's purpose to improve and open Dan Hoey Road. The village is not obligated to justify its motives, as the majority and concurrence seem to require.

Also, the fact that Dexter Development rather than the village is arguing for the improvements is not remarkable. Dexter Development agreed to indemnify the village against legal action arising from the proposed improvements. Hence, it is to be expected that Dexter Development would advance the legal arguments supporting the proposed improvements in place of the village.

When viewed objectively, the purpose of the improvements is to open and improve the road. The fact that a developer seeks to implement them rather than the

village has no legal relevance. The improvements could be undertaken by the village directly, at its discretion. Villages may open streets. MCL 67.12. They may install sidewalks or require property owners to install them. MCL 67.8. They may also landscape. MCL 67.21.

Moreover, the village was not required to have made a decision to further improve and open Dan Hoey Road before a developer requested it, as the majority implies. *Ante* at 39. It could decide to install landscaping and sidewalks for aesthetic reasons at any time. Also, it could decide at any time to install the improvements in question to enhance the road's safety, longevity, and utility as a transportation artery.

Justice YOUNG in his concurrence asserts without reference to authority that the village has an initial burden to show that the proposed improvements are within the scope of the easement. Such a burden contradicts standard practice that puts the onus on the party making a claim to articulate and substantiate it. See MCR 2.116(C)(8). In this case, the burden rightfully is on plaintiffs to assert and show that the proposed improvements exceed the scope of the easement. *Stewart v Hunt,* 303 Mich 161, 163; 5 NW2d 737 (1942).

Justice YOUNG appears to be suggesting as well that the village has the initial burden of showing that the underlying motivation for the improvements is consistent with the scope of the easement. This is inaccurate, and it belies his concurring argument that the parties' motivations are irrelevant to the disposition of the case.

THE PROPOSED USES DO NOT UNREASONABLY BURDEN THE SERVIENT ESTATE

This Court has held that, where broad language in an easement permits uses not stated, those uses must not impose an additional or increased burden on the servi-

ent estate. *Crew's Die Casting Corp*, *supra* at 546, quoting *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957). In this case, the access drives and related improvements do not increase the burden. They fit squarely within the scope of what the parties intended. Where there were four access drives, there would be only two. They would consolidate the traffic running over the access drives.

Plaintiffs' burden would not increase by virtue of the fact that the access drives would service a commercial development rather than four residences. This Court has held that, generally speaking, a mere increase in the number of persons using an unlimited right-of-way to which land is subject is not an unlawful additional burden. *Henkle v Goldenson*, 263 Mich 140, 143; 248 NW 574 (1933).

In theory, Dan Hoey Road could be opened to encompass several lanes of through traffic over the entire parcel. If so opened, the increased traffic would not necessarily exceed the scope of this unlimited easement to open the road.

Under the village's zoning requirements, Blackhawk could not build on the parcel. Blackhawk's quiet enjoyment of the parcel would not be impermissibly disturbed by increased traffic whether on the new access drives or on several lanes of through traffic.

Plaintiffs may not be heard to complain that Dexter Development's proposed uses involve more land than previously was in service. An easement is normally a permanent interest in land. 1 Restatement Property, 3d, § 4.1, comment *b*, p 498. This one contains no language preventing use of an increased amount of the land encompassed within it. Thus, I infer that the parties intended to allow the area used in the easement

to expand over time to maintain the easement's utility. 1 Restatement Property, 3d, § 4.10, p 592.

Plaintiffs should have expected that improvements of the kind contemplated here could be installed at some future day. They may not be heard to complain that that day has come. They have no grounds to assert that they did not understand the broad intention of the parties who created the easement. They had record notice that the easement was in part to open and improve the road.

Plaintiffs had inquiry notice of access drives for the use of the property owners to the north, and they never questioned their propriety when they acquired the property. Although there were no distinct easements in the record for each driveway, plaintiffs had to know that the easement included access drives.

The effect of the proposed improvements on the servient estate in this case can be compared with the situation in *Delaney*, *supra*. There, the easement was between private parties for lake access. The Court correctly held that

> [a] principle which underlies the use of all easements is that the owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden. See 17A Am Jur, Easements, § 115, p 723. [*Delaney* at 687.]

Mooring boats and sunbathing were not inherent in providing access to the lake, and they increased the burden on the servient estates. *Id.* By contrast, here the proposed improvements open Dan Hoey Road and improve it, and they do not increase the burden on the servient estate.

CONCLUSION

It is irrelevant in this case that Dexter Development is a private developer. Its proposed projects are compat-

ible with the purpose of and fall within the scope of the easement, which is to open and improve Dan Hoey Road. The actions of the parties who created the easement confirm this. Moreover, Dexter Development's proposed improvements do not unreasonably burden plaintiffs' estate.

I would affirm the decisions of the Court of Appeals and of the trial court. Dexter Development's proposed projects are within the scope of the easement.

HENRY v THE DOW CHEMICAL COMPANY

Docket No. 125205. Argued October 6, 2004 (Calendar No. 4). Decided July 13, 2005.

Gary and Kathy Henry and 171 others brought an action in the Saginaw Circuit Court against The Dow Chemical Company, alleging that the defendant negligently released dioxin, a potentially hazardous chemical into the Tittabawassee River flood plain, where the plaintiffs live and work. The plaintiffs alleged that the defendant's negligence created a risk of disease, and asked the court to certify a class that seeks the creation of a program, to be funded by the defendant and supervised by the court, that would monitor the class for possible future manifestations of disease. The plaintiffs do not seek compensation for physical injury or for the enhanced risk of future injury. The defendant moved for summary disposition with regard to the medical monitoring claim. The trial court, Leopold P. Borrello, J., denied the motion. The Court of Appeals, GRIFFIN, P.J., and WHITBECK, C.J. (OWENS, J., dissenting), denied leave to appeal in an unpublished order, entered October 29, 2003 (Docket No. 251234). The Supreme Court granted leave to appeal and stayed the proceedings below. 470 Mich 870 (2004).

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

The plaintiffs failed to establish the element of injury or damages for their medical monitoring claim. The alleged economic losses the plaintiffs will suffer as they are forced to monitor their medical condition do not satisfy the damages requirement of a negligence claim. Actual harm, an injury that is manifest in the present, is required in order to state a viable negligence claim.

1. Mere exposure to a toxic substance and the increased risk of physical injury do not constitute an "injury" for tort purposes. Present physical injury to person or property, not fear of injury in the future, gives rise to a cause of action for negligence. The plaintiffs failed to establish a cognizable injury and also failed to establish causation.

2. In recognition of the separation of powers provided in Const 1963, art 3, § 2, the Supreme Court defers to the

legislative regulatory choice, expressed in the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.*, that has authorized the Department of Environmental Quality to address and remedy precisely the sort of environmental and health risks occasioned by the defendant's release of a toxic substance.

3. The plaintiffs' medical monitoring claim is not cognizable under current Michigan law, and recognizing this claim would require both a departure from fundamental tort principles and a disregard of the principle of separation of powers. Regardless of whether the relief sought by the plaintiffs is equitable or legal in nature, the defendant is entitled to summary disposition of the plaintiffs' claim for medical monitoring because the plaintiffs have not stated a valid cause of action.

Justice WEAVER concurred in the majority opinion's result and reasoning, but wrote separately because she did not join in the majority's citations of a law review article. Because binding Michigan case law exists for the propositions for which the article was cited, Justice WEAVER found that the citations of the article written by one of the justices signing the majority opinion could at best be described as inappropriate and unnecessary.

Further, she found the article unworthy of citation because of its tone and its clumsy and crude analogy mocking the common law. The common law was adopted by the people of Michigan in art 3, § 7 of the Michigan Constitution.

Reversed and remanded for entry of an order of summary disposition in favor of the defendant with regard to the medical monitoring claim.

Justice CAVANAGH, joined by Justice KELLY, dissenting, stated that the plaintiffs presented a reasonable claim for medical monitoring costs. The plaintiffs have suffered actual harm and damages inasmuch as the heightened exposure to dioxin they received because of the defendant's acts is akin to an injury. Were it not for the acts of the defendant, the plaintiffs would not be obliged to incur the expenses involved in additional testing for early detection of any illnesses caused by the increased dioxin exposure. The exposure itself and the need for medical monitoring constitute the injury. The plaintiffs can also offer facts sufficient to establish causation.

The plaintiffs' claim for medical monitoring warrants equitable relief because there is no adequate legal remedy for the plaintiffs. Principles of equity are firmly entrenched in our justice system, and allowing the plaintiffs to seek a court-supervised medical monitoring program does not stray from tort principles or the

foundations of Anglo-American law. Equitable relief properly places the responsibility for any medical monitoring costs on the defendant, the party responsible for the need to monitor the plaintiffs' health.

The remedy offered by the Natural Resources and Environmental Protection Act (NREPA) does not preclude the plaintiffs' cause of action. While the Department of Environmental Quality may take responsive action pursuant to the NREPA, it is not required to take action. The fact that the department may choose to take responsive action to minimize injury to the public health does not absolve the defendant of its responsibility to the plaintiffs or prevent the plaintiffs from seeking a court-supervised medical monitoring program funded by the defendant. What the department may deem appropriate to protect the public as a whole is not necessarily what may be in an individual plaintiff's best medical interest.

The majority has presented a false choice between an equitable remedy for the plaintiffs and the economic viability of the defendant and of our state. By its decision, the Supreme Court has shirked its duty to protect the injured plaintiffs and the people of this state, thereby leaving the defendant's practices and interests unassailed.

NEGLIGENCE — ACTIONS — TOXIC SUBSTANCES — MEDICAL MONITORING COSTS.

Mere exposure to a toxic substance and the increased risk of physical injury do not constitute an "injury" for purposes of a tort action based on negligent release of the toxic substance; present physical injury to person or property, not the fear of future injury, gives rise to a cause of action for negligence; a negligence claim seeking the costs of medical monitoring for disease cannot be sustained where the costs are derived not from actual harm, but from fear of future harm.

Trogan and Trogan P.C. (by *Bruce F. Trogan*), *Stueve Siegel Hanson Woody LLP* (by *Teresa A. Woody* and *Todd M. McGuire*), and *Spencer Fane Britt & Browne LLP* (by *Carl H. Helmstetter* and *Michael F. Saunders*) for the plaintiffs.

Dickinson Wright PLLC (by *Kathleen A. Lang* and *Barbara H. Erard*), *Braun Kendrick Finkbeiner, PLC* (by *John A. Decker*), *Kirkland & Ellis, LLP* (by *Douglas*

J. Kurtenbach, Christopher M. R. Turner, and *Steven Engel*), *Beveridge & Diamond, PC* (by *John S. Guttman*), and *Michael A. Glackin* for the defendant.

Amici Curiae:

Warner Norcross & Judd LLP (*William K. Holmes, Thomas J. Manganello*, and *John J. Bursch)* (*Hugh F. Young, Jr.*, of counsel) for the Product Liability Advisory Council, Inc.

Law Offices of Robert June, P.C. (by *Robert B. June*), for the Ecology Center, American Public Health Association, Endometriosis Association, American Lung Association of Michigan, Genesee County Medical Society, Physicians for Social Responsibility, Science and Environmental Health Network, Lone Tree Council, Public Interest Research Group in Michigan, Sierra Club, and the Center for Civil Justice.

Plunkett & Cooney, P.C. (by *Mary Massaron Ross* and *Camille T. Horne*), for the Defense Research Institute and the Michigan Defense Trial Counsel.

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

Shook, Hardy & Bacon, L.L.P. (by *Victor E. Schwartz, Nicholas C. Gladding, Leah Lorber, Cary Silverman*, and *Emily Laird)*, and *Clark Hill PLC* (by *Frederick R. Damm* and *Paul C. Smith*) (*Robin S. Conrad, Sherman Joyce, Jan S. Amundson, Quentin Riegel, Paul W. Kalish, Mark D. Plevin*, *David F. Zoll, Donald D. Evans*, *Ann W. Spragens*, and *Robert J. Hurns*, of counsel), for Chamber of Commerce of the United States, American Tort Reform Association, National Association of Manufacturers, American Chemistry Council, Coalition

for Litigation Justice, Inc., and Property Casualty Insurers Association of America.

CORRIGAN, J. The 173 plaintiffs in this matter have asked to represent a putative class of thousands in an action against defendant, The Dow Chemical Company. Their core allegation is that Dow's plant in Midland, Michigan, negligently released dioxin, a synthetic chemical that is potentially hazardous to human health,[1] into the Tittabawassee flood plain where the plaintiffs and the putative class members live and work.

This situation appears, at first blush, to have the makings of a standard tort cause of action. But closer inspection of plaintiffs' motion for class certification reveals that one of plaintiffs' claims is premised on a novel legal theory in Michigan tort law and thus raises an issue of first impression for this Court.

In an ordinary "toxic tort" cause of action, a plaintiff alleges he has developed a disease because of exposure to a toxic substance negligently released by the defendant. In this case, however, the plaintiffs do not allege that the defendant's negligence has actually caused the manifestation of disease or physical injury. Instead, they allege that defendant's negligence has created the *risk* of disease—that they *may* at some indefinite time in the future develop disease or physical injury because of defendant's allegedly negligent release of dioxin.

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[1] According to the Attorneys' Dictionary of Medicine, v 2, p D-145, dioxin is

> [a] synthetic chemical that occurs as a byproduct in the manufacturing of trichlorophenol. Animal studies have shown dioxin to be a potent carcinogen. It is also believed to have teratogenic effects. Chloracne (a skin condition similar in appearance to severe acne) is known to be associated with exposure to dioxin; metabolic, hepatic (liver) and neurological disturbances have also been reported.

Accordingly, the plaintiffs have asked the circuit court to certify a class that collectively seeks the creation of a program, to be funded by defendant and supervised by the court, that would monitor the class and their representatives for possible future manifestations of dioxin-related disease. The defendant moved for summary disposition, arguing that plaintiffs' medical monitoring claim was not cognizable under Michigan law. The circuit court denied this motion, and the Court of Appeals denied defendant's interlocutory application for leave to appeal.

We now reverse the circuit court order denying the motion and remand for entry of summary disposition in favor of defendant on plaintiffs' medical monitoring claim. Because plaintiffs do not allege a *present* injury, plaintiffs do not present a viable negligence claim under Michigan's common law.

Although we recognize that the common law is an instrument that may change as times and circumstances require, we decline plaintiffs' invitation to alter the common law of negligence liability to encompass a cause of action for medical monitoring. Recognition of a medical monitoring claim would involve extensive fact-finding and the weighing of numerous and conflicting policy concerns. We lack sufficient information to assess intelligently and fully the potential consequences of recognizing a medical monitoring claim.

Equally important is that plaintiffs have asked this Court to effect a change in Michigan law that, in our view, ought to be made, if at all, by the Legislature. Indeed, the Legislature has already established policy in this arena by delegating the responsibility for dealing with health risks stemming from industrial pollution to the Michigan Department of Environmental Quality (MDEQ). As a matter of prudence, we defer in this case to the people's representatives in the Legislature, who

are better suited to undertake the complex task of balancing the competing societal interests at stake.

We therefore remand this matter to the circuit court for entry of summary disposition in defendant's favor on plaintiffs' medical monitoring claim.

FACTS AND PROCEDURAL HISTORY

Defendant, The Dow Chemical Company, has maintained a plant on the banks of the Tittabawassee River in Midland, Michigan, for over a century. The plant has produced a host of products, including, to name only a few, "styrene, butadiene, picric acid, mustard gas, Saran Wrap, Styrofoam, Agent Orange, and various pesticides including Chlorpyrifos, Dursban and 2, 4, 5-trichlorophenol." Michigan Department of Community Health, Division of Environmental and Occupational Epidemiology, *Pilot Exposure Investigation: Dioxin Exposure in Adults Living in the Tittabawassee River Flood Plain, Saginaw County, Michigan,* May 25, 2004, p 4.

According to plaintiffs and published reports from the MDEQ, defendant's operations in Midland have had a deleterious effect on the local environment. In 2000, General Motors Corporation was testing soil samples in an area near the Tittabawassee River and the Saginaw River when it discovered the presence of dioxin, a hazardous chemical believed to cause a variety of health problems such as cancer, liver disease, and birth defects. By spring 2001, the MDEQ had confirmed the presence of dioxin in the soil of the Tittabawassee flood plain. Further investigation by the MDEQ indicated that defendant's Midland plant was the likely source of the dioxin. Michigan Department of Environmental Quality, Remediation and Redevelopment Division, *Final Report, Phase II Tittabawassee/Saginaw River Dioxin Flood Plain Sampling Study*, June 2003, p 42 (identi-

fying Dow's Midland plant as the "principal source of dioxin contamination in the Tittabawassee River sediments and the Tittabawassee River flood plain soils").

In March 2003, plaintiffs moved for certification of two classes in the Saginaw Circuit Court. The first class was composed of individuals who owned property in the flood plain of the Tittabawassee River and who alleged that their properties had declined in value because of the dioxin contamination. The second group consisted of individuals who have resided in the Tittabawassee flood plain area at some point since 1984 and who seek a court-supervised program of medical monitoring for the possible negative health effects of dioxin discharged from Dow's Midland plant. This latter class consists of 173 plaintiffs and, by defendant's estimation, "thousands" of putative members.

Defendant moved under MCR 2.116(C)(8) for summary disposition of plaintiffs' medical monitoring claim. The Saginaw Circuit Court denied this motion, and denied defendant's subsequent motions for reconsideration and for a stay of proceedings.

After the Court of Appeals denied defendant's motion for peremptory reversal and emergency application for leave to appeal, the defendant sought emergency leave to appeal in this Court. Discovery and other preliminary proceedings on plaintiffs' motion for class certification continued in the Saginaw Circuit Court until, on June 3, 2004, we stayed the proceedings below and granted defendant's application for leave to appeal.[2] *Henry v Dow Chemical Co,* 470 Mich 870 (2004).[3]

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[2] Plaintiffs have since filed a motion for partial relief from stay, accompanied by a motion for immediate consideration. In light of the issuance of this opinion, we deny the motions because they are moot.

[3] In January 2005, defendant entered into a settlement agreement with the MDEQ regarding dioxin contamination in the Tittabawassee River

STANDARD OF REVIEW

We review de novo the circuit court's denial of defendant's motion for summary disposition under MCR 2.116(C)(8). *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). A movant is entitled to summary disposition under MCR 2.116(C)(8) if "[t]he opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). In determining whether a movant has met this standard, we " 'accept[] as true all well-pleaded facts.' " *Radtke v Everett,* 442 Mich 368, 373; 501 NW2d 155 (1993), quoting *Abel v Eli Lilly & Co*, 418 Mich 311, 324; 343 NW2d 164 (1984).

ANALYSIS

I

The question presented by this appeal is whether, in seeking a court-supervised medical monitoring program for future dioxin-related illnesses, plaintiffs have stated a claim on which relief may be granted. MCR 2.116(C)(8). Plaintiffs' theory is that Dow negligently released dioxin into the Tittabawassee flood plain and that, as a result, plaintiffs must incur the costs of intensive medical monitoring for the possible health effects of elevated exposure to dioxin. Thus, at its core, plaintiffs' medical monitoring claim is one of negligence. It is usually held that in order to state a negligence claim on which relief may be granted, plaintiffs must prove (1) that defendant owed them a duty of care, (2) that defendant breached that duty, (3) that

valley. See Hugh McDiarmid, Jr., *Dow, state OK plan on dioxin,* Detroit Free Press (January 20, 2005). The agreement, which was reached after months of negotiation, provides that defendant will fund extensive cleanup efforts aimed at minimizing residents' exposure to dioxin. *Id.*

plaintiffs were injured, and (4) that defendant's breach caused plaintiffs' injuries. See *Haliw v Sterling Hts,* 464 Mich 297, 309-310; 627 NW2d 581 (2001); *Schultz v Consumers Power Co,* 443 Mich 445, 459; 506 NW2d 175 (1993). These elements of an action for negligence are traditionally summarized, in a formula that ought to be familiar to any first-year law student, as "duty, breach of that duty, causation, and damages." *Fultz v Union-Commerce Assoc,* 470 Mich 460, 463; 683 NW2d 587 (2004). See also Prosser & Keeton, Torts (5th ed), § 30, pp 164-165 (describing this "traditional formula").

Here, defendant argues that plaintiffs have not established any present physical injuries, and have therefore failed to state a valid negligence claim. We agree. As an initial matter, it is necessary for us to determine the exact nature of plaintiffs' claim. We must decide whether plaintiffs are in fact seeking compensation for future injuries they *may* suffer, or for present injuries they *have* suffered.

If plaintiffs' claim is for injuries they may suffer in the future, their claim is precluded as a matter of law, because Michigan law requires more than a merely speculative injury. This Court has previously recognized the requirement of a present physical injury in the toxic tort context. In *Larson v Johns-Manville Sales Corp,* 427 Mich 301, 314; 399 NW2d 1 (1986), for example, we held that a cause of action for asbestosis, which typically is manifest between ten and forty years after exposure, arises only when an injured party knows or should know that he has, in fact, developed asbestosis. Similarly, we held that a cause of action for asbestos-related lung cancer arises only when there has been a "discoverable appearance" of cancer. *Id.* at 319. Thus, *Larson* squarely rejects the proposition that mere exposure to a toxic substance and the increased risk of

future harm constitutes an "injury" for tort purposes. It is a *present* injury, not fear of an injury in the future, that gives rise to a cause of action under negligence theory.

Here, it is clear that plaintiffs do not claim that they have suffered any present physical harm because of defendant's allegedly negligent contamination of the Tittabawassee flood plain. Indeed, plaintiffs in their arguments to this Court expressly deny having any present physical injuries.[4]

Plaintiffs have not cited an exception to the rule that a present physical injury is required in order to state a claim based on negligence. Nor, indeed, does the dissent.[5] We can therefore reach only one conclusion: if the alleged damages cited by plaintiffs were incurred in anticipation of possible future injury rather than in response to present injuries, these pecuniary losses are not derived from an injury that is cognizable under Michigan tort law.

However, if plaintiffs' claim is that by virtue of their potential exposure to dioxin they have suffered an "injury," in that any person so exposed would incur the additional expense of medical monitoring, then their claim is also precluded as a matter of law, because Michigan law requires an actual injury to person or property as a precondition to recovery under a negligence theory.

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[4] Specifically, plaintiffs argue that "[t]hey do not seek compensation for physical injury or for the enhanced risk of future physical injury. Instead, they seek to establish a judicially administered medical screening and diagnostic program to supervise and fund the medical monitoring regime that a reasonable physician would advise for persons exposed to Dow's dioxin in the way Plaintiffs have been and are being exposed."

[5] See *post* at 110, citing a California case, *Miranda v Shell Oil Co,* 17 Cal App 4th 1651, 1657; 26 Cal Rptr 2d 655 (1993).

As noted in this opinion at 71-72, the elements that a plaintiff in a negligence action must prove are usually summed up in the familiar four-part test: (1) duty, (2) breach, (3) causation, and (4) damages. Although these four elements are usually the primary focus of a negligence analysis, it has always been implicit in this analysis that in order to prevail, a plaintiff must also demonstrate an actual *injury* to person or property. Indeed, such injury constitutes the essence of a plaintiff's claim.

The logic behind this injury requirement—and, indeed, the very logic of tort law—is that of "giv[ing] security to the rights of individuals by putting within their reach suitable redress whenever their rights have been actually violated." Cooley on Torts (4th ed), § 32, p 57. Accordingly, an individual is entitled to relief under a tort theory only when he has suffered a present injury.[6] As Prosser and Keeton have explained:

> Since the action for negligence developed chiefly out of the old form of action on the case, it retained the rule of that action, that proof of damage was an essential part of the plaintiff's case. Nominal damages, to vindicate a tech-

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[6] See Cooley on Torts (4th ed), § 32, pp 57-58:

> Before any violation has in fact taken place, the law assumes that none will happen; but that each individual will respect the rights of all others. Therefore, it does not undertake in general to provide preventive remedies; it gives them in a few exceptional cases, which stand on peculiar grounds, and in which the mischiefs flowing from an invasion of rights might be such as would be incapable of complete redress in the ordinary methods, or perhaps in any manner. In most cases it is assumed that, if the law places within the reach of every one a suitable remedy to which he may resort when he suffers an injury, it has thereby not only provided for him adequate protection, but has given him all that public policy demands. The remedies that are aimed at wrongs not yet committed but only threatened, are so susceptible of abuse that they are wisely restricted within very narrow limits.

> nical right, cannot be recovered in a negligence action, *where no actual loss has occurred*. The threat of future harm, not yet realized, is not enough. Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered. [Prosser & Keeton, Torts (5th ed, § 30, p 165 (emphasis added).]

While the courts of this state may not have always clearly articulated this injury requirement, nor finely delineated the distinction between an "injury" and the "damages" flowing therefrom, the injury requirement has always been present in our negligence analysis. It has simply always been the case in our jurisprudence that plaintiffs alleging negligence claims have also shown that their claims arise from present physical injuries. We are not aware of any Michigan cases in which a plaintiff has recovered on a negligence theory without demonstrating some present physical injury. Thus, in all known cases in Michigan in which a plaintiff has satisfied the "damages" element of a negligence claim, he has also satisfied the "injury" requirement.

Plaintiffs effectively urge us to expand our common-law jurisprudence by concluding that the traditional four-part test can be met without also satisfying the requirement of a present physical injury, no doubt aware that we have never before been squarely presented with such a claim. Until now, there has never been a need for this Court to articulate specifically the injury requirement. But in light of the novel nature of plaintiffs' claims, however, it has become necessary for us to do so today. We therefore reaffirm the principle that a plaintiff must demonstrate a present physical injury to person or property *in addition to* economic

losses that result from that injury in order to recover under a negligence theory.

This requirement does not constitute a change in the common law of this state. While we have from time to time allowed for the development of the common law as circumstances have required, see, e.g., *Berger v Weber*, 411 Mich 1; 303 NW2d 424 (1981), the injury requirement has always been an implicit part of a negligence action in Michigan. Had we been presented in 1869 with an action against a blacksmith by local residents alleging that the blacksmith's emissions caused them the fear of physical injury *someday*, we have little doubt that this Court would have expressly articulated the injury requirement at that time. However, such a case has never before been presented to this Court, so it falls to us today to articulate what this Court has always assumed: present harm to person or property is a necessary prerequisite to a negligence claim.

The requirement of a present physical injury to person or property serves a number of important ends for the legal system. First, such a requirement defines more clearly who actually possesses a cause of action. In allowing recovery only to those who have actually suffered a present physical injury, the fact-finder need not engage in speculations about the extent to which a plaintiff possesses a cognizable legal claim. See Prosser & Keeton, Torts (5th ed), § 30, p 165. Second, such a requirement reduces the risks of fraud, by setting a clear minimum threshold—a present physical injury—before a plaintiff can proceed on a claim. By requiring a prospective plaintiff to make a showing of an actual physical injury, present tort law thus excludes from the courts those who might bring frivolous or unfounded suits. In particular, the fact-finder need not be left

wondering whether a plaintiff has in fact been harmed in some way, when nothing but a plaintiff's own allegations support his cause of action.

Finally, and perhaps most significantly, the requirement of a present physical injury avoids compromising the judicial power. The exercise of the "judicial power" by this Court, Const 1963, art 6, § 1, contemplates that there will be standards—legally comprehensible standards—that guide the judicial branch's resolution of the matters brought before it. The present physical injury requirement establishes a clear standard by which judges can determine which plaintiffs have stated a valid claim, and which plaintiffs have not. In the absence of such a requirement, it will be inevitable that judges, as in the instant case, will be required to answer questions that are more appropriate for a legislative than a judicial body: How far from the Tittabawassee River must a plaintiff live in order to have a cognizable claim? What evidence of exposure to dioxin will be required to support such a claim? What level of medical research is sufficient to support a claim that exposure to dioxin, in contrast to exposure to another chemical, will give rise to a cause of action?

Here, it is apparent that the only "injuries" alleged by the putative representatives of the medical monitoring class are "the losses they have and will suffer as they are forced to monitor closely their health and medical condition because of their exposure to Dow's Dioxin [sic] pollution." Thus, plaintiffs have arguably stated a present *financial* injury, i.e., damages. From this description, however, it is apparent that plaintiffs do not claim that they suffer from *present physical* injuries to person or property. Rather, plaintiffs allege that they *may* develop dioxin-related illnesses in the future. At best, then, the only "injury" from which

plaintiffs suffer at present is a *fear of future illness*. They seek an "equitable remedy" of a medical monitoring program not in order to redress actual or present injury to their persons but instead to screen for possible future injury. In this way, plaintiffs' claims depart from the principles articulated earlier in this opinion by Justice COOLEY and by Prosser and Keeton.

It is no answer to argue, as plaintiffs have, that the need to pay for medical monitoring is *itself* a present injury sufficient to sustain a cause of action for negligence. In so doing, plaintiffs attempt to blur the distinction between "injury" and "damages." While plaintiffs arguably demonstrate economic losses that would otherwise satisfy the "damages" element of a traditional tort claim, the fact remains that these economic losses are wholly derivative of a *possible, future* injury rather than an *actual, present* injury. A financial "injury" is simply not a present physical injury, and thus not cognizable under our tort system. Because plaintiffs have not alleged a present physical injury, but rather, "bare" damages, the medical expenses plaintiffs claim to have suffered (and will suffer in the future) are not compensable.

Plaintiffs' medical monitoring claim is also distinguishable from other causes of action, such as libel or professional malpractice, in which a plaintiff may recover for economic losses without showing present physical harm. In a cause of action for libel, a plaintiff must show an injury to his reputation.[7] In a cause of action for legal malpractice, a plaintiff must show an injury to the fiduciary relationship between the attor-

[7] *Locricchio v Evening News Ass'n*, 438 Mich 84, 115-116; 476 NW2d 112 (1991) (stating that the elements of libel are "1) a false and defamatory statement concerning the plaintiff, 2) an unprivileged communication to a third party, 3) fault amounting to at least negligence on

ney and client.[8] In each case, our common law requires a present injury in addition to economic loss incurred as a result of that injury.

Here, as noted, the only noneconomic injury alleged by plaintiffs is their fear of future physical injury. Plaintiffs' fear, however reasonable, is still not enough to state a claim of negligence. Even if we were to construe plaintiffs' claim broadly as one for emotional distress, our common law recognizes emotional distress as the basis for a negligence action only when a plaintiff can also establish *physical* manifestations of that distress.[9] Thus, plaintiffs have not established a present, legally cognizable injury.[10]

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the part of the publisher, and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication").

[8] *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). "In order to state an action for legal malpractice, the plaintiff has the burden of adequately alleging the following elements: '(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged.' " (Citation omitted.)

[9] See, e.g., *Daley v LaCroix*, 384 Mich 4, 12-13; 179 NW2d 390 (1970). See also *Hesse v Ashland Oil*, 466 Mich 21, 34 (2002) (KELLY, J., dissenting) (noting that a cause of action for negligent infliction of emotional distress requires a showing of physical harm); Prosser & Keeton, *supra*, § 54, p 361 ("Where the defendant's negligence causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, and in the absence of some other independent basis for tort liability, the great majority of courts still hold that in the ordinary case there can be no recovery.").

[10] Even assuming that the costs associated with plaintiffs' medical monitoring were sufficient to satisfy the "damages" element and the injury requirement of a negligence suit, we note that plaintiffs would still face substantial evidentiary hurdles with respect to the "causation" element. Significantly, while plaintiffs seek the imposition of a medical monitoring program for the possible health effects of elevated exposure to dioxin, they present no evidence that they themselves have elevated levels of dioxin in their bloodstreams, that these elevated levels are attributable in whole or in part to defendant's activities, and that these

Plaintiffs advance their claim as if it satisfies the traditional requirements of a negligence action in Michigan. In reality, plaintiffs propose a transformation in tort law that will require the courts of this state—in this case and the thousands that would inevitably follow—to make decisions that are more characteristic of those made in the legislative, executive, and administrative processes. For reasons that we discuss more fully in part II, we are not prepared to acquiesce in this transformation.

Plaintiffs maintain that this Court *implicitly* recognized a medical monitoring cause of action in *Meyerhoff v Turner Constr Co,* 456 Mich 933 (1998). In *Meyerhoff,* a number of construction workers were exposed to asbestos on the job. The Court of Appeals held that "medical-monitoring expenses are a compensable item of damages where the proofs demonstrate that such surveillance to monitor the effect of exposure to toxic substances . . . is reasonable and necessary." *Meyerhoff v Turner Constr Co (On Remand)*, 210 Mich App 491, 495; 534 NW2d 204 (1995). We vacated the Court of Appeals opinion with respect to the medical monitoring claim, but included language in our order that, quite understandably, led to confusion regarding the viability of a medical monitoring claim in Michigan: "The factual record is not sufficiently developed to allow a [sic] medical monitoring damages. Accordingly, that portion of the Court of Appeals decision which holds that medical monitoring expenses are a compensable item of damages is vacated." 456 Mich 933.

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elevated levels will lead to recognized physical injuries. Further, even if plaintiffs could show the likelihood of physical injuries like those associated with exposure to elevated levels of dioxin, see n 1 of this opinion, it is still unproven at this point whether such injuries would in fact be attributable to dioxin released by defendant, as opposed to some other environmental or physiological cause.

Plaintiffs read the first sentence quoted above to suggest that a factual record *may* in some circumstances be "sufficiently developed" to support medical monitoring damages. Accordingly, they maintain that an action for medical monitoring may be sustainable with a sufficiently developed record.

However, while perhaps not a model of clarity, the language of *Meyerhoff* does not support such a conclusion. *Meyerhoff* does not affirmatively state that a cause of action for medical monitoring is cognizable under Michigan law. To the contrary, our order in *Meyerhoff* vacated the part of the Court of Appeals opinion that had held precisely that. Rather, *Meyerhoff* should properly be read to hold that the factual record in that case was insufficiently developed to support a medical monitoring claim *if such a claim exists in Michigan*. As we clarify today, such a claim does *not* exist in Michigan.[11]

Nor are we persuaded by the opinion of the United States District Court for the Eastern District of Michigan in *Gasperoni v Metabolife, Int'l Inc,* 2000 US Dist LEXIS 20879 (ED Mich, 2000). Plaintiffs assert that the district court in *Gasperoni* "concluded that Michigan would recognize a state law claim for medical monitoring and certified a class for such a claim." A careful reading of *Gasperoni*, however, reveals that this argument mischaracterizes the district court's opinion.

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[11] While, given the language in *Meyerhoff*, it was certainly not unreasonable for the trial court in the instant case to decline summary disposition, *Meyerhoff* nonetheless is an exceedingly thin reed on which to rest arguments in favor of a medical monitoring cause of action—a reed that must give way under the vastly greater weight of Michigan precedent, which requires a manifest physical injury in order to state a viable negligence claim. *Meyerhoff*'s Delphic allusion to a medical monitoring claim was, at most, mere dictum. The trial court thus erred in allowing plaintiffs' claim to proceed to trial.

The plaintiffs in *Gasperoni* consumed Metabolife 356, an appetite suppressant manufactured and distributed by the defendant. They filed an action based on theories of fraudulent misrepresentation and breach of warranty, and sought a number of remedies—including medical monitoring. *Id.* at *3-*4. The defendant in that case did not challenge medical monitoring as a cause of action. Indeed, the defendant had no reason to do so. The plaintiffs sought medical monitoring only as a form of relief and did not claim that medical monitoring was, itself, a viable cause of action. Thus, the sole issue was whether the plaintiffs' proposed class met the requirements provided in Federal Rule of Civil Procedure 23(a).

With respect to the plaintiffs' medical monitoring claims, the district court held only that the plaintiffs' medical monitoring claims were not so individualized as to preclude class certification. *Id.* at *22. Whether a medical monitoring claim was viable under Michigan law—the central issue in this appeal—was neither raised by the defendant in *Gasperoni* nor addressed by the district court in its opinion. Far from holding that Michigan would "recognize a state law claim for medical monitoring," as asserted by plaintiffs, the district court merely suggested that medical monitoring may be a proper form of injunctive *relief* in an action based on fraudulent misrepresentation and breach of warranty. Thus, as with our order in *Meyerhoff, Gasperoni* does not provide any reason to conclude affirmatively that a cause of action for medical monitoring is cognizable under Michigan law.

II

Having determined that plaintiffs' claim cannot stand under our current law of negligence, we turn now

to plaintiffs' core argument—that we should *modify* the common law of negligence in order to permit their medical monitoring claim to proceed.

This Court is the principal steward of Michigan's common law. See, e.g., *Adkins v Thomas Solvent Co,* 440 Mich 293, 317; 487 NW2d 715 (1992); *Sizemore v Smock,* 430 Mich 283, 285; 422 NW2d 666 (1988). Acting in this capacity, we have on occasion allowed for the development of the common law as circumstances and considerations of public policy have required. See, e.g., *Berger, supra.* But as Justice YOUNG has recently observed, our common-law jurisprudence has been guided by a number of prudential principles. See Young, *A judicial traditionalist confronts the common law*, 8 Texas Rev L & Pol 299, 305-310 (2004). Among them has been our attempt to "avoid capricious departures from bedrock legal rules as such tectonic shifts might produce unforeseen and undesirable consequences," *id.* at 307, a principle that is quite applicable to the present case.

Plaintiffs have asked us to recognize a cause of action that departs drastically from our traditional notions of a valid negligence claim. Beyond this enormous shift in our tort jurisprudence, judicial recognition of plaintiffs' claim may also have undesirable effects that neither we nor the parties can satisfactorily predict. For example, recognizing a cause of action based solely on exposure —one without a requirement of a *present* injury—would create a potentially limitless pool of plaintiffs.[12] See,

[12] This was the precise situation that developed in West Virginia after the West Virginia Supreme Court of Appeals recognized a cause of action for medical monitoring in *Bower v Westinghouse Electric Corp*, 206 W Va 133, 140; 522 SE2d 424 (1999). Shortly after the *Bower* decision, a class action was filed against major cigarette manufacturers on behalf of approximately 270,000 West Virginia smokers who had not been diagnosed with any smoking-related diseases. See *In re Tobacco Litigation*

e.g., Schwartz, *Medical monitoring: Should tort law say yes?,* 34 Wake Forest L R 1057, 1079-1080 (1999) ("Once a showing of present physical injury is eliminated, as is the case in awards for medical monitoring, attorneys representing plaintiffs could virtually begin recruiting people off the street to serve as medical monitoring claimants."). Litigation of these preinjury claims could drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care. It is less than obvious, therefore, that the benefits of a medical monitoring cause of action would outweigh the burdens imposed on plaintiffs with manifest injuries, our judicial system, and those responsible for administering and financing medical care. Because such a balancing process would necessarily require extensive fact-finding and the weighing of important, and sometimes conflicting, policy concerns, and because here we lack sufficient information to assess intelligently and fully the potential consequences of our decision, we do not believe that the instant question is one suitable for resolution by the judicial branch.[13] We are certainly not alone in our reluctance to engage in the delicate balancing of costs and benefits that plaintiffs' proposed expansion of the common law requires.

(Medical Monitoring Cases), No. 00-C-6000 (W Va, Ohio County Cir Ct, 2001). In another medical monitoring class action filed in West Virginia, healthy plaintiffs from seven states (Illinois, Indiana, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia) are seeking medical monitoring on the basis of alleged exposure to toxic materials. See *Stern v Chemtall, Inc,* No. 03-C-49M (W Va, Kanawha County Cir Ct, 2001).

[13] It should not need explication that a balancing of private interests is invariably present in all legislation that establishes benefits and burdens. To name but a few: worker's compensation, unemployment compensation, and occupational health and safety. Such balancing is the essence of representative government. It is for precisely this reason that the decision whether and how to recognize a medical monitoring cause of action should be made by the people's representatives in the legislative branch of our government. See part III of this opinion.

Many of these concerns were noted by the United States Supreme Court in *Metro-North Commuter R Co v Buckley*, 521 US 424, 442; 117 S Ct 2113; 138 L Ed 2d 560 (1997) (holding that the Federal Employers' Liability Act, 45 USC 51 *et seq.*, does not permit recovery of future medical monitoring costs).[14] There, the Court observed that judicial recognition of mere exposure to a toxic substance as a sufficient trigger for tort liability could lead to a stampede of litigation that would divert resources from more immediate and compelling claims, such as those brought by individuals with actual disease or injury, to less meritorious claims:

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[14] Some legal scholars and commentators have also noted the undesirability of judicially sanctioned medical monitoring claims. See, e.g., Guzelian, *supra*, p 100 ("Ill-considered monitoring can also deter diseased individuals who are erroneously proclaimed healthy from returning promptly when symptoms do present, and can lead to severe psychological harm. In addition, the economic, manpower, and time costs for such programs are usually substantial."); Martin & Martin, *Tort actions for medical monitoring: Warranted or wasteful?*, 20 Colum J Envtl L 121, 142-143 (1995) ("[C]reating a new cause of action for medical monitoring that eliminates one of the traditional elements of tort actions does not seem warranted. Its deterrent value is negligible; its compensatory function should be rendered moot by changes in the health care system; and the costs of subsequent litigation will exceed the benefits obtained.").

We cite these studies not, as the dissent argues, to endorse the authors' views, *post* at 116, but to observe that it is far from settled that judicially supervised medical monitoring is an unmitigated benefit for all concerned.

We also note that, while certification of a class necessarily recognizes that common issues of law or fact may predominate over individual questions at the time of certification, see MCR 3.501(A)(1)(b), there is no guarantee that such common issues will continue over time to predominate in the instant case, particularly in light of the apparently perpetual duration of the proposed monitoring program. Rather, it is more likely that increasingly competitive interests will arise within the putative class of plaintiffs—interests that must be carefully weighed against each other. The likelihood that the interests of putative class members will diverge is yet another reason for judicial deference to the Legislature in this case.

> [T]ens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring. . . . And that fact, along with uncertainty as to the amount of liability, could threaten both a "flood" of less important cases . . . and the systemic harms that can accompany "unlimited and unpredictable liability . . . ." [*Metro-North Commuter R Co, supra* at 442.]

See also *Wood v Wyeth-Ayerst Labs,* 82 SW3d 849, 857 (Ky, 2002) (citing the policy concerns raised in *Buckley*); *Hinton v Monsanto Co*, 813 So 2d 827, 831 (Ala, 2001) (same).[15]

We share the concerns raised by the United States Supreme Court in *Buckley.* Simply put, judicial recognition of a medical monitoring cause of action may do more harm than good—not only for Michigan's economy but also for "other potential plaintiffs who are not before the court and who depend on a tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other." *Buckley,* 521 US at 443-444.

Even if this Court were institutionally equipped to gauge the potential costs and benefits of sanctioning a

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[15] It is a reality of modern society that we are all exposed to a wide range of chemicals and other environmental influences on a daily basis. For that reason alone, this Court should be wary of accepting plaintiffs' invitation to venture down the slippery slope that a medical monitoring cause of action would necessarily traverse. As the Supreme Court noted in *Buckley*: "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring." 521 US at 442. Thus, even if we were to create a medical monitoring cause of action, in light of both the essentially limitless number of such exposures and the limited resource pool from which such exposures can be compensated, a "cutoff" line would still inevitably need to be drawn. The Legislature is better suited to draw lines of this sort, because such decisions are fraught with difficult policy determinations.

medical monitoring cause of action, plaintiffs have done little to help us understand the ramifications that a decision in their favor might have for Michigan. When pressed at oral argument to address the potential costs and benefits of plaintiffs' proposed cause of action, for example, plaintiffs' counsel was unable to hazard a guess at how Michigan's economy might be affected:

> *Justice* TAYLOR: Where have you made note, or could you, of the kinds of suspected impact that monitoring will have on the business environment of this state. I don't think there's a word in your briefs about that. You just sort of assume it will be taken care of . . . .
>
> *Plaintiffs' Counsel*: I think if you look at the criteria [for a valid medical monitoring claim] we propose we think it has safeguards for that. We think it does allow . . . .
>
> *Justice* TAYLOR: Where in your brief is there any discussion of what cost this will bear on Michigan's business climate?
>
> *Plaintiffs' Counsel*: I don't [think] there is a particular discussion in our brief on what costs Michigan will bear.
>
> *Justice* YOUNG: Do you have any idea what that might be?
>
> *Plaintiffs' Counsel*: I don't think we have any particular specific dollar idea on what that will be, no. I don't think we have a specific dollar idea on what the cost to these people are.
>
> *Justice* TAYLOR: Doesn't this point out the problem with what you're asking us to do? We don't even know what the cost of this will be.

This line of questioning goes to the heart of why we are reluctant to alter the common law of negligence in the manner proposed by plaintiffs: however much equity might favor lightening the economic burden now borne by parties exposed to dioxin in the Tittabawassee flood plain, we have no assurance that a decision in plaintiffs'

favor—which would create a hitherto unrecognized cause of action with a potentially limitless class of plaintiffs—will not wreak enormous harm on Michigan's citizens and its economy. Such a decision necessarily involves a drawing of lines reflecting considerations of public policy, and a judicial body is ill-advised to draw such lines given the limited range of interests represented by the parties and the resultant lack of the necessary range of information on which to base a resolution.[16] See Young, *supra* at 307 ("Good intentions, unsupported by well informed policy choices, often result in bad law.").

We would be unwise, to say the least, to alter the common law in the manner requested by plaintiffs when it is unclear what the consequences of such a decision may be and when we have strong suspicions, shared by our nation's highest court, that they may well be disastrous.

III

Although the caution engendered by our difficulty in identifying, much less weighing, the potential costs and benefits of a decision in plaintiffs' favor is an important factor militating against recognizing plaintiffs' pro-

[16] We note that plaintiffs are in effect asking us to *create* policy, not simply consider it. We have previously cautioned against this Court acting as a policy-making body:

> As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's. [*Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1990) (citations and quotations omitted).]

posed cause of action, there is a stronger prudential principle at work here: the judiciary's obligation to exercise caution and to defer to the Legislature when called upon to make a new and potentially societally dislocating change to the common law.[17]

Ours, after all, is a government founded on the principle of separation of powers.[18] In certain instances, the principle of separation of powers is an affirmative constitutional bar on policy-making by this Court.[19] In other cases, however, the separation of powers considerations may operate as a *prudential* bar to judicial policy-making in the common-law arena. This is so when we are asked to modify the common law in a way that may lead to dramatic reallocation of societal benefits and burdens.[20] As shown above, plaintiffs have sought a radical change in our negligence jurisprudence and have provided no guidance on how this proposed

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[17] In suggesting that the "only question" properly posed in this case involves who should pay the costs of medical monitoring and environmental cleanup, *post* at 105, the dissent misapprehends the real question: what is the appropriate venue for determining the answer to the question? It is *this* question, not that posited by the dissent, that fundamentally divides the majority and the dissenting opinions.

[18] See Const 1963, art 3, § 2: "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."

[19] See, e.g., *Mayor of Lansing v Pub Service Comm*, 470 Mich 154, 161; 680 NW2d 840 (2004) ("Our task, under the Constitution, is the important, but yet limited, duty to read and interpret what the Legislature has actually made the law. We have observed many times in the past that our Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature.").

[20] The Illinois Supreme Court recently expressed precisely this concern while rejecting a nuisance claim asserted by the city of Chicago and Cook County against various gun manufacturers and distributors. *City of Chicago v Beretta USA Corp*, 213 Ill 2d 351; 290 Ill Dec 525; 821 NE2d

change might affect Michigan. In effect, we have been asked to craft public policy in the dark. This problem alone ought to make any reasonably prudent jurist extremely wary of granting the relief sought by the plaintiffs.[21]

1099 (2004). In rejecting the plaintiffs' claim that nuisance law should be expanded to hold the defendants responsible for the costs of gun violence, the court concluded:

> Any change of this magnitude in the law affecting a highly regulated industry must be the work of the legislature, brought about by the political process, not the work of the courts. In response to the suggestion of *amici* that we are abdicating our responsibility to declare the common law, we point to the virtue of judicial restraint. [*Id*. at 433.]

[21] Recent events in Louisiana reinforce the notion that the decision whether to permit a cause of action for medical monitoring is one that belongs to the Legislature.

In *Bourgeois v AP Green Industries, Inc*, 716 So 2d 355 (La, 1998), the Louisiana Supreme Court concluded that a cause of action for medical monitoring was cognizable under then-La Civ Code Ann, art 2315, which provided, "Every act whatever of man that causes damage to another obliges him by whose fault it happened . . . ." Although the court recognized that Louisiana law had not previously allowed the recovery of medical expenses "[a]bsent a corresponding physical injury," *Bourgeois*, *supra* at 358, the court decided to follow "a majority of state supreme courts faced with the issue" in recognizing a medical monitoring cause of action. *Id*. at 359. The court held, however, that medical monitoring expenses satisfied the "damage" requirement of art 2315 only if seven criteria were met. *Id*. at 360-361.

In response, the Louisiana legislature added the following language to art 2315, clearly indicating its disagreement with the Louisiana Supreme Court's decision in *Bourgeois*:

> Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease. [1999 La Acts 989, now codified at La Civ Code Ann, art 2315(B).]

See, generally, Comment, *Implications of amending Civil Code Article 2315 on toxic torts in Louisiana*, 60 La L R 833 (2000).

In addition to the problems presented by the legal question whether a medical monitoring cause of action exists, we are faced with the more practical questions of *how* such a monitoring program would work. For example, a threshold concern would likely be the determination of eligibility for participation in such a program.[22] Such a determination involves the consideration of a number of practical questions and the balancing of a host of competing interests—a task more appropriate for the legislative branch than the judiciary.

Of equal concern would be the administration of such a program.[23] The day-to-day operation of a medical

[22] An example of just a few of the questions facing a court in determining eligibility for such a monitoring program would include: How old does the applicant have to be? How long must an applicant have lived in the affected area? Where, exactly, is the "affected area"? Must the applicant have measurable levels of dioxin in the bloodstream to qualify? If so, what is the threshold level of dioxin an applicant must have for eligibility?

The dissent's argument underscores the difficulty presented by such an inquiry. Justice CAVANAGH does not "advocate that *any* exposure allows a person to bring a claim for medical monitoring costs." *Post* at 108 (emphasis in dissent). But if "any" exposure is not enough on which to rest such a claim, how much exposure is enough? The dissent apparently recognizes that a cutoff line must necessarily be drawn, in light of the competing interests at stake, but fails to offer any standards to be used in locating that line. However, such a line, if it is to be drawn at all, must be drawn not by this Court, but by the Legislature—the branch of government best able to balance the relevant interests in light of the policy considerations at stake.

[23] An example of some of the questions facing a court in administering the monitoring program would include: How would claims be filed? How would claims be processed? Who would do the processing—court staff or a private contract firm? Would a claimant be free to receive testing from any medical facility he chooses, or would a claimant's choice of testing facility be limited? To keep down costs of the program, could defendant be permitted to establish a "preferred provider network" of medical professionals such that claimants could only be tested within the network? In the absence of such a network, would claimants be limited to the usual and necessary costs for such services, or is the sky the limit? How would

monitoring program would necessarily impose huge clerical burdens on a court system lacking the resources to effectively administer such a regime. Nor do the courts possess the technical expertise necessary to effectively administer a program heavily dependent on scientific disciplines such as medicine, chemistry, and environmental science. The burdens of such a system would more appropriately be borne by an administrative agency specifically created and empowered to administer such a program. The court system, in our view, is simply not institutionally equipped to establish, promulgate operative rules for, or administer such a program.

The propriety of judicial deference to the legislative branch in expanding common-law causes of action is further underscored where, as here, the Legislature has already created a body of law that provides plaintiffs with a remedy. Were we to create an alternate remedy in such cases—one that may be pursued in lieu of the remedy selected by our Legislature—we would essentially be acting as a competing legislative body. And we would be doing so without the benefit of the many resources that inform legislative judgment.[24]

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the system reconcile two different physicians' opinions of what is "reasonable" in terms of medical testing? Would there be a grievance procedure? Would defendant be billed directly, or would it periodically pay into a fund?

[24] Legislators face a far different decision-making calculus than judges face. As one scholarly work recently observed:

> Legislatures are in the best position to consider far-reaching and complex public policy issues. First, they can gather facts from a wide range of sources to help lawmakers decide whether the law should be changed and, if so, what sorts of changes should be made. Second, legislatures make law prospectively, which gives the public fair notice about significant legal changes. . . . Third, they must be sensitive to the will of the public; if they are not, the public can vote them out of office. In our democratic system, if

In this case, the Legislature has already provided a method for dealing with the negligent emission of toxic substances such as dioxin. The Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*, empowers the MDEQ to deal with the environmental and health effects of toxic pollution:

> *The department shall coordinate all activities required under this part and shall promulgate rules to provide for the performance of response activities*, to provide for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release, and to implement the powers and duties of the department under this part, and as otherwise necessary to carry out the requirements of this part. [MCL 324.20104(1) (emphasis added).]

Further, MCL 324.20118 provides, among other things:

> (1) The department may take response activity or approve of response activity proposed by a person that is consistent with this part and the rules promulgated under this part relating to the selection and implementation of

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far-reaching public policy decisions are to be made, the public should have the opportunity to evaluate those changes and express their agreement or disagreement in the voting booth.

Courts, on the other hand, are best suited to make incremental changes over time. Judges decide cases one at a time. Their information-gathering is limited to one set of facts in each lawsuit, which is shaped and limited by arguments from opposing counsel who seek to advance purely private interests. Second, judges "make law" retroactively. This creates notice and fairness problems. Third, there is no "public light" placed on judicial lawmaking. Judges in many states are appointed, not elected. The public has no voice in and must accept judicial will. When judges are elected, the public is generally unaware of the legal opinions the judges have written or the impact of those opinions on society. [Schwartz & Lorber, *State Farm v Avery: State court regulation through litigation has gone too far*, 33 Conn L R 1215, 1219-1220 (2001).]

> response activity that the department concludes is necessary and appropriate to protect the public health, safety, or welfare, or the environment.
>
> (2) Remedial action undertaken under subsection (1) at a minimum shall accomplish all of the following:
>
> (a) Assure the protection of the public health, safety, and welfare, and the environment.

These provisions authorize the MDEQ to undertake "response activity" and "remedial action" when the public health is threatened by pollution. "Response activity" is defined by the NREPA as

> evaluation, interim response activity, remedial action, demolition, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment or the natural resources. Response activity also includes health assessments or health effect studies carried out under the supervision, or with the approval of, the department of public health and enforcement actions related to any response activity. [MCL 324.20101(1)(ee).]

"Remedial action," which is included in the definition of "response activity," is defined under MCL 324.20101(1)(cc):

> "Remedial action" includes, but is not limited to, cleanup, removal, containment, isolation, destruction, or treatment of a hazardous substance released or threatened to be released into the environment, monitoring, maintenance, or the taking of other actions that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment.

Given this statutory framework, this much is clear: the Legislature has authorized the MDEQ to address precisely the sort of environmental and health risks occasioned by Dow's alleged emission of dioxin into the Tittabawassee flood plain. Not only is the MDEQ specifically authorized under the NREPA to undertake

"health assessments" and "health effect studies," MCL 324.20101(1)(ee), but the department is also empowered to take "other actions that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment." MCL 324.20101(1)(cc). Indeed, as plaintiffs' counsel acknowledged at oral arguments, the MDEQ *has* been involved in the remediation of the Tittabawassee dioxin contamination and has engaged in a pilot medical monitoring program of residents.

Plaintiffs believe, however, that the MDEQ's response has been insufficient—that the department lacks the funding necessary to engage in medical monitoring on the scale they would prefer.[25] It is apparent, therefore, that the plaintiffs are asking this Court to create a new remedy—a cause of action for medical monitoring—where the Legislature has already signaled its preference with respect to the appropriate form a remedy should take. In deference to the policy-making branch of our government, we decline to create this alternative remedial regime.[26]

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[25] We cite the NREPA not to comment on its adequacy as a remedy for addressing environmental contamination or its effectiveness in dealing with dioxin contamination in the Tittabawassee flood plain, or to suggest that the NREPA constitutes the only appropriate remedy in dealing with "toxic tort" types of cleanups. Rather, the Legislature may, in due course, choose to enact additional legislation dealing with such cleanups, and the MDEQ may, in due course, decide that additional measures need to be taken to address dioxin levels in the Tittabawassee flood plain. We note the statutory framework merely to highlight that the NREPA arises as a result of a balancing of competing policy interests made by the people's elected representatives, and that the MDEQ, in administering the NREPA within the executive branch, must undertake decisions grounded in its own expertise.

[26] We are aware that a number of courts in other jurisdictions have allowed claims for medical monitoring to proceed. See, e.g., *Petito v AH Robins Co, Inc*, 750 So 2d 103 (Fla App, 1999); *Hansen v Mountain Fuel*

IV

We have established that plaintiffs' medical monitoring claim is not cognizable under our current law and that recognition of this claim would require both a departure from fundamental tort principles and a cavalier disregard of the inherent limitations of judicial decision-making. For these reasons, defendant is entitled to summary disposition of plaintiffs' medical monitoring claim. We need address only one remaining argument: plaintiffs' contention that their request for a medical monitoring program is not subject to summary disposition under MCR 2.116(C)(8) because it is a claim for equitable, as opposed to legal, relief.[27]

Plaintiffs' reliance on the nature of the relief they seek essentially puts the cart before the horse. Regardless of what sort of remedy a plaintiff requests, we must nevertheless determine whether that remedy is supported by a valid claim. As the Kentucky Supreme Court recently observed, "It is not the remedy that supports the cause of action, but rather the cause of

Supply Co, 858 P2d 970 (Utah, 1993); *In re Paoli Railroad Yard PCB Litigation*, 916 F2d 829 (CA 3, 1990); *Ayers v Jackson Twp*, 106 NJ 557; 525 A2d 287 (1987); *Burns v Jaquays Mining Corp*, 156 Ariz 375; 752 P2d 28 (Ariz App, 1987); *Friends for All Children, Inc v Lockheed Aircraft Corp*, 241 US App DC 83; 746 F2d 816 (1984). We find none of the rationales in these cases persuasive.

[27] Amici have urged us to view plaintiffs' medical monitoring claim as a request for a preliminary injunction, arguing that an injunction may be granted even if irreparable harm or injury has not yet occurred. *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 228; 634 NW2d 692 (2001). But this argument disregards that, in order to obtain a preliminary injunction, the movant must establish that he "is likely to prevail on the merits . . . ." *Michigan State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 158; 365 NW2d 93 (1984). Thus, a court's prerogative to grant a preliminary injunction is tempered by the need to determine whether the movant has pleaded a claim on which he might ultimately obtain relief.

action that supports a remedy." *Wood v Wyeth-Ayerst Labs,* 82 SW3d 849, 855 (Ky, 2002). Here, plaintiffs have pleaded a cause of action based on a theory of negligence and have argued that we should expand the common law of torts in order to permit their medical monitoring claim to proceed.[28] Plaintiffs never attempt to characterize their claim as an equitable cause of action, and point to no case law where a similar tort-based claim is held to create an equitable cause of action.

As shown above, plaintiffs' claim is not cognizable under our current law of negligence and is not within a permissible expansion of the common law. Neither, perforce, is the claim based in equity. A court cannot "create substantive rights under the guise of doing equity," or "confer rights" where none exists. *Stein v Simpson*, 37 Cal 2d 79, 83; 230 P2d 816 (1951); *Lathrop Co v Lampert*, 583 P2d 789, 790 (Alas, 1978). Therefore, regardless of whether the relief plaintiffs seek is equitable or legal in nature, defendant was entitled to summary disposition regarding plaintiffs' medical monitoring cause of action because plaintiffs have not stated a valid cause of action.

V

Although the dissenting opinion is passionately argued and, no doubt, well-intentioned, it is rooted in a number of fundamental misconceptions about the ap-

[28] For example, plaintiffs' brief argues, "Plaintiffs seek to certify a class of individuals who, as a result of Dow's *negligence*, have suffered substantially increased risks of exposure to dioxin, and from this exposure, increased risks of developing grave but latent diseases and adverse health effects." (Emphasis added.) They add, "These innocent victims of Dow's *negligence* should receive periodic medical testing so that early detection and treatment can minimize the impact of any resulting illness." (Emphasis added.)

plicable law and about our majority opinion. Some of these errors have already been noted and need no further discussion. But three particular inaccuracies in the dissent warrant special mention.

First, the dissent argues that our holding makes "plaintiffs' physical health . . . secondary to defendant's economic health." *Post* at 105. But our opinion does no such thing. We take no position on whether defendant should or should not pay for the costs of monitoring for dioxin-related disease. Rather, we hold that plaintiff has not stated a claim under our current tort law and that the determination whether that law should change to accommodate plaintiffs' claims belongs, in our view, to the people's representatives in the Legislature.

It may be desirable that our tort law should expand to allow a cause of action for medical monitoring. But what we as *individuals* prefer is not necessarily what we as *justices* ought to impose upon the people. Our decision in this case is driven not by a preference for one policy or another, but by our recognition that we must not impose our will upon the people in matters, such as this one, that require a delicate balancing of competing societal interests. In our representative democracy, it is the legislative branch that ought to chart the state's course through such murky waters.

Second, the dissenting opinion casts our opinion as one leaving injured plaintiffs without a remedy. See *post* at 122 ("Today, the majority holds that defendant's egregious long-term contamination of our environment and the resulting negative health effects to plaintiffs are just another accepted cost of doing business."). But our opinion does not hold that a party who actually contracts a dioxin-related disease will be foreclosed from recovery. On the contrary, assuming such a person could show physical harm and causation, the four

elements of a traditional negligence claim would be met. See p 71-72 of this opinion. Upon such a showing, that person would be entitled to full compensation for the injury in the same manner as any other person injured by another's negligence.[29]

The dissent's overwrought rhetoric aside, the question is not *whether* an injured party should recover for Dow's contamination of the environment but *when* a party may be considered "injured" under Michigan tort law and recover for Dow's negligence. Justice CAVANAGH may prefer a system in which polluters' resources are doled out on a first-come, first-served basis. He may be comfortable with the notion that such a regime runs the risk of diverting limited resources from those devastated by cancer, birth defects, and other dioxin-related diseases to those who have yet to manifest dioxin-related illness.[30] He is entitled to these beliefs. But his beliefs are not reflected in our common law of negligence and, given the potential repercussions of his first-come, first-served notions of justice, his vision should be turned into law, if at all, by the Legislature.

This point leads to the dissenting opinion's third and most troubling error: Justice CAVANAGH's complete disregard for the effects that our decision may have on those other than the parties at bar. For example, the dissent asserts that our concerns about the effects that a decision in plaintiffs' favor might have are unfounded given the nature of the relief that plaintiffs request:

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[29] We also note that there would be no statute of limitations problems for such a plaintiff. Under the so-called "discovery rule," a cause of action "accrues" in the toxic tort context when an injured party knows or should have known of the manifestation of the injury. See, e.g., *Larson*, *supra* at 314. Provided that the injured person brings an action within three years of the date he knows or should have known of a dioxin-related injury, the statute of limitations would be satisfied. See MCL 600.5805(10).

[30] See *Metro-North Commuter R Co*, *supra* at 442.

> [T]he majority's prediction of a ruined economy falters after examining the true nature of the equitable relief that plaintiffs are seeking. Notably, allowing plaintiffs to seek medical monitoring costs would not result in a windfall for plaintiffs. . . . *[p]laintiffs would receive no money whatsoever*. . . . The only "benefit" that a plaintiff would receive is payment for tests ordered by a doctor that are above and beyond what would generally be ordered for that plaintiff. [*Post* at 113-114 (emphasis in original).]

The dissent asserts, in effect, that we need not trouble ourselves about recognizing plaintiffs' proposed cause of action because they seek a medical monitoring program rather than a cash payment. What this argument ignores, of course, is that medical monitoring is not without cost.

Moreover, the dissent overlooks the fact that recognizing a cause of action before manifest injury in this case will allow *other* causes of action for negligence before manifest injury. The dissent's disdain for our "concerns about financial impact" can be sustained only by disregarding the effect that these other preinjury actions might have on the state's economy. To recognize a medical monitoring cause of action would essentially be to accord carte blanche to any moderately creative lawyer to identify an emission from any business enterprise anywhere, speculate about the adverse health consequences of such an emission, and thereby seek to impose on such business the obligation to pay the medical costs of a segment of the population that has suffered no actual medical harm.

Worse still is the dissenting opinion's failure to consider the possible human toll of its approach. Indeed, our dissenting colleague is offended at our suggestion that allowing these plaintiffs to recover might limit resources available to those who show manifest physical injury:

> I can think of no greater misdeed than to actually argue that allowing *these plaintiffs* to seek the equitable remedy of requiring this defendant to pay for the *costs* of necessary medical monitoring tests somehow would divert resources from children with birth defects. This is fabrication at its most unforgivable—refusing to acknowledge that providing these plaintiffs with the opportunity to merely seek an equitable remedy is well with the bounds of judicial discretion and will not devastate the economy or cause sick children to die. [*Post* at 117-118 (emphasis in original).]

This is an argument that can be sustained only if one believes that we live in a world in which every tortfeasor has unlimited resources to compensate those affected by its negligence. Ours, of course, is not that sort of world. Those who do wrong necessarily have a limited capacity to compensate those who suffer from their wrongdoing.

Justice CAVANAGH himself recognized this reality in *Larson v Johns-Manville Sales Corp, supra* at 304. There, he joined a majority opinion holding that manifest injury rather than exposure alone gives rise to a claim for asbestos exposure. The opinion concluded with a frank acknowledgement that this rule was necessary in light of the limited resources available to compensate injured parties:

> We believe that discouraging suits for relatively minor consequences of asbestos exposure will lead to a fairer allocation of resources to those victims who develop cancers. Rather than encouraging every plaintiff who develops asbestosis to recover an amount of money as compensation for the chance of getting cancer, we prefer to allow those who actually do develop cancer to obtain a full recovery. [*Id.* at 319.]

Thus, the *Larson* Court recognized that a rule that created an incentive for plaintiffs to seek recovery for

asbestosis would limit the resources available to compensate those whose asbestosis turned to cancer.

Our nation's experience with asbestos litigation has shown that this concern was well-founded.[31] It is therefore quite puzzling that our dissenting colleague would show such a blithe disregard for the real-world effects of his invocation of equity in this case.

Equity is indeed an instrument of justice. But when it is exercised without due regard for the interests of those who are not before the Court, its invocation can lead to great injustice. It is precisely because a decision in plaintiffs' favor may have sweeping effects for Michigan's citizens and its economy that we believe this matter should be handled by those best able to balance these competing interests: the people's representatives in the Legislature.

CONCLUSION

We conclude that the trial court erred in denying defendant's motion for summary disposition regarding plaintiffs' medical monitoring claim. The cause of action proposed by plaintiffs is not cognizable under Michigan law. Accordingly, we remand this matter to the Saginaw Circuit Court for entry of an order of summary disposition in defendant's favor with regard to plaintiffs' medical monitoring cause of action.

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

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[31] See, e.g., Schwartz et al., *Addressing the "elephantine mass" of asbestos cases: consolidation versus inactive dockets (pleural registries) and case management plans that defer claims filed by the non-sick*, 31 Pepp L R 271, 273-274 (2003) (noting that asbestos litigation has led to "at least 78" bankruptcies, leading to "staggering" effects on the economy and, worse, fewer resources for the "truly sick").

WEAVER, J. (*concurring*). I concur and join in the majority opinion's result, and in its reasoning. I write separately because I do not join in the opinion's citations of an article in the *Texas Review of Law & Politics*, *ante* at 83, 88.[1]

There is better authority than a law review article to support the propositions for which the article is cited. The opinion cites the article for two propositions: (1) that "our common-law jurisprudence has been guided by a number of prudential principles. . . . Among them has been our attempt to 'avoid capricious departures from bedrock legal rules as such tectonic shifts might produce unforeseen and undesirable consequences,' " and (2) that the judiciary is ill-advised to make decisions that involve a drawing of lines reflecting considerations of public policy. *Ante* at 83, 88.

Rather than an out-of-state, nonbinding law review article, real and binding Michigan authority for these propositions is found in our case law. See *Olmstead v Anderson,* 428 Mich 1, 11; 400 NW2d 292 (1987),[2] and *Van v Zahorik,* 460 Mich 320, 327; 597 NW2d 15 (1999).[3] Because there is binding case law for these

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[1] The article is based on remarks Justice YOUNG made at a joint Federalist Society/Ave Maria Law School symposium.

[2] *Olmstead* noted approvingly that, in a prior case, "[t]he Court, therefore, applied the public policy exception to the lex loci doctrine, rather than making sweeping changes [by reappraising Michigan's entire conflict of laws policy] with potential unforeseen consequences."

[3] In *Van*, *supra* at 327, the Court quoted the following passage from the earlier Court of Appeals opinion in that case, 227 Mich App 90, 95; 575 NW2d 566 (1997):

> "As a general rule, making social policy is a job for the Legislature, not the courts. See *In re Kurzyniec Estate*, 207 Mich App 531, 543; 526 NW2d 191 (1994). This is especially true when the determination or resolution requires placing a premium on one social interest at the expense of another: 'The responsibility for

propositions, the citations of the article written by one of the justices signing the majority opinion can at best be described as inappropriate and unnecessary.

Further, I do not agree with some of the article's tone, nor with its comparison of the common law to

> a drunken, toothless ancient relative, sprawled prominently and in a state of nature on a settee in the middle of one's genteel garden party.[4]

An article containing such a clumsy and crude analogy that mocks the common law is unworthy of citation. The people of Michigan expressly adopted the common law, in addition to statutory laws, in the 1963 Constitution.[5]

Therefore, I concur in the result and join in the majority opinion, except the citations of the *Texas Review of Law & Politics* article.

CAVANAGH, J. (*dissenting*). The proper issue in this case is whether defendant must pay for plaintiffs' medical monitoring costs. However, rather than simply address this basic issue, the majority chooses to use this case as a vehicle to raise fears about the economy and hypothesize that providing medical monitoring to these plaintiffs would result in our state's economic disaster.

> drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's.' *O'Donnell v State Farm Mut Automobile Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979)."

[4] Young, *A judicial traditionalist confronts the common law*, 8 Texas Rev L & Pol 299, 302 (2004).

[5] Michigan's Constitution adopted the common law that was in force in 1963: "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." Const 1963, art 3, § 7.

The majority erroneously presents this case as one in which it must choose between an equitable remedy for plaintiffs and the economic viability of defendant and of our state. Because the dichotomy the majority has constructed is a false one, I must dissent.

At its core, this case is about rights and responsibilities. Defendant is undeniably responsible for years of actively contaminating the air, water, and soil that surrounds plaintiffs' homes. Defendant is undeniably responsible for the suffering that plaintiffs must endure as they face years of wondering if the contamination that they and their children have been exposed to will result in devastating illnesses and their untimely deaths. Thus, the issue is who should pay for plaintiffs' medical monitoring costs under the unique circumstances of this case when it is clear that defendant is responsible for the wrong that prompted the need for plaintiffs to be medically monitored. Stated differently, where defendant has contaminated the environment, should plaintiffs, defendant, or the taxpayers of the state of Michigan pay plaintiffs' medical monitoring costs? Whatever the majority's intent, the result of disregarding the only question properly posed in this case is that plaintiffs' physical health is inexcusably deemed secondary to defendant's economic health.

I. PLAINTIFFS PRESENT A REASONABLE CLAIM FOR MEDICAL MONITORING COSTS

Plaintiffs are owners and residents of property located within the one-hundred-year flood plain of the Tittabawassee River in Saginaw County. The Michigan Department of Environmental Quality (MDEQ) found as much as 7,300 parts per trillion (ppt) of dioxin in the flood plain, which substantially exceeds Michigan's cleanup standard of ninety ppt for direct residential

contact.[1] After the MDEQ conducted testing, it determined that defendant was the source of the pollution. Because of the health risks that plaintiffs may face, plaintiffs seek a court-supervised medical monitoring program that is administered by qualified health professionals.

"Dioxin" is the term used to identify a number of similar toxic chemicals. Dioxin is a known human carcinogen and, as the majority notes, " 'a potent carcinogen.' " *Ante* at 67 n 1 (citation omitted). Exposure to dioxin can cause cancer, liver disease, birth defects, miscarriages, and reproductive damage, as well as other illnesses. Children are more significantly affected by dioxin than adults. Dioxins do not break down easily. Once dioxin is released into the environment, it stays in the environment for an extremely long time.[2] When dioxin gets into a person's body, it stays indefinitely in a person's blood and body fat. Because dioxin stays in the body for a long time, the adverse effects of dioxin exposure may not be immediate.

Plaintiffs' counsel stated at oral argument that a pilot study of the community conducted by the Michi-

[1] The Michigan Department of Community Health, the Michigan Department of Environmental Quality, and the Michigan Department of Agriculture state that "recent studies suggest that dioxins may be far more harmful to human health than was previously believed and these standards [referring to standards for drinking water and eating fish and shellfish] as well as others set for soil, sediment, and food may change in the future." Dioxins Fact Sheet.

[2] The majority notes that defendant has entered into a settlement agreement in which "defendant will fund extensive cleanup efforts aimed at minimizing residents' exposure to dioxin." *Ante* at 71 n 3. The specifics of this agreement indicate that defendant is willing to pay for items such as landscaping some homes to cover exposed soil and augmenting some ground cover in public parks; however, defendant remains unwilling to pay for any necessary medical monitoring costs as a result of its dioxin contamination.

gan Department of Community Health found that fifty to eighty percent of the people tested have dioxin levels that put them in the 75th to the 95th percentile compared to the national average for their age and gender.

II. PLAINTIFFS' CLAIM FOR MEDICAL MONITORING WARRANTS EQUITABLE RELIEF

Plaintiffs' request for a court-supervised medical monitoring program that is administered by qualified health professionals is undoubtedly reasonable. Plaintiffs merely request that defendant pay the cost of medical monitoring to ensure that dioxin-related illnesses are caught at their earliest. Plaintiffs simply seek to minimize the devastating effects of illnesses caused by defendant's acts.

The majority, *ante* at 72, notes that "any first-year law student" knows the principle for negligence—duty, breach, causation, and damages—and argues that plaintiffs' rights have not been actually violated and they have suffered no injuries and, therefore, no damages. With this, I vehemently disagree. Plaintiffs have suffered actual harm and damages—the heightened exposure to dioxin that they received because of defendant's acts is akin to an injury. Plaintiffs were exposed to dioxin at *over eighty times* the level deemed safe for direct residential contact. Plaintiffs were advised that routine activities, such as flower gardening and lawn work, could further increase their risk of dioxin exposure. Tittabawassee/Saginaw River Flood Plain, Environmental Assessment Initiative, June 2003. Plaintiffs were further advised that they should avoid allowing their children to play in the soil to avoid further contamination. If it were not for defendant's acts, plaintiffs would not be obliged to incur the expenses

involved in additional testing for early detection of any illnesses caused by the increased dioxin exposure. In this case, the exposure itself and the need for medical monitoring constitute the injury. See, e.g., *Petito v AH Robins Co, Inc*, 750 So 2d 103, 105 (Fla App, 1999) ("One can hardly dispute that an individual has just as great an interest in avoiding expensive diagnostic examinations as in avoiding physical injury.").

Plaintiffs can also offer facts sufficient to establish causation, contrary to the majority's assertion. As noted by the majority, defendant's Midland plant was identified as the " 'principal source of dioxin contamination in the Tittabawassee River sediments and the Tittabawassee River flood plain soils.' " *Ante* at 70 (citation omitted). Given the facts, it is entirely reasonable for plaintiffs to argue that they would not have to undergo medical monitoring tests for dioxin poisoning but for the actions of defendant. To argue that there are insufficient facts to support plaintiffs' argument is a willful avoidance of the record.

Notably, my belief that these plaintiffs should be allowed to seek equitable relief does not mean that I advocate that *any* exposure allows a person to bring a claim for medical monitoring costs. That position would indeed be imprudent. However, in this case, a candid review of the facts indicates that plaintiffs' heightened exposure has caused them harm and plaintiffs have no adequate legal remedy. While plaintiffs may not have yet developed dioxin-related illnesses, the fact remains that they are at a much greater risk because of defendant's acts. As such, their long-term exposure to dioxin has caused a change in the medical monitoring that plaintiffs would otherwise be prescribed. For example, according to reasonably accepted medical practice, doctors do not generally prescribe testing to determine a

patient's dioxin level. However, in this case, because of the prolonged exposure to high levels of dioxin, a doctor may, according to accepted scientific principles, find that such tests are reasonably necessary to best monitor and treat a patient. When these tests are ordered, defendant should be responsible for paying the costs of the tests because defendant is responsible for the *need* for the tests.

Plaintiffs do not, as the majority asserts, advocate for "a cause of action that departs drastically from our traditional notions of a valid negligence claim" and seek a "radical change" in negligence law. *Ante* at 83, 89.[3] Medical monitoring is recognized in a number of jurisdictions. See, e.g., *In re Paoli R Yard PCB Litigation*, 916 F2d 829, 852 (CA 3, 1990); *Stead v F E Myers Co*, 785 F Supp 56, 57 (D Vt, 1990); *Merry v Westinghouse Electric Corp*, 684 F Supp 847, 849 (MD Pa, 1988); *Bower v Westinghouse Electric Corp*, 206 W Va 133, 135; 522 SE2d 424 (1999); *Redland Soccer Club, Inc v Dep't of the Army*, 548 Pa 178, 194; 696 A2d 137 (1997); *Potter v Firestone Tire & Rubber Co*, 6 Cal 4th 965, 974; 863 P2d 795; 25 Cal Rptr 2d 550 (1993); *In re Fernald*, 1989 US Dist LEXIS 17762 (SD Ohio, 1989) (appointing

[3] Also, contrary to the majority's assertion, *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 304-305; 399 NW2d 1 (1986), does not affect the decision before the Court today. *Larson* dealt with the statute of limitations for causes of action for asbestosis and cancer related to asbestos exposure. This Court held that a cause of action for asbestosis or cancer related to asbestos exposure accrues when a person learns or should learn that he has developed asbestosis or cancer, not when he was first exposed to asbestos. This was necessary because the underlying claims in *Larson* were wrongful death actions premised on *asbestosis and cancer*. A person cannot bring a wrongful death claim for asbestosis until the victim *actually has asbestosis*. But *Larson* has no effect on whether plaintiffs can seek an equitable remedy for a court-supervised medical monitoring program that is administered by health professionals.

trustees and special masters to administer a medical monitoring program as part of a $78 million settlement). Moreover, because of the latent nature of most illnesses resulting from exposure to dioxin, plaintiffs may not be able to establish an immediate physical injury of the type contemplated by a traditional tort action. See, e.g., *Paoli*, *supra* at 852 ("Medical monitoring claims acknowledge that, in a toxic age, significant harm can be done to an individual by a tortfeasor, notwithstanding latent manifestation of that harm."); *Cook v Rockwell Int'l Corp (Cook I)*, 755 F Supp 1468, 1476 (D Colo, 1991) ("injuries resulting from exposure to toxic substances are often latent"). But merely because an illness is latent does not mean that plaintiffs have not been injured and suffered damages.[4]

> A plaintiff who is involved in an automobile accident and suffers no observable physical injury but nevertheless undergoes medically necessary diagnostic tests to determine whether internal injuries exist is no doubt entitled to recover the costs of the examination. If accepted medical practice also deemed it necessary to perform such tests in the future, in order to detect the onset of any subsequently developing injury caused by the accident, the costs of the continued tests would be recoverable . . . . The outcome should be the same when the operative incident is toxic exposure rather than collision and the potential future harm is disease rather than physical impairment. [*Miranda v Shell Oil Co*, 17 Cal App 4th 1651, 1657; 26 Cal Rptr 2d 655 (1993).]

See also *Friends for All Children, Inc v Lockheed Aircraft Corp*, 241 US App DC 83, 92; 746 F2d 816 (1984).

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[4] "The 'injury' that underlies a claim for medical monitoring—just as with any other cause of action sounding in tort—is 'the invasion of any legally protected interest.' " *Bower*, *supra* at 139, quoting Restatement Torts, 2d, § 7(1) (1964).

Because of the established facts in this case, a court-supervised medical monitoring program that is administered by qualified health professionals is a viable and equitable remedy for plaintiffs to seek that is nonpreclusive of any future damages claim. See, e.g., *Day v NLO, Inc*, 811 F Supp 1271, 1275 (SD Ohio, 1992) ("Because of ongoing court supervision, any medical monitoring awarded by this Court would constitute equitable relief."). An equitable remedy is necessary because there is no adequate legal remedy for plaintiffs. See *Multiplex Concrete Machinery Co v Saxer*, 310 Mich 243, 259-260; 17 NW2d 169 (1945); *Powers v Fisher*, 279 Mich 442, 447; 272 NW 737 (1937). "The absence of precedents, or novelty in incident, presents no obstacle to the exercise of the jurisdiction of a court of equity, and to the award of relief in a proper case." 30A CJS, Equity, Effect of Absence of Precedents, § 10, pp 171-172; see also 27A Am Jur 2d, Equity, § 100, p 587 ("The appropriateness of the equitable remedy is determined by current rather than past conditions."). "The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action." *Freeman v Pitts*, 503 US 467, 487; 112 S Ct 1430; 118 L Ed 2d 108 (1992).

It is within the sound discretion of the courts whether to offer equitable relief. *Youngs v West*, 317 Mich 538, 545; 27 NW2d 88 (1947). Regardless of how plaintiffs may have characterized their pleadings, "[t]he court has equitable jurisdiction to provide a remedy where none exists at law, even if the parties have not specifically requested an equitable remedy, whenever the pleadings sufficiently give notice of a party's right to relief and demand for judgment." 30A CJS, Equity, Lack of Remedy at Law as Ground and Limit of Jurisdiction, § 18, p 180; see also 27A Am Jur 2d, Equity,

§ 216, p 699 ("Equity jurisdiction nevertheless may arise even though the claimant has pleaded no equitable claims and has not pleaded inadequacy of the remedy at law."); *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 774 n 8; 664 NW2d 185 (2003). However, contrary to the majority's assertion, plaintiffs indeed ask for equitable relief as it relates to medical monitoring. Plaintiffs' complaint states that they have no adequate remedy at law and they seek "equitable/injunctive relief in the form of a medical monitoring program . . . ."

While the majority argues that the separation of powers precludes it from allowing plaintiffs to proceed, I strongly disagree. The majority's framing of the issue and its subsequent argument allow it to claim that "[w]e take no position on whether defendant should or should not pay for the costs of monitoring for dioxin-related disease." *Ante* at 98. The majority's argument is essentially that its hands are tied because the Legislature has not acted. But this argument ignores a basic tenet of our system of jurisprudence–courts have the inherent power to provide equitable remedies. "Every equitable right or interest derives not from a declaration of substantive law, but from the broad and flexible jurisdiction of courts of equity to afford remedial relief, where justice and good conscience so dictate." 30A CJS, Equity, In general, § 93, p 289. The majority's steadfast insistence that it cannot allow plaintiffs to proceed because the Legislature has not acted allows the majority to sidestep the issue, instead of explicitly stating and supporting its position that these plaintiffs are unworthy of relief.

Because principles of equity are firmly entrenched in our justice system, plaintiffs' position would not require this Court to depart from longstanding principles fun-

damental to our justice system. "The purpose of equity is to do complete justice in a case where a court of law is unable, because of the inflexibility of the rules by which it is bound, to adapt its judgment to the special circumstances of the case." 27A Am Jur 2d, Equity, Nature, Purpose, and Distinguishing Features, § 2, pp 520-521. "[E]quity is the perfection of the law, and is always open to those who have just rights to enforce where the law is inadequate." *Grand Lodge of the Ancient Order of United Workmen of the State of Michigan v Child*, 70 Mich 163, 172; 38 NW 1 (1888). Allowing plaintiffs to merely *proceed* to seek a court-supervised medical monitoring program under equity principles certainly does not stray from the foundations of Anglo-American law.

III. EQUITABLE RELIEF PROPERLY PLACES THE RESPONSIBILITY FOR ANY MEDICAL MONITORING COSTS ON DEFENDANT, THE PARTY RESPONSIBLE FOR IMPOSING THE COSTS ON PLAINTIFFS

Throughout its opinion, the majority invokes the fear of a ruined economy to support its decision. But the majority's prediction of a ruined economy falters after examining the true nature of the equitable relief that plaintiffs are seeking. Notably, allowing plaintiffs to seek medical monitoring costs would not result in a windfall for plaintiffs. "A medical monitoring claim compensates a plaintiff for diagnostic treatment, a tangible and quantifiable item of damage caused by a defendant's tortious conduct." *Cook I*, *supra* at 1478; see also *Paoli*, *supra* at 850. Notably, these *plaintiffs would receive no money whatsoever*. Payments for doctor-prescribed testing would be made through a court-supervised fund. This fund would only compensate plaintiffs for medical monitoring costs actually incurred after the monitoring was ordered by a qualified health professional. The only "benefit" that a

plaintiff would receive is payment for tests ordered by a doctor that are above and beyond what would generally be ordered for that plaintiff.[5]

Notably, the majority's concerns about financial impact can actually be alleviated to a great degree by allowing plaintiffs' practical, proactive approach. A court-supervised medical monitoring program administered by qualified health professionals would provide early detection to plaintiffs and likely *lessen* the fiscal damages that defendant would be liable for if dioxin-related illnesses are discovered later. The early detection of illnesses may allow treatment to proceed in a more reasonable manner, often with more options for the person affected than if detection had been delayed. See *Bower*, *supra* at 140. "It is common knowledge early diagnosis of many serious conditions promotes en-

[5] This is in contrast to the relief sought in *Metro-North Commuter R Co v Buckley*, 521 US 424, 439-441; 117 S Ct 2113; 138 L Ed 2d 560 (1997). In *Metro-North*, an employee sought a change in the common law that would permit a lump-sum damages award for medical monitoring costs. The Court stated the following:

> [W]e do not find sufficient support in the common law for the unqualified rule of lump-sum damages recovery that is, at least arguably, before us here. And given the mix of competing general policy considerations, plaintiff's policy-based arguments do not convince us that the FELA [Federal Employers' Liability Act] contains a tort liability rule of that *unqualified* kind.
>
> This limited conclusion disposes of the matter before us. We need not, and do not, express any view here about the extent to which the FELA might, or might not, accommodate medical cost recovery rules more finely tailored than the rule we have considered. [*Id*. at 444.]

As Justice Ginsburg, concurring in part and dissenting in part, in *Metro-North*, *supra* at 455-456, noted, "If I comprehend the Court's enigmatic decision correctly, Buckley [the employee] may replead a claim for relief and recover for medical monitoring, but he must receive that relief in a form other than a lump sum."

hanced cure and survival rates." *Miranda*, *supra* at 1658. "Harm in the form of increased risk of future cancer attributable to delay in diagnosis and treatment has become so widely accepted by the medical community that the existence of such harm could be reasonably inferred from this professional common knowledge." *Evers v Dollinger*, 95 NJ 399, 424; 471 A2d 405 (1984). "[E]xperts continuously urge vigilant detection as the most realistic means of improving prognosis . . . ." *Id*. at 426 n 2, citing Rubin, Clinical Oncology for Medical Students and Physicians (3d ed, 1970-1971), p 33. The intent of medical monitoring is "to facilitate early diagnosis and treatment of disease or illness caused by a plaintiff's exposure to toxic substances as a result of a defendant's culpable conduct." *Miranda, supra* at 1655. Plaintiffs' counsel clearly articulated just such an example of the benefits of medical monitoring:

> Let me give you a very clear example of how medical monitoring would work in an instance like this. Say there's a woman of child bearing age and her blood is tested for high levels of dioxin and she is found to have high levels of dioxin, 95th percentile or so in her body. Medical doctors who are familiar with dioxin contamination say well one of the possible results of having high levels of dioxin contamination in your blood is that you may have depressed thyroid function. So they do a very simple test, a standard test for thyroid function and find out that there is depression of thyroid function. She is then treated and birth defects that are linked to depressed thyroid function do not happen to her [child]. She does not have a child with a birth defect because that preventative measure prevented that irreparable harm.

The establishment of a court-supervised fund for medical monitoring "encourages plaintiffs to detect and treat their injuries as soon as possible." *Paoli*, *supra* at 852.

Notably, the majority fails to mention that plaintiffs would not be *forced* to engage in medical monitoring tests if they chose not to. A court-supervised medical monitoring program would allow plaintiffs to make a choice, and those who choose to be monitored and who meet the requirements set forth by qualified health professionals could be monitored.

The majority also notes an argument—not often heard—that monitoring for the early detection of illnesses can actually be *bad* for plaintiffs because a person with an illness who is erroneously proclaimed healthy may ignore symptoms and, therefore, delay seeking necessary treatment, possibly leading to severe psychological harm. The only logical import from stating these arguments is that because plaintiffs may also be the victims of medical malpractice they should consider not going to a doctor to determine if defendant's contamination of the environment poisoned them. But a fear of medical malpractice should certainly not result in the position that plaintiffs should forgo necessary medical testing. While the majority states that it does not cite these viewpoints to endorse them, but merely to note their existence, the majority's citation at the very least indicates that it deems them relevant considerations. I, however, do not believe that the possibility of medical malpractice should be used to support the notion that plaintiffs are not deserving of an equitable remedy.

Also, contrary to the majority, I do not believe that an equitable remedy should be refused merely because administering the remedy may be inconvenient or even difficult. "Rather, the true principle [of equitable relief] seems to be that the hardship of the plaintiff is balanced against the inconveniences and difficulties anticipated by the court, which principle is sometimes called the

'balance of convenience.' " 27A Am Jur 2d, Equity, § 101, p 587. Indeed, the desegregation of our nation's schools was certainly not an easy task, yet the United States Supreme Court found that overseeing this process was an appropriate equitable remedy for the courts. *Brown v Bd of Ed of Topeka*, 349 US 294, 300; 75 S Ct 753; 99 L Ed 1083 (1955) ("Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."). I certainly believe that a court in our state, just as courts have done in other states, can determine a suitable way to administer a medical monitoring program. See, e.g., *Cook v Rockwell Int'l Corp*, 778 F Supp 512, 515 (D Colo, 1991) *(Cook II)*; *Burns v Jaquays Mining Corp*, 156 Ariz 375, 380-381; 752 P2d 28 (1987); 27A Am Jur 2d, Equity, § 103, p 588 ("[A] court of equity is clothed with the authority to designate a commission, master, receiver, or agent of the court to effectuate and supervise compliance with its decrees and orders.").

Finally, not content to merely present this case as one in which allowing plaintiffs to seek an equitable remedy would devastate the economy of Michigan, the majority also seeks to pit plaintiffs against "those devastated by cancer, birth defects, and other dioxin-related diseases . . . ." *Ante* at 99. While the majority accuses the dissent of countless transgressions, I can think of no greater misdeed than to actually argue that allowing *these plaintiffs* to seek the equitable remedy of requiring this defendant to pay for the *costs* of necessary medical monitoring tests somehow would divert resources from children with birth defects. This is fabrication at its most unforgivable—refusing to acknowledge that providing these plaintiffs with the opportunity to merely seek an equitable remedy is well

within the bounds of judicial discretion and will not devastate the economy or cause sick children to die.

IV. A FURTHER REVIEW OF THE ECONOMIC CONSIDERATIONS OF PLAINTIFFS' CLAIM INDICATES THAT EQUITABLE RELIEF IS PROPER

At its core, this is not a complex case. Defendant contaminated the environment with dioxin. Because of defendant's conduct, plaintiffs require medical monitoring to ensure that the negative effects of defendant's acts can be best countered. Medical monitoring costs money. Plaintiffs, defendant, or the taxpayers of the state of Michigan must pay the costs. Because plaintiffs only require medical monitoring as a result of defendant's conduct, it seems clear that it is reasonable that defendant pay the costs.[6] This is not meant to punish defendant; it merely seeks to hold defendant to the reasonable standard that a polluter pays for the costs of polluting. "The mere fact that a wrongdoer may suffer, however, will not deter equity from granting relief to an injured party." 27A Am Jur 2d, Equity, § 102, p 588.

The majority's decision that plaintiffs cannot seek equitable relief is indefensible when one realizes that its position leaves plaintiffs who cannot afford to pay for doctor-prescribed medical monitoring with no recourse. "Special tests are available to measure dioxin levels in body fat, blood, and breast milk, but these tests are very expensive and are not routinely available to the public." Dioxins Fact Sheet, *supra*. "Indeed, in many cases a

[6] The theory behind a claim for medical monitoring is simple. When a plaintiff is exposed to a hazardous substance, it is often sound medical practice to seek periodic medical monitoring to ascertain whether the plaintiff has contracted a disease. Because this need for medical monitoring was caused by a defendant's tortious acts or omissions, a defendant may be required to pay the cost of monitoring. [*Cook I*, *supra* at 1477.]

person will not be able to afford such tests, and refusing to allow medical monitoring damages would in effect deny him or her access to potentially life-saving treatment." *Hansen v Mountain Fuel Supply Co*, 858 P2d 970, 976 (Utah, 1993) (medical monitoring costs may be awarded even when the plaintiffs have not yet suffered from any asbestos-related illnesses). As plaintiffs' counsel stated, researchers conducting the pilot studies "have been besieged by people begging to have their blood tested and particularly begging to get their children tested because it's very difficult to do that by yourself. . . . it's really, really hard for individuals to get them done because it's cost prohibitive and beyond that it's just not available to them as individuals."

Whatever its intent, the majority's result protects a wrong-doing corporation at the expense of the health of the people wronged. But we cannot turn a blind eye to defendant's repeated contamination of our state's environment because holding defendant accountable may negatively affect its profits. If defendant cannot produce its product without behaving responsibly, then it has no business operating within our state. The lives of the people in the affected area are worth more than defendant's financial well-being, even if it were indeed at stake. And contrary to the majority's position, I am fully aware of the "real-world effects" of today's decision, as plaintiffs most certainly will be as well. The "real-world effects" are that defendant, the party responsible for plaintiffs' need for medical monitoring, will not bear any of the costs of its wrongdoing. Rather, the burden now falls on plaintiffs' shoulders.

The decision to turn our backs on plaintiffs because we have not yet faced a case so egregious violates the trust that the people of the state of Michigan have placed in us. "Our oath is to do justice, not to perpetu-

ate error." *Montgomery v Stephan*, 359 Mich 33, 38; 101 NW2d 227 (1960). "Lack of precedent cannot absolve a common-law court from responsibility for adjudicating each claim that comes before it on its own merits." *Berger v Weber*, 411 Mich 1, 12; 303 NW2d 424 (1981). "It is the distinguishing feature of equity jurisdiction that it will apply settled rules to unusual conditions and mold its decrees so as to do equity between the parties." 30A CJS, Equity, Effect of Absence of Precedents, § 10, p 172. Where a claim is equitable in nature, exercising discretion may be necessary to ensure that an unconscionable decree is not entered. *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 142; 500 NW2d 115 (1993). And that discretion most certainly should be exercised in this case.

While no one can say with certainty which plaintiffs will contract illnesses, suffer, and die because of their increased exposure to dioxin, this does not mean that plaintiffs cannot seek an equitable remedy. The unfortunate reality is that dioxin causes cancer, birth defects, and other illnesses. The prolonged exposure of plaintiffs to such high levels of dioxin puts them at a vastly increased risk. When a qualified health professional believes that it is in a patient's best interest to administer medical testing that would not be required if it were not for defendant's acts, this Court should not deny plaintiffs the ability to seek this modest remedy.

V. THE "REMEDY" OFFERED BY THE NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT DOES NOT PRECLUDE PLAINTIFFS' CAUSE OF ACTION

The majority states that the Legislature has already provided plaintiffs with a remedy because the "Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*., empowers the MDEQ to deal with the environmental and health effects of toxic

pollution . . . ." *Ante* at 93. While the MDEQ *may* take responsive action, it is not *required* to take action. Further, the fact that the MDEQ may choose to take responsive action to minimize injury to the public health does not absolve defendant of its responsibility to plaintiffs. While the majority repeatedly claims to be concerned about the effect on Michigan's economy if plaintiffs are allowed to bring a claim against defendant, the majority's approach shifts the costs resulting from defendant's actions to Michigan taxpayers.[7] The majority distorts the fact that the MDEQ has the ability to take responsive action. Merely because the MDEQ has this ability does not mean that this is plaintiffs' *sole* remedy. The NREPA clearly provides "[t]hat there is a need for additional administrative and *judicial* remedies to supplement existing statutory and common law remedies." MCL 324.20102(d) (emphasis added). The MDEQ's ability to act does not eliminate defendant's responsibility to plaintiffs or eliminate the fact that plaintiffs can seek a court-supervised medical monitoring program funded by defendant.

As a case in point, a small pilot study is being conducted by the state that includes a study of residential soil at approximately twenty-five properties within the Tittabawassee River flood plain and an investigation of dioxin levels in twenty-five adults who are currently living on the flood plain and have lived there for at least five years. This Pilot Exposure Investigation is inadequate to address the concerns of the individual plaintiffs. But plaintiffs do not, as the majority asserts, bring this claim merely because the MDEQ is not

[7] A shift in financial responsibility conflicts with the NREPA. MCL 324.20102(f) specifically provides, "That liability for response activities to address environmental contamination should be imposed upon those persons who are responsible for the environmental contamination." See also MCL 324.20102(e).

conducting the study on the scale that they *prefer*. Plaintiffs seek a court-supervised medical monitoring program based on tests ordered by *qualified health professionals*; plaintiffs' individual preferences have nothing to do with the tests that will be ultimately ordered. Medical monitoring tests would not be done to placate plaintiffs' fears; they would be done when qualified health professionals using accepted scientific principles order medical testing.

Finally, the concern of the MDEQ is *public* health, but what the MDEQ may deem appropriate to protect the public as a whole, even assuming sufficient funds were available in the budget, is not necessarily what may be in an individual plaintiff's best medical interest. Further, the MDEQ does not purport that its study can be extrapolated to provide relevant information to other people in the affected areas. The MDEQ even states in its Pilot Investigation Fact Sheet that the results of an exposure investigation (EI) are "site-specific and applicable only to the community involved in EI; they are not generalizable to other individuals or populations." The majority's insistent and inexplicable refusal to hold defendant accountable for its acts allows defendant to escape responsibility for its actions and leaves plaintiffs with no adequate remedy.

VI. CONCLUSION

Today, the majority holds that defendant's egregious long-term contamination of our environment and the resulting negative health effects to plaintiffs are just another accepted cost of doing business. But as long as defendant is not held responsible for the decisions it makes, it behooves corporations like defendant to continue with business practices that harm our residents because the courts will shield them from liability by

claiming that they are powerless to act. And it is the people of our state who will pay the costs—with their money and with their lives—of allowing defendant to contaminate our environment with no repercussions. Sadly, this Court has resorted to a cost-benefit analysis to determine and, consequently, degrade the value of human life, and this is an analysis that I cannot support.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v Madison*, 5 US 137, 163; 2 L Ed 60 (1803). Today, our Court has shirked its duty to protect plaintiffs and the people of our state, thereby leaving defendant's practices and interests unassailed. As such, I must respectfully dissent.

KELLY, J., concurred with CAVANAGH, J.

DEPARTMENT OF TRANSPORTATION v HAGGERTY CORRIDOR PARTNERS LIMITED PARTNERSHIP

Docket No. 124765. Argued January 12, 2005 (Calendar No. 1). Decided July 15, 2005.

The Department of Transportation brought an action in the Oakland Circuit Court against Haggerty Corridor Partners Limited Partnership and others, seeking to condemn for public use property that was zoned residential-agricultural. The court, Barry L. Howard, J., denied a motion by the plaintiff to exclude evidence that a portion of the defendants' land that was not taken was rezoned from residential to commercial after the taking. The jury awarded damages consistent with the defendants' valuation, which was based on the use of the land if zoned commercial, and the court entered a judgment consistent with the award. The Court of Appeals, OWENS, P.J., and BANDSTRA, J. (MURRAY, J., dissenting), affirmed in part and reversed in part, determining that the trial court had abused its discretion in admitting the evidence of the zoning change. Unpublished opinion per curiam of the Court of Appeals, issued July 22, 2003 (Docket No. 234099). The Supreme Court granted the defendants' application for leave to appeal. 470 Mich 874 (2004).

In separate opinions the Supreme Court *held*:

Evidence of rezoning after a taking is not admissible in a trial to determine the just compensation due at the time of the taking. The trial court abused its discretion in admitting evidence of the rezoning after the taking. The decision of the Court of Appeals that set aside the judgment of the trial court must be affirmed and the matter must be remanded for a new trial at which the evidence that the property was rezoned after the taking is not to be admitted.

Justice YOUNG, joined by Chief Justice TAYLOR and Justice CORRIGAN, stated that a posttaking event or occurrence is irrelevant to the calculation of just compensation and cannot affect the price on the date of the taking. Evidence of a posttaking zoning change is irrelevant to the just-compensation calculation because it does not make the fact of consequence—that information regarding the reasonable possibility of a zoning change may have affected the

market value on the date of the taking—more probable or less probable. Information concerning an event occurring after the date of the taking could not possibly have influenced the conduct of a willing buyer and seller on the date of the taking and is neither legally nor logically relevant information to the fair market value at the time of the taking. Moreover, the error in admitting evidence of the posttaking rezoning was not harmless. The trial court compounded the error by excluding the plaintiff's evidence that the rezoning was caused by the taking, and the jury was not instructed that it was to consider only the information extant at the time of the taking. The judgment of the Court of Appeals, which set aside the jury's verdict, should be affirmed and the matter should be remanded for a new trial at which the evidence of the rezoning should not be admitted.

Justice KELLY, concurring, stated that evidence of posttaking rezoning is relevant because it corroborates a fact that is of consequence to the determination of the action—whether there existed a reasonable possibility of rezoning at the time of the taking. Evidence of rezoning following a taking is not admissible, however, because the probative value of such evidence is substantially outweighed by its prejudicial effect. Evidence of the rezoning was relevant to show that at the time of the taking a reasonable possibility of rezoning may have existed. It is not enough that posttaking rezoning is probative of an antecedent possibility of rezoning. The question is was the rezoning reasonably possible at the time of the taking. The fact that it occurred does not conclusively answer the question. To be relevant, the possibility must have arisen at or before the taking. Admission of such evidence risks that the jury will accord it weight wildly disproportionate to its probative value and treat rezoning when the taking occurred as a foregone conclusion. Thus, although such evidence can be relevant, it is unfairly prejudicial. The jury should not know of posttaking rezoning. It causes too great a danger of confusion of the issues and unfair prejudice to the taking party, substantially outweighing its probative value. The decision of the Court of Appeals should be affirmed and the matter should be remanded for a new trial at which the evidence of the rezoning should not be admitted.

Affirmed; case remanded to the circuit court for a new trial.

Justice WEAVER, joined by Justice CAVANAGH, dissenting, stated that evidence of the posttaking rezoning is relevant evidence that was admissible in this case to enable the jury to assess whether a reasonable possibility of rezoning existed on the date of the taking and whether the possibility would have affected the price a willing buyer would have offered at the time of the taking. The trial court

did not abuse its discretion in admitting the evidence. The trial court abused its discretion in excluding the plaintiff's evidence that the posttaking rezoning was caused by the taking, where the evidence was offered to counter the defendants' argument that there was a reasonable possibility of a zoning change. The opinion of the Court of Appeals should be vacated and the matter should be remanded to the trial court for a new trial.

Justice MARKMAN, dissenting, stated that the evidence of the posttaking rezoning was relevant evidence that was admissible to demonstrate that a reasonable possibility of rezoning existed on the date of the taking, and, thus, the trial court did not abuse its discretion in admitting the evidence. The trial court did, however, abuse its discretion in prohibiting the plaintiff from introducing evidence that the posttaking rezoning was caused by the taking. The decision of the Court of Appeals should be vacated and the matter should be remanded to the trial court for a new trial at which the defendants should be allowed to introduce evidence of the posttaking rezoning and the plaintiff should be allowed to introduce evidence that the posttaking rezoning was caused by the taking.

EMINENT DOMAIN — EVIDENCE — POSTTAKING REZONING OF PROPERTY — JUST COMPENSATION.

Evidence of rezoning after a taking is not admissible in a trial to determine the just compensation due at the time of the taking.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Patrick Isom*, Assistant Attorney General in Charge, and *Raymond O. Howd*, First Assistant Attorney General, for the plaintiff.

Plunkett & Cooney, P.C. (by *Mary Massaron Ross*), *Ackerman & Ackerman, P.C.* (by *Alan T. Ackerman* and *Darius W. Dynkowski*), and *Jaffe, Raitt, Heuer & Weiss, P.C.* (by *Brian G. Shannon* and *Mark P. Krysinski*), for the defendants.

YOUNG, J. Defendants own land that was partially taken in condemnation proceedings initiated by plaintiff. At issue is whether the trial court properly allowed defendants to present, in support of their proffered calculation of just compensation, evidence that their

property had been rezoned from residential to commercial after the taking.

We conclude that the evidence of the posttaking rezoning was irrelevant to the issue of the condemned property's fair market value at the time of the taking. Because the trial court abused its discretion in admitting this evidence, and because the error was not harmless, we affirm the judgment of the Court of Appeals, which reversed the jury's verdict and remanded the case for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Defendant Haggerty Corridor Partners Limited Partnership owned approximately 335 acres of an undeveloped tract of land in Novi, Michigan, which it had assembled for the future purpose of building a high-tech office park. Plaintiff, the Michigan Department of Transportation (MDOT), sought to condemn approximately fifty-one acres of this property for construction of a portion of the M-5 Haggerty Road Connector in the city of Novi. As required under MCL 213.55,[1] MDOT provided defendants with a good-faith offer of $2,758,000 for the property, based on its then-applicable single-family and agricultural zoning classification.[2] Defendants, believing that the property's "highest and best use"[3] was commercial rather than residential,

[1] MCL 213.55(1) requires a condemning agency, before initiating negotiations for the purchase of property, to make a "good faith written offer" based on the agency's appraisal of just compensation for the property.

[2] At the time, the property was zoned by the city of Novi for single-family homes and agricultural uses (R-A Residential/Acreage). In May 1998, approximately two and one-half years after the taking occurred, Novi rezoned the property for office/service/technology uses (OST).

[3] " 'Highest and best use' is a concept fundamental to the determination of true cash value. It recognizes that the use to which a prospective buyer would put the property will influence the price that the buyer would be willing to pay." *Edward Rose Bldg Co v Independence Twp*, 436

refused MDOT's offer.

In December 1995, MDOT initiated an eminent domain proceeding under the Michigan Uniform Condemnation Procedures Act (UCPA)[4] to condemn the property. At trial, as might be expected, the parties presented widely divergent evidence with respect to just compensation.

Consistent with its theory that the highest and best use of the property was residential, MDOT presented evidence that, at the time of the taking, the property was not likely to be rezoned to permit the commercial use proposed by defendants.[5] MDOT's appraiser testified that it was economically feasible to develop the parcel, both before and after the taking, as a residential subdivision, and that, in 1995, it was not reasonably possible that the land would be rezoned for commercial use. On the basis of an estimation that defendants' land would support development of fifty-four residential lots, MDOT's appraiser testified that the difference in the value of defendants' property before and after the taking amounted to $1,415,000.

Defendants, on the other hand, sought to establish that they, along with other knowledgeable participants in the commercial real estate market, knew at the time of the December 1995 taking that the property was likely to be rezoned to allow for its planned use as an

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Mich 620, 633; 462 NW2d 325 (1990). Thus, a condemnee is generally entitled to compensation based on the "highest and best use" of his property. *St Clair Shores v Conley*, 350 Mich 458, 462; 86 NW2d 271 (1957).

[4] MCL 213.51 *et seq*.

[5] For example, MDOT presented the testimony of Novi's chief planning consultant that, in 1993, the planning commission recommended that the parcel not be rezoned commercial. The consultant further testified that, as of the date of the taking, there was no plan to rezone the property because of the demand for large-lot, million-dollar homes.

office park.[6] Defendants' appraiser testified that the land could not have been profitably developed as residential property, and that rezoning was imminent at the time of the taking. Against this backdrop, defendants' appraiser arrived at a just compensation figure of $18.6 million.

Consistent with their theory that the fair market value of the residential property on the date of the taking was increased because of the realistic prospect that it would soon be rezoned commercial, defendants sought to introduce evidence of the fact that the property had, in fact, been later rezoned. Defendants wished to show that in May 1998, approximately two and one-half years after the taking occurred, defendants' property was rezoned for office/service/technology (OST) uses. MDOT filed a motion in limine to bar this evidence, arguing that it was irrelevant to the fair market value of the property as of the date of the taking. The trial court denied MDOT's motion. Additionally, the trial court refused to grant MDOT's alternative request to present evidence that the rezoning took place solely as a result of the taking.[7]

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[6] For example, defendants presented evidence that city officials had made representations concerning their interest in rezoning the area to accommodate business interests and that, at the time of the taking, Novi's economic development coordinator was already involved in the planning for an OST zoning classification to accommodate defendants' planned use of their property. At the time of the taking, however, defendants had not petitioned the city to have the land rezoned.

[7] Evidence of value related solely to the taking itself, including evidence of a rezoning that occurs because of the taking, is not admissible for just compensation purposes. See MCL 213.70(1); *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 378 n 13; 663 NW2d 436 (2003), citing *In re Urban Renewal*, *Elmwood Park Project*, 376 Mich 311, 318; 136 NW2d 896 (1965) ("The effect on market value of the condemnation proceeding itself may not be considered as an element of value.").

At MDOT's request, the jury was taken on a bus tour of defendants' property. The parties vigorously dispute what the jurors saw on this tour. MDOT contends that the jurors saw mainly an undeveloped tract with some commercial buildings under construction on a portion of the property. Defendants contend, on the other hand, that the jurors saw many completed office buildings on the developed portion of the property and that only a small portion of the property remained undeveloped. There is no record to support either party's contention.

The jury was instructed that fair market value must be assessed as of the date of the condemnation, and not as of some future date. The jury was further instructed, with respect to the zoning reclassification, that

> if there was a reasonable possibility, absent the threat of this condemnation case, that the zoning classification would have been changed, you should consider this possibility in arriving at the value of the property on the date of the taking.

The jury determined that just compensation was owed to defendants in the amount of $14,877,000.

On appeal to the Court of Appeals, MDOT contended that the trial court erred in denying its motion to exclude evidence of the posttaking rezoning decision and in further prohibiting MDOT from introducing evidence establishing that the zoning change was caused by the condemnation itself. The Court of Appeals majority agreed that the trial court abused its discretion in allowing the jury to consider evidence of the posttaking zoning change and that the error was not harmless:

> The subject property was to be valued "as though the acquisition had not been contemplated." MCL 213.70(1). Plaintiff attempted to introduce evidence establishing that the subject property was rezoned because of the condem-

nation. If so, the actual rezoning was irrelevant. Indeed, the value of condemned property should have been determined without regard to any enhancement or reduction of the value attributable to condemnation or the threat of condemnation. *State Highway Comm v L & L Concession*, 31 Mich App 222, 226-227; 187 NW2d 465 (1971). Defendants were not entitled to the enhanced value that resulted from the condemnation project, only the value of the property at the time of taking. *In re Urban Renewal, Elmwood Park Project*, 376 Mich 311, 318; 136 NW2d 896 (1965). Although the potential for rezoning on the date of taking was properly considered, evidence of the actual zoning change was irrelevant to the value of the property on the date of taking and should not have been disclosed to the jury. Moreover, we agree with plaintiff's contention that the evidence improperly contributed to the jury's finding that the rezoning was reasonably possible. At the very least, the improperly admitted evidence tainted the jury's resolution of the "reasonable possibility" question of fact. Therefore, we conclude that the trial court abused its discretion in admitting the evidence.

We reject defendants' contention that the evidentiary error was harmless. Had the evidence not been admitted, it is unlikely that the jury would have been exposed to the evidence that defendants now claim renders the improperly admitted evidence harmless.[8] Consequently, we deem it appropriate to reverse and remand for further proceedings.[9] [Unpublished opinion per curiam of the Court of Appeals, issued July 22, 2003 (Docket Nos. 234099, 240227), slip op, p 3.]

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[8] Defendants contended that the posttaking rezoning evidence was merely cumulative of the jurors' bus tour of the property, because, in light of the extensive commercial development present on the property at the time of the tour, it was evident that the property had already been rezoned to allow for commercial uses.

[9] In light of its conclusion, the majority did not address MDOT's contention that the trial court further abused its discretion in prohibiting it from introducing evidence that the rezoning was caused by the condemnation.

The dissenting judge opined that the evidence was properly admitted:

> As the trial court concluded, evidence of the actual rezoning had the tendency to make the existence of the possibility of rezoning more probable than it would be without the evidence. MRE 401. More importantly, however, is the fact that there is no Michigan case on point regarding the admissibility of the subsequent fact of rezoning, and our Sister States' case law provide [sic] divergent views. However, one respected source (also cited by the trial court) indicates that "[t]he fact that, subsequent to the taking, the zoning ordinance was actually amended to permit the previously proscribed use has been held to be weighty evidence of the existence (at the time of the taking) of the fact that there was a reasonable probability of an imminent change." 4 Nichols, Eminent Domain (3d ed), § 12C.03[3]. Accordingly, it cannot be said that the decision to admit the evidence was an abuse of discretion when no prior case has so held, and there is respected authority that favors the ruling made by the trial court.
>
> Moreover, even if the admission of the evidence was an abuse of discretion, it was harmless error in light of the jury instructions and other competent, admissible evidence that allowed the jury to properly conclude that rezoning was a reasonable possibility. Here, the jury was presented with sufficient evidence regarding whether there was a reasonable possibility that the subject property would be rezoned, independent of the evidence of the actual rezoning, a fact which the majority concedes. Further, the trial court properly instructed the jury on the principles of condemnation law set forth by the majority, and repeatedly stressed the principle that the jury must value the property as of the date of the condemnation, rather than at some future date . . . . [MURRAY, J., dissenting, slip op, pp 2-3 (citations omitted).]

The dissent further rejected MDOT's alternative argument that the trial court erred in refusing to allow it to introduce evidence establishing that the rezoning

was directly attributable to the condemnation proceedings. Judge MURRAY noted that MCL 213.73, which allows enhancement in value of the remainder of a partially condemned parcel to be considered in determining just compensation, was inapplicable and did not serve to permit MDOT to introduce this evidence because MDOT did not plead in its complaint that defendants' property was enhanced because of the improvement.[10] Thus, Judge MURRAY opined, the majority's decision "effectively ignores the fact that defendants' evidence directly relates to the 'reasonable possibility' that rezoning of the property would be effectuated." *Id*. at 4.

This Court granted defendants' application for leave to appeal, limited to the issues "(1) whether a posttaking zoning decision can be considered in determining value at the time of the taking, and (2) whether the Court of Appeals decision in this case is consistent with *Dep't of Transportation v* [*VanElslander*], 460 Mich 127 [594 NW2d 841] (1999)."[11] We would hold that the evidence of a posttaking rezoning is irrelevant to a just compensation determination, that the error in the admission of such evidence in this case was not harmless, and that our conclusion is wholly consistent with *VanElslander*, *supra*, and we affirm the judgment of the Court of Appeals majority.

II. STANDARD OF REVIEW

Evidentiary rulings are reviewed for an abuse of

[10] The dissent's rationale here is difficult to follow, and we agree with Justice MARKMAN'S conclusion that MCL 213.73 does not apply. See *post* at 186. As the dissenting judge himself notes, MDOT made no "*enhancement*" claim under MCL 213.73. Rather, it simply sought to rebut defendants' posttaking rezoning evidence with its own evidence that the rezoning was caused by the condemnation and, thus, could not properly be considered in determining just compensation. See MCL 213.70(1), (2).

[11] 470 Mich 874 (2004).

discretion.[12] However, preliminary issues of law underlying an evidentiary ruling are reviewed de novo. See *People v Lukity*[13] ("[T]he admission of evidence frequently involve[s] preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo."). A trial court abuses its discretion when it admits evidence that is inadmissible as a matter of law.[14]

III. ANALYSIS

A. INTRODUCTION

Const 1963, art 10, § 2 provides that "[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." The term "just compensation" as used in our Constitution, as well as in the UCPA, is a term of art that "imports with it all the understandings those sophisticated in the law give it."[15] The concept of just compensation " 'includes all elements of value that inhere in the property,' "[16] and must be determined on the basis of all factors relevant to its cash or market value.[17]

As we have recently had occasion to reaffirm, fair market value is to be determined as of the date of the taking. See *Silver Creek, supra* (" '[A]ny evidence that

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[12] *VanElslander, supra* at 129.

[13] 460 Mich 484, 488; 596 NW2d 607 (1999).

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

[15] *Silver Creek, supra* at 379.

[16] *Id*. at 378, quoting *United States v Twin City Power Co*, 350 US 222, 235; 76 S Ct 259; 100 L Ed 240 (1956) (Burton, J., dissenting).

[17] *Silver Creek, supra* at 377, quoting *Searl v Lake Co School Dist No 2*, 133 US 553, 564; 10 S Ct 374; 33 L Ed 740 (1890).

would tend to affect the market value of the property as of the date of the condemnation' " is relevant in determining just compensation.).[18]

In keeping with these venerated principles concerning the calculation of just compensation, the UCPA specifically provides that fair market value "shall be determined with respect to the condition of the property and *the state of the market on the date of valuation*."[19] The UCPA prohibits, however, the consideration of any changes in market conditions that are substantially due to the general knowledge of the imminent condemnation of the property.[20] Instead, with the exception of enhancement in value of the remainder of a partially taken parcel,[21] "the

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[18] *Silver Creek, supra* at 379, n 14, quoting *VanElslander*, *supra* at 130.

[19] See former MCL 213.70 (1980 PA 87), now MCL 213.70(3), amended by 1996 PA 474, effective December 26, 1996 (emphasis supplied). The 1996 amendment of MCL 213.70, which took effect after the condemnation complaint was filed in this case, does not contain any substantive changes that would affect our analysis in this case.

[20] See former MCL 213.70 (1980 PA 87), now MCL 213.70(1), (3), amended by 1996 PA 474, effective December 26, 1996.

[21] See MCL 213.73, which provides, in part:

> (1) Enhancement in value of the remainder of a parcel, by laying out, altering, widening, or other types of improvements; by changing the scope or location of the improvement; or by either action in combination with discontinuing an improvement, shall be considered in determining compensation for the taking.
>
> (2) When enhancement in value is to be considered in determining compensation, the agency shall set forth in the complaint the fact that enhancement benefits are claimed and describe the construction proposed to be made which will create the enhancement. . . .
>
> * * *
>
> (4) The agency has the burden of proof with respect to the existence of enhancement benefits.

property shall be valued in all cases as though the acquisition had not been contemplated."[22]

B. POSSIBILITY OF REZONING AS A FACTOR AFFECTING JUST COMPENSATION

A condemned parcel's fair market value must be determined " ' "based upon a consideration of all the relevant facts in a particular case." ' "[23] Accordingly, evidence demonstrating the likelihood of a zoning modification, just like any number of circumstances that may affect a property's value on the open market, may be relevant in determining just compensation. However, because just compensation must be calculated on the basis of the market value of a property on the date of the taking, the relevance of any such evidence is wholly dependent on whether, and how, the particular factor at issue would have affected market participants *on that date*.

As explained in note 10 of this opinion, this portion of the UCPA is inapplicable to this dispute. MDOT raised no argument that the award of just compensation had to reflect any enhancement to the remainder of defendants' property by virtue of the condemnation.

It must be noted that the principles set forth in MCL 213.70 and 213.73, as well as the principles we today set forth, are wholly *reciprocal*. Just as MCL 213.73 allows the condemning agency to offset the fair market value of partially taken property by the increased value to the remainder, MCL 213.70(3) allows the property owner to seek increased just compensation on the basis of the *devaluation* of his remaining property due to the taking. Similarly, just as our holding today precludes a property owner from seeking increased just compensation on the basis of an *ex ante* event, it also precludes the condemning agency from paying a reduced amount on the basis of such an event. See note 34 of this opinion.

[22] See former MCL 213.70 (1980 PA 87), now MCL 213.70(1), amended by 1996 PA 474, effective December 26, 1996.

[23] *Silver Creek, supra* at 378, quoting *In re Widening of Gratiot Ave*, 294 Mich 569, 574; 293 NW 755 (1940), quoting *In re Widening of Michigan Ave,* 280 Mich 539, 548; 237 NW 798 (1937); see also *State Hwy Comm'r v Eilender*, 362 Mich 697, 699; 108 NW2d 755 (1961).

Our case law is quite clear in this regard. As we noted in *State Hwy Comm'r v Eilender*:[24]

> We look at the value of the condemned land at the time of the taking, not as of some future date. If the land is then zoned so as to exclude more lucrative uses, such use is ordinarily immaterial in arriving at just compensation. But, on the other hand, it has been held, "if there is a reasonable possibility that the zoning classification will be changed, this possibility should be considered in arriving at the proper value. *This element, too, must be considered in terms of the extent to which the 'possibility' would have affected the price which a willing buyer would have offered for the property just prior to the taking*." [Emphasis supplied.]

Thus, we concluded in *Eilender* that a nonfrivolous, nonspeculative "reasonable possibility" of a zoning change, as evidenced by an already pending zoning modification, could properly be considered in determining just compensation.[25]

Similarly, we held in *VanElslander, supra*, that the trial court abused its discretion in refusing to allow plaintiff MDOT to present into evidence an appraisal of the condemnees' property that was based on the possibility that a zoning variance could be obtained to cure the violations created by the condemnation. Noting that " 'any evidence that would tend to affect the market value of the property as of the date of condemnation is relevant,' "[26] we held that the possibility of obtaining a variance, just like the possibility of a zoning modification, may be relevant to the just-compensation determination. We stressed, however, that such evidence was

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[24] 362 Mich 697, 699; 108 NW2d 755 (1961), quoting *United States v Meadow Brook Club,* 259 F2d 41, 45 (CA 2, 1958).

[25] *Eilender, supra* at 700.

[26] *VanElslander, supra* at 130, quoting the Court of Appeals dissent.

only relevant to the extent that it aided the fact-finder in determining " ' "the price which a willing buyer would have offered for the property *just prior to the taking* . . . ." ' "[27]

Applying these longstanding principles as reaffirmed in *Eilender*, *VanElslander*, and *Silver Creek*, we would hold that the trial court here committed an error of law, and thus abused its discretion,[28] when it denied MDOT's motion to exclude evidence of the posttaking zoning modification.

We of course agree with the Court of Appeals dissent, and with our dissenting colleagues,[29] that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[30] Where we believe the dissenters have gone astray is in misidentifying the "*fact that is of consequence*."

The dissenters frame this consequential fact as the existence of a "reasonable possibility" that the property would be rezoned. See *post* at 169. The possibility of a zoning modification must, indeed, be a "reasonable" one in order, as a matter of logic, for it to have any bearing on fair market value. However, this is only part of the equation. The "reasonable possibility" of a zoning change bears on the calculation of fair market value *only* to the extent that it *could* have affected the price that a theoretical willing buyer would have offered for

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[27] *Id*. at 131, quoting *Eilender, supra* at 699 (emphasis supplied).

[28] See *Katt, supra* at 278.

[29] Our responses to the "dissent" refer to Justice MARKMAN's opinion. Although Justice WEAVER has also issued a dissent, this dissent does nothing more than reiterate, in abridged fashion, the opinion of Justice MARKMAN.

[30] MRE 401.

the property immediately prior to the taking.[31] Thus, the "fact that is of consequence" is the reasonable possibility of a zoning modification, *as that possibility might have been perceived by a market participant on condemnation day*.[32]

Any information that was available at the time of the taking may certainly be relevant in determining the price that a property might fetch on the day of the taking. For example, in this case, defendants were properly permitted to present evidence that they had met with city officials regarding their plans for the area, and that these officials had expressed a willingness to make the required zoning changes; that the Novi Chamber of Commerce and other members of the business community supported the proposed zoning change; that Novi's Economic Development Coordinator, Greg Capote, did not believe that the property was suitable for single-family development; that there was a dire need for zoning to accommodate high-tech office development; and that, at the time of the taking, Capote was already involved in the planning for an OST zoning classification to accommodate this type of development. All of this evidence pertains to information that might have affected the value of the property as of the date of

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[31] See *VanElslander, supra* at 130; *Eilender, supra* at 699; *In re Widening of Gratiot Ave, supra.*

[32] Justice MARKMAN purports to agree that " 'the "fact that is of consequence" is the reasonable possibility of a zoning modification, *as that possibility might have been perceived by a market participant on condemnation day*.' " *Post* at 171, n 8. Yet his analysis completely ignores the italicized phrase, which is *critical* to the just-compensation inquiry. A market participant in December 1995 would have had absolutely no way of knowing that the subject property would have been rezoned two and one-half years later. Moreover, as we have pointed out, the *objective* probability that something will occur in the future is in no way dependent on what *actually* occurs after that probability is calculated.

condemnation, December 7, 1995. Indeed, at the time defendants acquired their Novi property, beginning in 1988, the property was more valuable in their eyes because of the looming possibility of a future zoning change.[33]

In contrast, a posttaking event or occurrence is utterly irrelevant to the calculation of just compensation. Market participants are, as a general rule, not omniscient, and would not be aware on the date of the taking that a posttaking event is absolutely certain to occur.[34] A posttaking occurrence cannot possibly affect the fair market value of property on the day of the condemnation, because the occurrence has not yet come to pass and, thus, cannot contribute to the mass of information affecting the market value of the property on that day. In short, a posttaking zoning change is irrelevant to the just compensation calculation because it does not make the *fact of consequence*—that information regarding the reasonable possibility of a zoning change may have impacted the market value of property on the date of the taking—more probable or less

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[33] Of course, as of the date of the taking, December 7, 1995, defendants had not even made a formal request for a zoning change.

[34] Consider the stock market. The price of a given share is often affected by available information. The value of a share may decrease, for example, as rumors spread that a company's chief operating officer might be indicted for a crime related to the operation of the business. Similarly, during the preindictment period, that share's value may rise or fall depending on investors' perceptions regarding the probability that an indictment is or is not imminent. The fact that the officer is, in fact, indicted, however, does not and *cannot* have any bearing on the market price of the share *on the day before the day the officer is indicted*. The fact of the actual indictment is, then, quite irrelevant in determining why the share was trading at a given price on the day before the indictment was filed. Rather, it was merely the *speculation* concerning the indictment that made the stock price fluctuate.

probable.[35]

The trial court's ruling and the Court of Appeals dissenting position on the admission of posttaking evidence are informed by a common logical fallacy. As our dissenting colleague, Justice MARKMAN, argues: "That the property was, in fact, rezoned makes it 'more probable' that a 'reasonable possibility' of rezoning existed at the time of the taking. *Post* at 171-172. At its core, this argument supposes that the probability of a particular occurrence at a specific point in time is made stronger by after-the-fact events.[36] This fallacy pre-

[35] The error of defendants' position is evident when one considers that it makes fair market value wholly dependent on extraneous temporal considerations: when the condemnation trial occurs and when, if ever, a zoning change occurs. For example, suppose that identical adjoining properties, separately owned, are zoned residential on the day that each is condemned. Suppose that one trial occurs two months before the properties are rezoned commercial, while the other trial does not occur until after the rezoning. The first property owner to go to trial will, of course, not be able to present to the jury evidence that the property was actually rezoned. The second property owner, however, will be in a position to argue that the fact that the rezoning *actually* occurred increased the *probability*, on the day of the taking, that the rezoning was going to occur, and, in turn, that a higher fair market value must be assigned to that property. This illustrates the incongruity of defendants' position: The two properties, on the day of the taking, had precisely the same probability of being later rezoned; yet the second owner, solely by virtue of the later trial date, will be permitted to present evidence to show that not only was there a "reasonable possibility" of rezoning, but future rezoning was an absolute *certainty*. Aside from the obvious logical error of defendants' position, adopting such a rule would also lead to gamesmanship and strategic filing. Indeed, this rule would give condemning agencies every incentive to postpone zoning plans in order to reduce the price of just compensation.

[36] In the world of psychology, this phenomenon is known as "hindsight bias," whereby the subject, upon learning that something occurred, overestimates the ability to predict that that "something" would occur. See <http://en.wikipedia.org/wiki/Hindsight_bias> (noting that "[p]eople are, in effect, biased by the knowledge of what has actually happened when evaluating its likelihood").

sumes that a zoning event occurring *after* the date of condemnation has logical and legal relevance to the hypothetical "willing buyer's" calculation of the price of the property on the condemnation date.

In order to understand the flaw in the probability theory and rationale of the Court of Appeals dissent and the trial court, it is important to remember the context of the just compensation valuation goal. Although condemnation results in a "forced sale," the price the condemning agency is required to pay must approximate that price which a willing buyer would have offered for the property at the time of the taking. Consequently, because information concerning events occurring *after* the condemnation could not possibly have influenced the conduct of a willing buyer on the date of the taking, it can never be logically, and thus legally, relevant in determining the price that the theoretical willing buyer and seller would have agreed upon on the date of the taking.

Consider the application of this theory of probability to an event–such as the toss of a die–the probability of which is known. That a six is rolled *after* one predicts this outcome does not increase the strength of the prediction beyond the usual one-in-six chance of being correct. However, contrary to conventional probability theory, the proffered dissenting probability theory suggests that the predictive force of a "six" call is made stronger by the mere fact that the thrown die actually revealed a six. It is hard to understand how such a "back to the future probability theory" works any more logically when an event less predictable than the roll of a die is at issue.

Compare this flawed *ex ante* probability logic with the common logical fallacy known, in the realm of causation theory, as "*post hoc ergo propter hoc*" ("after this, therefore because of this"). In each case, the subject assigns inflated significance to an after-the-fact event.

While a posttaking change in zoning may suggest that one party may have had a more astute prognostication of local zoning practices, it cannot seriously be advanced that a zoning change made after the taking could in any way have influenced a "willing buyer's" pricing decision on the day of the taking. Only that which could legitimately influence a buyer at the time of the taking is legally and logically relevant to the amount of compensation that must be paid for a taking. Because events that occur after the taking fall outside this zone of potential influence, they cannot logically and therefore legitimately be considered in determining just compensation.

This case well illustrates the illogic of admitting evidence of postcondemnation events to influence the fact-finder's determination of just compensation under the statute. Here, the change in zoning occurred two and one-half years after the date of the taking. It is difficult to envision how a theoretical "willing buyer" of defendants' property would have factored into his purchase offer in 1995 a zoning decision made by Novi[37] more than two years after that date.[38]

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[37] As an aside, it must be remembered that it was the *city of Novi*, and not the condemning authority (MDOT), that rezoned this property. We are not, in this case, concerned with any allegations of fraud or gamesmanship on the part of the condemning agency (for example, by delaying an inevitable rezoning decision in order to avoid paying a higher amount as just compensation for a taking).

[38] We stress again that it is not the *probability* of a zoning change that is irrelevant to the just-compensation determination. Indeed, we adhere to the rule, set forth in *Eilender* and *VanElsander*, that evidence of the reasonable possibility of a zoning change is admissible to the extent that it aids in determining the fair market value of the property at the time of the taking. Rather, it is merely the *fact* of the posttaking zoning change that is irrelevant, as it is of no import in determining " 'the price which a willing buyer would have offered for the property just prior to the taking . . . .' " *VanElslander, supra* at 131, quoting *Eilender, supra* at 699.

As noted by the Court of Appeals dissent and by our dissenting colleague, *post* at 178, 4 Nichols, Eminent Domain (3d ed), § 12C.03[3], indicates that " '[t]he fact that, subsequent to the taking, the zoning ordinance was actually amended to permit the previously proscribed use has been held to be weighty evidence of the existence (at the time of the taking) of the fact that there was a reasonable probability of an imminent change.' "[39] Although it is true that some courts have, indeed, permitted the introduction of posttaking rezoning evidence, for the reasons we have expressed, we reject the reasoning employed by these courts.[40] We do not, for example, agree with the New Jersey Supreme Court that evidence of a posttaking zoning change may serve to "support the reasonableness of the factual claim that on the date of taking the parties to a voluntary sale would have recognized and been influ-

[39] Similarly, it is noted in 9 ALR3d 291, § 11 that some courts have permitted the introduction of this type of evidence, while other courts have rejected the admission of such evidence.

[40] While there is a dearth of case law on point, Justice MARKMAN has cited a small handful of foreign cases supporting his position. It is far from evident that the few cases cited in the Nichols text and in footnote 10 of Justice MARKMAN's dissent, *post* at 173 n 10, represent a majority rule. In any event, we are hardly compelled to subscribe to the view of a few misguided courts. These cases give lip service to the notion that it is fair market value at the *time of the taking* that must guide the determination of just compensation; yet, without providing a satisfactory explanation for doing so, they sanction the admission of evidence that is wholly irrelevant to market status at that critical time. We choose, rather than blindly to follow the lead of these few jurisdictions, to adhere to the principles set forth in the UCPA and developed under our Constitution. Moreover, as the Nichols text itself recognizes, "[a]n important caveat to remember in applying [the rule that the probability of rezoning may be considered in determining just compensation] is that *the property must not be evaluated as though the rezoning were already an accomplished fact*. It must be evaluated under the restrictions of the existing zoning with consideration given to the impact upon market value of the likelihood of a change in zoning." Nichols, *supra* at § 12C.03[2].

enced by the probability of an amendment in the near future in fixing the selling price."[41] The issue, again, is whether the perception of the existence of a market factor (such as the possibility of an imminent rezoning) would change the amount that a fictional buyer would be willing to pay on a given date. The fact that something that was only a *possibility* on day 1 becomes a *reality* on day 2 is not relevant to fair market value *on day 1*.[42]

Our dissenting colleague, as evidenced by his lengthy discussion describing the "imperfect" nature of the eminent domain procedure in calculating just compensation, appropriately explains why condemnation, being a forced sale, can only *approximate* a real market real estate transaction. Although we are certainly not unsympathetic to the plight of the innocent landowner who is compelled to sell its property to the public, the governmental power of condemnation *is* one that is specifically condoned by our Constitution and regulated by the UCPA.

Justice MARKMAN's proposal—that we allow in evidence of posttaking events in order to counterbalance the "artificial construct" of the hypothetical willing

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[41] *New Jersey v Gorga*, 26 NJ 113, 118; 138 A2d 833 (1958).

[42] We note further that, perhaps fearful of misuse of such evidence, the New Jersey court in *Gorga* stressed that the posttaking zoning amendment at issue had to be "carefully confined to its proper role" and could be received *only* for the purpose of establishing the reasonableness of the factual claim that market participants would have been influenced by the possibility of a future zoning change. *Id*. at 118. We think that admission of posttaking zoning changes cannot be so easily "confined." After all, the jurors will have been told that an event that was merely a *possibility* pretaking is now a foregone conclusion.

Moreover, Justice MARKMAN does not explain how to limit his approach to only posttaking *rezoning* situations (and not to the myriad other posttaking events that might be argued to be somehow relevant to fair market value, such as catastrophic property damage).

buyer and seller—is not only inimical to the constitutional and statutory duty to determine fair market value as of the date of the taking; it is also illogical. We submit that Justice MARKMAN incorrectly assumes that the inadmissibility of evidence of posttaking occurrences leads to the invariable "detriment of the property owner" and "the benefit of the government." *Post* at 182. Although the property owners in this *particular* case might be benefited by the introduction of such evidence, the converse would be true were the government permitted to introduce evidence of posttaking events having a *diminishing* effect on property value. It is not difficult to imagine a situation in which a condemning authority might seek to present, in connection with its just-compensation calculation, evidence that the condemned property was rezoned after the taking from commercial to residential, resulting in a *lower* market value.[43]

C. HARMLESS ERROR

Defendants argue that any error was harmless because MDOT requested that the jury view the property and because, during the view, the jury saw evidence that a commercial office park was being constructed on defendants' remaining property. The Court of Appeals majority held that this evidence would likely not have been admitted had defendants not been permitted to present evidence of the posttaking rezoning. We disagree; MDOT's motion for a jury view was granted *before* the trial court ruled that defendants could put on

[43] Again, Justice MARKMAN appears to be of the belief that the condemning agency in this case is somehow profiting, at defendants' expense, from the rezoning decision. Yet this case illustrates how misplaced is Justice MARKMAN's supposition. In this very case it was not plaintiff MDOT, but a third party—the city of Novi—that made the rezoning decision.

their valuation experts. Moreover, we simply have no basis in the existing record to determine what it was that the jury actually saw, and the parties give radically divergent opinions on this point.

We nevertheless conclude that the error was not harmless. Although the jury was properly instructed that it was to determine fair market value as of the date of the taking, it was not instructed that it was to consider only the information extant at the time of the taking. Rather, the jury no doubt believed that the fair market value of the property on the date of the taking was to be calculated as if rezoning were a *fact*, as it was at the time of the trial.

More important, the trial court sorely compounded the error by refusing to allow MDOT to rebut the posttaking evidence by demonstrating that the rezoning was directly attributable to the condemnation itself. In this regard, we agree with our dissenting colleague that the trial court erred in precluding the admission of such evidence. See *post* at 167. As we have noted, the UCPA provides that just compensation is not to be determined on the basis of changes in market conditions that are substantially due to the general knowledge of the imminent condemnation of the property; rather, as MCL 213.70 provided at the time of the filing of this condemnation action, "[t]he property shall be valued in all cases as though the acquisition had not been contemplated."[44] Thus, to the extent that defendants presented any evidence supporting a change in market value, MDOT should have been permitted to establish that such a change in value was a result of the condemnation of the property. Because MDOT was deprived of this clear statutory right, the trial court's

[44] See former MCL 213.70 (1980 PA 87), now MCL 213.70(1), amended by 1996 PA 474, effective December 26, 1996.

initial error in admitting the posttaking rezoning evidence was inconsistent with substantial justice[45] and, therefore, may not be considered harmless. We thus affirm the judgment of the Court of Appeals and remand this case for a new trial.

IV. CONCLUSION

The trial court abused its discretion when it denied MDOT's motion to exclude evidence that defendants' property was rezoned commercial after the property was condemned. Such evidence is irrelevant to the critical just compensation inquiry, which is what a willing buyer would pay for the property on the date of the taking. Because the trial court further compounded this error by refusing to allow MDOT to establish, as contemplated by the UCPA, that the zoning change was effectuated by the fact of the condemnation itself, the error in the admission of the evidence was not harmless. We affirm the decision of the Court of Appeals and remand for further proceedings.

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

KELLY, J. (*concurring).* In this case, we consider whether evidence of rezoning after a taking is admissible to demonstrate that, when the taking occurred, a reasonable possibility of rezoning existed.[1] We hold the evidence inadmissible.

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[45] MCR 2.613(A); see also *Ward v Consolidated Rail Corp,* 472 Mich 77, 84; 693 NW2d 366 (2005).

[1] I use "taking" in this opinion synonymously with "condemnation" to refer to the government's expropriation of private property from its owner for public use through the power of eminent domain.

The lead opinion by Justice YOUNG concludes that the evidence is inadmissible on the ground that it is irrelevant. I disagree and believe that this view erroneously constricts the definition of legal relevance by placing a temporal constraint on it, whereas legal relevance is an encompassing characteristic of evidence.

A majority of the Court agrees that the evidence of rezoning is relevant because it corroborates a fact that is of consequence to the determination of the action: whether there existed a reasonable possibility of rezoning at the time of the taking. MRE 401.

A different majority agrees that the evidence is inadmissible. However, my reasoning differs from the other three justices comprising this majority. I would hold that the inadmissibility of the evidence lies in the fact that its probative value is substantially outweighed by its prejudicial effect. MRE 403.

The admission of the evidence of rezoning unjustly overwhelmed other relevant evidence that showed rezoning was not reasonably likely and that the parcel's reasonable value was as residential property. The jury's consideration of this evidence caused substantial injustice to plaintiff. Accordingly, it was an abuse of the trial court's discretion to admit it, and the error was not harmless.

I agree with the decision of the Court of Appeals to set aside the jury verdict, although for slightly different reasons. I also agree to remand the case for a new trial at which the evidence that the property was rezoned after the taking will not be admitted.

UNDERLYING FACTS

This controversy concerns land on which a portion of phase II of the M-5 Haggerty Road Connector in Novi

was built.[2] Plaintiff Michigan Department of Transportation filed a complaint under the Michigan Uniform Condemnation Procedures Act (UCPA)[3] to take the land by condemnation. The land is part of a larger tract owned by defendant Haggerty Corridor Partners Limited Partnership. The partnership had aggregated the tract over time by acquiring adjacent parcels in the expectation of future development.

The issue concerns the reasonable market value of the land at the time of the taking. When it was expropriated, the land was zoned residential-agricultural and was undeveloped. At trial, defendants asserted that they had planned to seek to have it rezoned to commercial use. They hoped to develop the land into a technology park, as they had done with a tract in nearby Farmington Hills.

Plaintiff made an offer to buy the land from defendants based on its value for residential or agricultural use, consistent with its zoning classification at the time of the taking. Michigan law requires the government to make a good-faith offer to purchase land for its fair market value before filing a condemnation complaint. MCL 213.55. Defendants rejected the offer. They believed that the true market value was much higher because there was a reasonable possibility that the land would be rezoned for commercial use in the near future.

THE COURT PROCEEDINGS

Plaintiff filed its condemnation complaint on December 7, 1995. It again asserted that the fair market value

[2] This portion of the Connector includes a north and southbound roadway between Twelve and Fourteen Mile Roads, west of Haggerty Road in the city of Novi, Oakland County.

[3] MCL 213.51 *et seq*. All statutory references are to the act as it existed at the time the condemnation complaint was filed.

of the land was its value for residential purposes. Defendants responded that the land was worth more than plaintiff offered due to its potential for commercial use. Plaintiff countered that rezoning was not reasonably possible.

Defendants planned to present significant evidence to show that rezoning for commercial use was reasonably possible at the time of the taking. Key to their argument was evidence that the portion of the tract not condemned was in fact later rezoned commercial. Two and a half years after the taking, Novi rezoned the noncondemned land for office/service/technology use.

Plaintiff made a motion to prevent introduction of this evidence.[4] The trial court heard oral argument and concluded that it was admissible. The court found it relevant, not too remote in time, and not overly prejudicial. The evidence was admitted, and the jury awarded damages consistent with defendants' evaluation, which was based on use of the land if zoned commercial.

On appeal, plaintiff argued that admission of the evidence was erroneous. The Court of Appeals held that the trial court had abused its discretion in admitting it because it "tainted the jury's resolution of the 'reasonable possibility' question of fact." The Court reversed the judgment of the trial court and remanded the case for a new trial without the erroneously admitted evidence.[5] Unpublished opinion per curiam of the Court of Appeals, issued July 22, 2003 (Docket Nos. 234099, 240227).

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[4] Plaintiff's March 6, 2001, motion in limine to bar testimony of a May 1998 zoning change.

[5] The Court of Appeals, in dicta, also discussed the trial court's consideration of defendants' "cost to cure" the taking. We did not grant leave to appeal on this issue, and I decline to express a view about it.

The Court of Appeals decision was not unanimous. The dissent argued that the majority did not give the trial court's evidentiary ruling the deference it was due and that the trial court's decision should be affirmed. It observed that this Court held in *Dep't of Transportation v VanElslander*[6] that the possibility of subsequent rezoning can be relevant to the market value of land at the time of the taking. It opined that any error was harmless.

Defendants sought leave to appeal to this Court. Until today, no published decision of this Court or of the Court of Appeals has directly addressed the question presented, and it is susceptible to arising again. Recognizing its jurisprudential significance, we granted leave to appeal

> limited to [the issues] (1) whether a posttaking zoning decision can be considered in determining value at the time of the taking, and (2) whether the Court of Appeals decision in this case is consistent with [*VanElslander, supra*]. [470 Mich 874 (2004).]

JUST COMPENSATION

We review decisions regarding the admissibility of evidence at trial for an abuse of discretion. *VanElslander, supra* at 129. It is basic to condemnation law that the government may take private property for public use as long as it pays just compensation for it. Const 1963, art 10, § 2.

"Just compensation" is a legal term of art. *Silver Creek Drain Dist v Extrusions Division, Inc*, 468 Mich 367, 376; 663 NW2d 436 (2003). It is intended to place the property owner in as good a position financially as if the property had not been taken. This ensures that

[6] 460 Mich 127, 130; 594 NW2d 841 (1999).

neither the property owner nor the public is enriched at the other's expense. *State Hwy Comm'r v Eilender,* 362 Mich 697, 699; 108 NW2d 755 (1961).

Just compensation is the fair market value of land at the time of its taking. *Id*. Under the UCPA, what is just compensation is determined as of the date the condemnation complaint is filed and as if the government's acquisition of the land had not been contemplated. MCL 213.70.

The jury assesses the value of condemned land as of the date of condemnation through the eyes of those acquiring or losing it. The market participants cannot foresee the future. In the case under consideration, the participants would not have known that the land would be rezoned. The participants' prediction of whether there was a reasonable possibility of rezoning could be based only on information available at the time of the taking.[7] Current property values are based in part on potential changes discounted for their uncertainty.

The law accepts that a reasonable possibility that the zoning classification will be changed " 'should be considered in arriving at the proper value.' " *Eilender, supra* at 699, quoting *United States v Meadow Brook Club,* 259 F2d 41, 45 (CA 2, 1958). In *Eilender*, the state presented an appraisal based on the property's

[7] Defendants' real estate appraiser testified that the present value of real estate may be assessed by comparing the value of a given property with that of similar properties.

There was testimony that relevant similarities include the locations, sizes, and available uses of the parcels. Recent sales are more relevant than older sales. However, an appraisal should also consider possible market changes during the time a property can reasonably be expected to remain on the market. For instance, a large, undeveloped parcel like the one at issue here may remain on the market for two to three years before a buyer is found. Comparison data is drawn from appraisals done by other professionals and from public records.

residential-use zoning status. The property owner's appraisal was based on commercial use. An application by the owner to rezone the property for commercial use was pending at the time of the taking.

Commercial use of the property in *Eilender* would have been consistent with the zoning of property in some of the surrounding area. But the city commissioners awarded compensation that reflected the state's assessment. In so doing, they failed to consider the reasonable possibility that the property would be rezoned. We held that an application for rezoning, submitted before the taking, was relevant to show the reasonable possibility of rezoning and should be considered in determining the property's market value.[8] *Eilender* at 699-700.

THE RELEVANCE OF THE FACT OF FUTURE REZONING

At trial in this case, defendants submitted evidence suggesting that Novi might rezone defendants' land to a use higher than residential. Because if there was a possibility of rezoning at the time of the taking, it affected the property's fair market value. Hence, any possibility of rezoning it was relevant.[9]

Similarly, I agree with Justices MARKMAN and WEAVER that the rezoning was relevant to show that two-and-

[8] In his opinion, Justice MARKMAN fails to discuss the factual context out of which *Eilender* arose. The facts in *Eilender* differed critically from those in this case. There, we remanded the case to allow the jury to hear about an application for rezoning that had been submitted when the taking occurred. In contrast, the jury in this case heard evidence that was not available to the market participants at the time of the taking.

[9] Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable" than without the evidence. MRE 401.

one-half years before it occurred, a reasonable possibility of rezoning may have existed. If something occurs, by definition, the occurrence had to have been possible then and likely at some time beforehand. The fact that the reasonable possibility may not have arisen until after the taking does not render evidence of the rezoning irrelevant. It has some tendency to make more likely the existence of a reasonable possibility before the taking.

However, Justice YOUNG erroneously relies on the fact that a market participant could not have known of the rezoning at the time of the taking. This confuses the temporal relationship between the events with their legal relationship. Although the market participant could not have known that an event would occur in the future, the fact that it did occur shows that it was reasonable to believe beforehand that its occurrence was likely.

Justice YOUNG's example of the roll of a die is misplaced. When one is asked beforehand the result of the roll of a die, six is among the guaranteed results. Each of the six alternative results has an equal chance of occurring with every roll. The fact that a six was rolled is unnecessary to prove that six was possible or that it was reasonable to believe before the roll that six was possible.

Rezoning is more like a horse race than the roll of a die. The probability of a certain horse winning depends on many factors. They include, among others, the condition of the horse on race day, the condition of the other horses, and the condition of the track. The odds on a bet placed on that horse, which are an expression of the perceived probability of that horse winning, are based on these factors known before the race. If the horse wins, the victory corroborates the strength of the

prediction that the horse would win. But there are no guarantees that the horse will ever win, unlike the result of the roll of a die.

Similarly, there are no guaranteed outcomes when one estimates whether property will be rezoned.[10] Rezoning is one of several possibilities. The probability of it occurring may never become a reality. But the fact of rezoning corroborates the assertion that the belief it would be rezoned was reasonable, just as a winning bet corroborates the belief that a horse would win. As Justice YOUNG notes, rezoning suggests that the prognostication is more accurate than another's that was to the contrary. *Ante* at 143. Hence, the evidence of rezoning is legally relevant.

THE PREJUDICIAL EFFECT OF A FUTURE FACT

Just because evidence is relevant does not mean that it is admissible. The trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." MRE 403.

We have noted that "[e]vidence is not inadmissible simply because it is prejudicial. Clearly, in every case, each party attempts to introduce evidence that causes prejudice to the other party." *Waknin v Chamberlain*, 467 Mich 329, 334; 653 NW2d 176 (2002). "In this context, prejudice means more than simply damage to an opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion." *People v Vasher,* 449 Mich 494, 501; 537 NW2d 168 (1995).

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[10] Similarly, there are no guarantees that an officer of a corporation will be indicted. See *ante* at 140 n 34.

This rule " 'is not designed to permit the court to 'even out' the weight of the evidence . . . or to make a contest where there is little or none.' " *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), quoting *United States v McRae*, 593 F2d 700, 707 (CA 5, 1979). The rule prohibits evidence that is unfairly prejudicial. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford,* 458 Mich 376, 398; 582 NW2d 785 (1998).

THE DISTINCTION BETWEEN FACT AND REASONABLE POSSIBILITY

The mischief here is that, once a juror hears evidence that rezoning occurred, the juror will have difficulty concluding anything but that rezoning was reasonably possible when the taking occurred. As noted earlier in this opinion on pp 154-155, it is not necessarily true that the possibility reasonably existed at the time of the taking. Rezoning might have become reasonably possible only upon the happening of one or more events after the taking. The taking itself could be one such event, as plaintiff argued at trial.

Moreover, it does not follow from the fact that something occurs that people could have reasonably believed beforehand that it would occur. Consider these illustrations: In January 1968 one could have predicted that it was reasonably possible that Neil Armstrong would set foot on the moon in July 1969. Similarly, one could say today that it is reasonably possible that man will visit Mars in future years.

Merely because an event occurred does not mean that it was reasonably possible on a given date beforehand. Reasonable predictions of space exploration require one to know much about the status of our space program at

the time the prediction is made. An accurate assessment of the reasonable possibility of these two space explorations depends on the information known beforehand. Similarly, a reasonable prediction of future rezoning requires that certain knowledge be available to the market participant at the time of the taking. See p 153 n 7 of this opinion.

The distinction between the fact of an occurrence and whether it was reasonably possible on a given date before it occurred has eluded many. For example, one prominent treatise, cited by the trial court, the dissent in the Court of Appeals, and Justice MARKMAN, characterized the fact of posttaking rezoning as "weighty evidence." 4 Nichols, Eminent Domain (3d ed), § 12C.03[3].

It is not enough that posttaking rezoning is probative of an antecedent possibility of rezoning, as Justice MARKMAN argues. The question is was it reasonably possible at the time of the taking? In this case, the taking was two-and-one-half years before rezoning occurred. The fact that rezoning did occur does not mean that it was reasonably possible at the time of or before the taking that it would occur.

At first blush, posttaking rezoning is compelling evidence that there was a strong possibility of rezoning at the time of the taking. But the admission of this evidence was unfair because of the significant danger that the jury would not properly limit its consideration of it. Admission of this evidence risks that the jury will accord it weight wildly disproportionate to its probative value and treat rezoning when the taking occurred as a foregone conclusion.[11] This is the "hindsight bias" dis-

[11] In his opinion, Justice MARKMAN illustrates this danger, *post* at 181. Admission of posttaking rezoning evidence may encourage a witness to testify that it shows a reasonable possibility of rezoning

cussed by Justice YOUNG that leads the jury to give the evidence undue weight and render it unfairly prejudicial. See *ante* at 141 n 36. Rather than prove Justice YOUNG's point, this bias demonstrates why the evidence can be relevant yet unfairly prejudicial.

Evidence of posttaking rezoning also tends to confuse the value of property once rezoned and its value when it was only reasonably possible that it would be rezoned. In a takings case, the amount that the property owner is entitled to be paid is the latter value. However, the jury may improperly award just compensation based on the value of the land as rezoned as if the property had already been rezoned before the taking.

Justice MARKMAN proceeds on the faith that the jury can limit the evidence to its proper sphere. See *post* at 178-179. However, this approach negates the trial court's role as a gatekeeper, under MRE 403. The court must ensure that the influence of the evidence presented to the jury is not wildly disproportionate to its probative value.

In every case, the fact of subsequent rezoning is unavailable to the market participant at the time of the taking. As Justice MARKMAN points out, it allows one party the benefit of the skyscraper or stadium looming overhead whereas the market participant was limited to imagination and someday plans. It is highly prejudicial because it gives one party an unfair advantage over the other by giving the jury information that the hypothetical market participant could not have obtained.[12]

Just as the market does not have the benefit of twenty-twenty hindsight, neither do litigants. The jury

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although when the taking occurred, there was no reasonable possibility.

[12] Justice MARKMAN muses about the subjective motivations of the parties in a marketplace transaction. However, those motivations are

must assess the value of the property " 'on the basis of facts as they then would have appeared to and been evaluated by the mythical buyer and seller.' " *Roach v Newton Redevelopment Auth*, 381 Mass 135, 138; 407 NE2d 1251 (1980), quoting *New Jersey v Gorga*, 26 NJ 113, 118; 138 A2d 833 (1958).[13]

In the interest of having the same availability of information as the market participants at the time of the taking, the jury should not know of posttaking rezoning. It causes too great a danger of confusion of the issues and unfair prejudice to the taking party, outweighing its probative value.[14]

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irrelevant here. "Just compensation" is not intended to perfectly replicate a private deal. Nor does it consider that the property owner was an unwilling seller. In fact, the analysis is meant to ensure that this factor is not considered.

Like all "objective" legal determinations, "just compensation" is a legal construct. I disagree that it should be ascertained by considering factors that were unavailable to market participants at the time of the taking.

[13] See also *Reeder v Iowa State Hwy Comm*, 166 NW2d 839, 842 (Iowa, 1969) (inference that the adoption of the ordinance more than eight months after condemnation proves that the higher use was the best use "*at time of taking* . . . is manifestly lacking in substance") (emphasis in original).

These cases and others cited by Justice MARKMAN for the proposition that evidence of posttaking rezoning is admissible, dealt only with whether the evidence was admissible because it was relevant. They admitted the evidence without addressing its prejudicial effect. See also *Bembinster v Wisconsin*, 57 Wis 2d 277, 284-285; 203 NW2d 897 (1973); *Texas Electric Service Co v Graves*, 488 SW2d 135, 137 (Tex App, 1972). Thus, I am not as persuaded as is Justice MARKMAN by their less thorough analysis.

[14] Justice MARKMAN implies that our decision today improperly favors the government. *Post* at 182 n 18. Although the government may benefit today, I strive to apply the rules of evidence objectively and in accordance with their goal of deciding cases fairly and on their merits. I do not consider the identities of the parties.

THIS EVIDENCE OF POSTTAKING REZONING WAS UNFAIRLY PREJUDICIAL

The highly prejudicial tendency of posttaking evidence to confuse and mislead substantially outweighed its minimal probative value in this case. Plaintiff estimated that the land was worth $2,758,200. Defendants set their damages at $18,586,000. The jury substantially agreed with defendants and awarded them $14,877,000.

The award suggests a high likelihood that the jury was overwhelmed with the evidence of the posttaking rezoning. The jury appears to have ignored significant evidence that rezoning was not foreseeable. Novi's chief planning consultant testified that, in 1993, the planning commission recommended that the land not be rezoned commercial. He revealed that the city had no plan to rezone the land because there was a demand for large-lot, million-dollar homes. He told the jury that the intention of the city council and the planning commission was to maintain the property for residential purposes. As of the date of the taking, he would not have recommended a change in zoning. Also, defendants had no pending petition for a zoning change, unlike the defendant in *Eilender*.

The evidence of posttaking rezoning was not harmless, as defendants argue. Plaintiff presented sufficient evidence to the jury that it could have concluded that there was little reasonable possibility of rezoning at the time of the taking. But defendants' damages award, which was substantially in agreement with their claim, demonstrates that the jury likely gave the posttaking evidence far more weight than it merited. Therefore, its admission here violated MRE 403 and was an abuse of discretion.[15]

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[15] My analysis would not prevent a trial court from considering posttaking rezoning when determining the admissibility of other evidence that was available at the time of the taking. MRE 104(a).

I agree with Justice YOUNG that the trial court exacerbated the error. The court admitted the evidence of rezoning but precluded plaintiff from presenting evidence that the rezoning occurred as a result of the taking. Plaintiff should have been allowed to counter the effect of the evidence once it was admitted. See *ante* at 147.

Michigan takings law has long recognized that a condemnation award may be disturbed on appeal where erroneously admitted evidence caused substantial injustice in the result. *Michigan Air Line R v Barnes,* 44 Mich 222, 227; 6 NW 651 (1880); MCR 2.613(A). I find that because of the erroneous admission of evidence, a substantial injustice occurred here.

THE EFFECT OF THE VIEW OF THE LAND BY THE JURY

It bears noting that, contrary to the Court of Appeals dissent, plaintiff did not open the door to evidence of posttaking rezoning or render its admission harmless by requesting a jury view. Plaintiff filed its motion in limine opposing the evidence of subsequent rezoning on March 6, 2001. At a March 15 hearing, although the court did not rule, its language suggested that ultimately it would deny the motion.

By March 28, the trial court had not ruled on the motion. Plaintiff feared that it would receive an adverse ruling. Therefore, it moved for a jury view. Plaintiff argues that it did so to provide some evidence that the property, most of which remained undeveloped at the time, was more akin to residential property than commercial property. Plaintiff asserted that it would have withdrawn the motion if, before the jury view, the court had announced its decision to exclude defendants' posttaking rezoning evidence. Plaintiff did not preclude

appellate review by properly anticipating and attempting to mitigate the trial court's error.

Moreover, the jury view did not render harmless the erroneous admission of the evidence of posttaking rezoning. There is no record evidence of what the jury saw when it viewed the property. It may have seen some commercial construction and inferred that part of the parcel had been rezoned. But I agree with plaintiff that the jury view was not the equivalent of uncontroverted evidence that the entire parcel had been rezoned.

DEP'T OF TRANSPORTATION v VANELSLANDER

My view is not inconsistent with our decision in *VanElslander, supra*. In that case, the Department of Transportation took a portion of the defendants' land. As a consequence, a building on the remainder of the land was in violation of local set-back requirements. The department attempted to introduce evidence that it was reasonably possible for the defendants to mitigate the effect of the taking on the uncondemned building by obtaining a zoning variance. A variance could have cured the set-back violation and avoided loss of the building. On appeal to this Court, the department argued that the defendants' appeal was moot because the building had been demolished.

We held that the evidence showing the possibility of obtaining a variance was admissible. Also, the fact that the building had been demolished did not render the appeal moot. *VanElslander, supra* at 132.

In determining just compensation, the jury in *VanElslander* was entitled to hear of the likelihood that, at the time of the taking, a variance might have been sought and granted. Similarly, the jury in this case was entitled to hear evidence showing the likelihood of rezoning. But just as subsequent demolition was not an

appropriate consideration when determining damages in *VanElslander*, neither was subsequent rezoning an appropriate consideration here.

CONCLUSION

The government must pay just compensation when it takes land for public use. Const 1963, art 10, § 2. Just compensation is the fair market value of the land. *Eilender, supra* at 699. It is determined at the time of the taking. MCL 213.70.

The prejudicial effect of evidence of subsequent rezoning on the determination of fair market value substantially outweighs its relevance. MRE 403. For that reason, it is not admissible to show the reasonable possibility of rezoning at the time of the taking. In this case, the erroneous admission of this evidence was an abuse of discretion. It was not harmless because it caused substantial injustice to plaintiff.

I agree with the conclusion of the Court of Appeals. Plaintiff is entitled to a new trial without the admission of evidence of the posttaking zoning change.[16] I agree with the decision to remand the case to the trial court and not retain jurisdiction.

WEAVER, J. *(dissenting).* I dissent from the majority's conclusion that evidence of a posttaking rezoning is inadmissible in this case. I agree with Justice MARKMAN's conclusion that the evidence of a posttaking rezoning is relevant evidence that is admissible in this case to enable the jury to assess whether a "reasonable possibility" of rezoning existed on the date of the taking and whether the possibility would have affected the

[16] Consequently, I need not address the argument that the trial court should have admitted evidence that the taking itself caused the rezoning.

price a willing buyer would have offered for the property at the time of the taking. Therefore, I would conclude that the trial court did not abuse its discretion in admitting the evidence.

I also agree with Justice MARKMAN's conclusion that the trial court did abuse its discretion in excluding plaintiff's evidence that the posttaking rezoning was caused by the taking, where this evidence was offered to counter defendants' argument that there was a reasonable possibility of a zoning change.

Therefore, I would vacate the Court of Appeals decision and remand this case for a new trial.

Just compensation for private property that is condemned for public use is intended to "put the party injured in as good position as he would have been if the injury had not occurred." *State Hwy Comm'r v Eilender*, 362 Mich 697, 699; 108 NW2d 755 (1961). Determining just compensation "is not a matter of formula or artificial rule but of sound judgment and discretion based upon the relevant facts in the particular case." *Id.* We have held that a reasonable possibility that a zoning classification will be changed is relevant and should be considered when determining just compensation to the extent that the " 'possibility' would have affected the price which a willing buyer would have offered for the property just prior to the taking." *Id.* at 699 (citation omitted); see also *Dep't of Transportation v VanElslander*, 460 Mich 127, 130; 594 NW2d 841 (1999). A posttaking change in zoning is relevant[1]

[1] As defined in MRE 401, "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Further, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States,

because it may assist the jury in assessing the possibility of a zoning change at the time of the taking—i.e., how likely a zoning change was at the time of the taking—and whether that possibility would have affected the price a willing buyer would have offered for the property at the time of the taking.[2] Therefore, I would conclude that the trial court did not abuse its discretion in admitting evidence of a posttaking change in zoning.

Additionally, just as the defendants in this case should be permitted to introduce evidence of a posttaking change in zoning to demonstrate the possibility of a zoning change at the time of the taking and how the possibility would have affected the price, plaintiff in this case should be permitted to offer evidence to counter defendants' evidence. Such evidence includes evidence that the rezoning in this case was a result of the taking. Therefore, I would conclude that the trial court abused its discretion in excluding evidence that the rezoning was a result of the taking.

Consistent with this opinion, I would remand the case to the trial court for a new trial.

CAVANAGH, J., concurred with WEAVER, J.

MARKMAN, J. (*dissenting*). The majority concludes that evidence of a posttaking rezoning is inadmissible to demonstrate that a "reasonable possibility" of rezoning

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the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court." MRE 402.

[2] As stated by the Supreme Court of New Jersey, "In short if the parties to a voluntary transaction would as of the date of taking give recognition to the probability of a zoning amendment in agreeing upon the value, the law will recognize the truth." *New Jersey v Gorga*, 26 NJ 113, 117; 138 A2d 833 (1958).

existed on the date of the taking.[1] I respectfully disagree. Because I believe that evidence of a posttaking rezoning is admissible to demonstrate that a "reasonable possibility" of rezoning existed on the date of the taking, I do not believe that the trial court abused its discretion in admitting such evidence. However, I do believe that the trial court abused its discretion in prohibiting plaintiff from introducing evidence that the posttaking rezoning was caused by the taking. Therefore, I would vacate the decision of the Court of Appeals and remand this case for a new trial, in which defendants would be allowed to introduce evidence of the posttaking rezoning and plaintiff would be allowed to introduce evidence that such posttaking rezoning was caused by the taking.

I. FACTS AND PROCEDURAL HISTORY

Defendant partnership, a partnership that develops real estate, owned 335 acres of vacant property in Novi.[2] In 1995, the Michigan Department of Transportation (MDOT) began proceedings to condemn fifty-one acres of defendants' property for use in the construction of the M-5 Haggerty Road Connector in Novi. On the date of the taking, the property was zoned for residential use, but in 1998 the property was rezoned for commercial use. At trial, at which the jury was charged with determining the "just compensation" due defendants,

[1] Throughout this opinion, I use the term "majority" when referring to both Justice YOUNG's lead opinion and Justice KELLY's concurring opinion, and I use the term "plurality" when referring only to Justice YOUNG's lead opinion.

[2] According to defendants, they purchased this property to build a high technology office park, anticipating that the property would be rezoned from residential to commercial. After the taking, the property was rezoned from residential to commercial and defendants did build an office park on their remaining 284 acres.

the trial court allowed defendants to present evidence of the posttaking rezoning.[3] However, the trial court refused to allow MDOT to introduce rebuttal evidence that the property was rezoned only as a result of the taking. Defendants requested approximately $18.5 million in compensation and MDOT agreed to pay approximately $2.7 million. The jury returned a verdict of approximately $14.8 million. In a split decision, the Court of Appeals affirmed in part, reversed in part, and remanded for a new trial. Unpublished opinion per curiam, issued July 22, 2003 (Docket Nos. 234099 and 240227). The majority held that the trial court abused its discretion in admitting evidence of the posttaking rezoning, and, thus, remanded for a new trial. The dissenting judge concluded that the trial court did not abuse its discretion either in admitting evidence of the posttaking rezoning or in excluding evidence that the posttaking rezoning was caused by the taking, and, thus, he would have affirmed the verdict.

II. ANALYSIS

Art 10, § 2 of Michigan's 1963 Constitution provides that "[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." " ' "The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them." ' " *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999) (citations omitted). Therefore, "the proper amount of compensation for property takes into account all factors relevant to market value." *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 379; 663 NW2d 436 (2003). In order to determine

[3] At MDOT's request, the jury saw the property in its posttaking state.

"just compensation," we must determine the market "value of the condemned land at the time of the taking . . . ." *State Hwy Comm'r v Eilender*, 362 Mich 697, 699; 108 NW2d 755 (1961). The fair market value of condemned property "shall be determined with respect to the condition of the property and the state of the market on the date of valuation." MCL 213.70(3). " '[A]ny evidence that would tend to affect the market value of the property as of the date of condemnation is relevant.' " *VanElslander, supra* at 130 (citation omitted).

A. RELEVANCE OF EVIDENCE OF POSTTAKING REZONING

It is well established and uncontested that one of the factors relevant to market value is the " 'reasonable possibility that the zoning classification will be changed.' " *Eilender, supra* at 699 (citation omitted). As this Court held in *Eilender, supra* at 699, " 'if there is a reasonable possibility that the zoning classification will be changed, this possibility should be considered in arriving at the proper value.' " (Citation omitted.)[4] In other words, if, at the time of the taking, there existed a "reasonable possibility" that the property would be rezoned to allow "more lucrative uses," this "reasonable possibility" should be considered.[5] *Id.* This factor " 'must be considered in terms of the extent to which the "possibility" would have affected the price which a

[4] Justice KELLY states that I am mischaracterizing this Court's holding in *Eilender*. I cite *Eilender* only for a proposition with which everybody apparently agrees—a "reasonable possibility" of rezoning should be considered when determining "just compensation." I do not suggest that this Court in *Eilender* already answered the question at issue here.

[5] The opposite, of course, is true as well. That is, if, at the time of the taking, there existed a "reasonable possibility" that the property would be rezoned to exclude "more lucrative uses," this "reasonable possibility" should also be considered. *Id.*

willing buyer would have offered for the property just prior to the taking.' " *Id*. (citation omitted). Property that is zoned to allow "more lucrative uses" is worth more money than property that is not so zoned. Therefore, property that has a "reasonable possibility" of being rezoned to allow "more lucrative uses" is worth more money than property that does not have a "reasonable possibility" of being rezoned to allow "more lucrative uses."[6] A person whose property has been taken by the government is entitled to the full market value of the taken property, taking into consideration the totality of factors that a willing buyer would consider, including the "reasonable possibility" of rezoning.

The majority does not disagree that the "reasonable possibility" of rezoning is a factor that must be considered when determining "just compensation." However, the majority concludes that the fact itself that the property was rezoned after the taking cannot be considered in determining whether there was, at the time of the taking, a "reasonable possibility" of rezoning. I disagree. Instead, I believe that such evidence may afford compelling evidence that a "reasonable possibility" of rezoning existed at the time of the taking.

In this case, one of the primary issues for the jury to resolve was whether, at the time of the taking, there was a "reasonable possibility" that the subject property would be rezoned from residential to commercial. MDOT argues that the trial court abused its discretion when it allowed defendants to introduce evidence that, although the property was zoned residential at the time of the taking, $2\frac{1}{2}$ years later the property was rezoned

[6] As the plurality recognizes, "at the time defendants acquired their Novi property, beginning in 1988, the property was more valuable in their eyes because of the looming possibility of a future zoning change." *Ante* at 140.

commercial. The Court of Appeals majority agreed with MDOT, concluding that "evidence of the actual zoning change was irrelevant to the value of the property on the date of taking and should not have been disclosed to the jury." Slip op at 3.

The Court of Appeals dissent, on the other hand, concluded that the trial court did not abuse its discretion in admitting evidence of the posttaking rezoning. I agree with this dissent. MRE 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court."[7] MRE 401 defines relevant evidence as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

As already discussed, whether a "reasonable possibility" of rezoning existed at the time of the taking is of consequence to the determination of "just compensation."[8] That the property was, in fact, rezoned makes it

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[7] MDOT does not argue that the admission of the posttaking rezoning violated the Constitution of the United States or the Constitution of the state of Michigan. It only argues that the evidence is not relevant and that, even if it is relevant, it should be excluded pursuant to MRE 403, as discussed later in this opinion.

[8] I do not know why the plurality suggests that I "misidentify[] the 'fact that is of consequence,' " *ante* at 138 (emphasis deleted), because I agree with the plurality that " ' "the 'fact that is of consequence' is the reasonable possibility of a zoning modification, *as that possibility might have been perceived by a market participant on condemnation day*." ' " *Ante* at 139 n 32 (emphasis in the original). Where the plurality and I differ is with regard to whether evidence of a posttaking rezoning makes it "more probable" that a "reasonable possibility" of rezoning existed at the time of the taking. I agree with the plurality that the fact that the property was subsequently rezoned does not necessarily mean that a "reasonable possibility" of a rezoning existed at the time of the taking. However, the fact that the property was subsequently rezoned makes it "more probable" that a

"more probable" that a "reasonable possibility" of rezoning existed at the time of the taking. As the Court of Appeals dissent explained, "evidence of the actual rezoning had the tendency to make the existence of the possibility of rezoning more probable than it would be without the evidence." Slip op at 2. This is true because a jury confronted with the reality of a subsequent rezoning would be acting in an altogether logical fashion by comparing this reality to an alternative reality in which no subsequent rezoning had occurred, and concluding that the former reality gives rise to a greater inference than the latter that the impetus for rezoning preceded the taking. Whether this inference is strong or weak would depend on the totality of the circumstances.

The majority, however, would, in every case, deny the property owner the ability to introduce evidence of an actual rezoning, regardless of the strength of the inference raised by the rezoning either by itself or in conjunction with other evidence. Because I believe that evidence of actual rezoning gives rise to the wholly logical inference that the genesis of that rezoning *may* have preceded the taking, I would not bar the introduction of such evidence.[9] Indeed, the leading treatise on eminent domain observes that evidence of a posttaking rezoning "has been held to be weighty evidence of the existence (at the time of the taking) of the fact that

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"reasonable possibility" of a rezoning existed at the time of the taking than would the fact that the property was not subsequently rezoned.

[9] The plurality is impressive in the breadth of the analogies that it brings to bear in its analysis, ranging from probability to the stock market to psychology. If, as I understand it to be the plurality's point, the future is unpredictable, I am persuaded. If, on the other hand, it is the plurality's point that when the future becomes the present it is of no relevance in assessing what the prospects yesterday were of that future, I respectfully disagree.

there was a reasonable probability of an imminent change." 4 Nichols, Eminent Domain (3d ed), § 12C.03[3]. As the New Jersey Supreme Court has explained, such evidence "support[s] the reasonableness of the factual claim that on the date of taking the parties to a voluntary sale would have recognized and been influenced by the probability of an amendment in the near future in fixing the selling price." *New Jersey v Gorga*, 26 NJ 113, 118; 138 A2d 833 (1958).[10]

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[10] Other states have held that evidence of a posttaking rezoning is admissible to help the jury determine the "just compensation" due for the taking. *Roach v Newton Redevelopment Auth*, 381 Mass 135, 137; 407 NE2d 1251 (1980) (holding that "[a]ctual amendment of the zoning law, subsequent to the taking, may be 'weighty evidence' of such a prospect"); *Bembinster v Wisconsin*, 57 Wis 2d 277, 284-285; 203 NW2d 897 (1973) (holding that "[t]he type of evidence which has been admitted as material as tending to prove a reasonable probability of change includes . . . the actual amendment of the ordinance subsequent to the taking"); *Texas Electric Service Co v Graves*, 488 SW2d 135, 137 (Tex App, 1972) (holding that "if subsequent to the taking and before the trial the ordinance was actually amended to permit the previously forbidden use then that of itself was weighty evidence of the existence at the time of the taking of the fact that there was a reasonable probability of an imminent change"); *Reeder v Iowa State Hwy Comm*, 166 NW2d 839, 841 (Iowa, 1969) (holding that a rezoning ordinance enacted more than eight months after the taking, although not dispositive, was admissible). See also 9 ALR3d 291, § 11[a], p 320 ("[c]hange of an existing zoning ordinance, subsequently to the time of condemnation, has been held admissible in a trial for the award of compensation as bearing on the degree of probability and the imminence of the change at the time of the taking"); 4 Rathkopf's The Law of Zoning and Planning, § 75:8 (4th ed) ("[a] change in the zoning classification of a condemned parcel or similarly situated adjacent properties subsequent to a taking is considered weighty evidence of a reasonable probability of an imminent change at the time of taking"). Contrary to the plurality's suggestion, *ante* at 144 n 40, I have chosen to "blindly . . . follow the lead of these few jurisdictions," only if the entirety of the analysis contained in this dissent is disregarded. I cite the above cases only to contrast the support in other states for the position expressed in this dissent with the utter absence of similar support for the majority's position.

B. MARKETPLACE TRANSACTIONS VERSUS CONDEMNATION PROCESS

As the majority explains, the jury is charged in cases of this sort with determining what a "mythical," "hypothetical," "theoretical," "fictional," "willing" buyer, would have paid a "mythical," "hypothetical," "theoretical," "fictional," "willing" seller for the property in a "voluntary," transaction at the time of the taking. *Ante* at 137, 138, 142, 143 n 38, and 145; *ante* at 160. However, in truth, the condemnation process does not involve a typical willing buyer,[11] a willing seller, or a voluntary transaction.[12] Instead, it involves a transaction in which the government takes property without the permission or consent of the property owner, in what is essentially a "forced sale." The property owner is not a willing seller, and the government is not a typical willing buyer. The condemnation process bears little in common with a voluntary sale of property in the market between a willing seller and a willing buyer.

It is a source of its confusion that the majority fails to give significance to these differences. Yet, they are determinative of the very issue before this Court. The majority provides that the jury is to "suppose" that the property owner is indistinguishable from a willing seller, that the government is indistinguishable from a typical willing buyer, and that both have entered into a market transaction. Next, the jury is asked to "imagine" the value that a "reasonable" buyer and seller

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[11] "As to the condemnor/government in the hypothetical 'fair market value' scenario, the government stands in the shoes of a 'willing [private] buyer.' " 13 Powell, Real Property, § 79F.04[2][a][ii], p 39.

[12] "Not only does the 'fair market value' test posit a hypothetical buyer and a hypothetical seller, it also posits a hypothetical market . . . ." 13 Powell, Real Property, § 79F.04[2][a][iii][A], p 39.

would have placed on the property in the market. Finally, although the jury can be apprised by the governmental "buyer" that at the time of "sale," the property was zoned residential and there was no "reasonable possibility" of it being rezoned, the jury cannot be apprised by the private "seller" that such rezoning, in fact, has already occurred. The upshot of this procedure is that the jury must "imagine" a typical willing buyer, a willing seller, and a voluntary transaction—none of which, of course, exist in reality—while at the same time the jury must not consider a reality that *does* exist, namely, that the government has taken property that has been rezoned.

Moreover, not only is the jury to "imagine" a market transaction where in reality there is none, but in calculating the "fair market value" of the property being "sold" the jury must imagine a particular moment in time at which the taking, or "forced sale," occurred, placing itself in the shoes not of any real parties involved in the taking, but of a nonexistent "reasonable" buyer and seller. This is in further contrast to a genuine market transaction in which the buyer and the seller stand in their own shoes, and there is no need for a jury, or any other third party, to imagine anything concerning the value of property.

What is the significance of the fact that the condemnation process is not truly equivalent to a market transaction? Its significance lies in its demonstration that the majority operates on a faulty premise when it insists that the jury, in making its "fair market value" determination, can have access only to such information as would have been possessed by a "real" buyer and seller at the time of the "real" transaction. In the instant case, this means, according to the majority, that the jury must be deprived of the information that the

property was rezoned after it was taken. Apart from the fact that all of the majority's "realities" are merely fictive, there is simply no basis for the proposition that parties to a genuine transaction and parties to a constructive transaction can, or should, be placed on an equal footing concerning the range of access to information. This is a false equivalency because the underlying transactions are not equivalent.

In the market transaction, the buyer and the seller will typically possess considerable information that is distinctive or unique to themselves—sentimental considerations concerning property, subjective assessments of value, and estimations of worth that are a function of their personal experiences, their varied speculations of the future, and their diverse financial circumstances and ambitions. Such "subjective" factors are inaccessible to the jury, which can only make a "fair market value" determination on the basis of "objective" factors.[13] Just as the participants in the "subjective" transaction may then possess information that is un-

[13] "Market value" or "fair market value" is defined as the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner who was willing but not obliged to sell it.

> The hypothetical nature of this "value" should be obvious. Moreover, the condemnee is assumed to be not only a "willing seller" but also a person who will act as a purely economic creature, when in fact neither assumption may be true. One inescapable result of imposing the purely economic "willing seller" persona onto the condemnee is that the formula permits no compensation for subjective or sentimental attachment that the condemnee may have to the property. Only objective transferable value is considered. Subjective nontransferable value, such as . . . sentimental value generally [is] not included in the just compensation calculation. [13 Powell, Real Property, § 79F.04[2][a][i], pp 37-38.]

available to the participants in the "objective" transaction, the corollary is also true. For the participants in the "subjective" transaction are involved in the task of calculating "personal value," while the participants in the "objective" transaction are involved in the very different task of calculating "fair market value." In calculating the former amount as accurately as possible —"personal value"—it is necessary merely that the buyer and the seller be permitted to take into consideration as much information as is of importance to each. In calculating the latter amount as accurately as possible—"fair market value"—it is necessary in contrast that as much relevant information as available concerning value be taken into consideration.

For the reasons set forth earlier, I believe that evidence of posttaking rezoning is relevant to "fair market value." Such relevance is not diminished by the fact that this information might not have been available to participants in a "subjective" transaction. Although the "objective" transaction of the condemnation process can never truly replicate the "subjective" transaction of the marketplace, it can nonetheless be made as perfect as possible on its own terms. This can be achieved only by making available as much relevant information as possible to the fact-finder.

C. PROBATIVE VALUE VERSUS DANGER OF UNFAIR PREJUDICE

MDOT argues that, even if evidence of the posttaking rezoning is relevant evidence, it should be excluded pursuant to MRE 403. MRE 403 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

However, "[e]vidence is not inadmissible simply because it is prejudicial." *Waknin v Chamberlain*, 467 Mich 329, 334; 653 NW2d 176 (2002). " ' "Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403 . . . ." ' " *Id*. at 334 (citations omitted). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id*. at 334 n 3, quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). "The fact that, subsequent to the taking, the zoning ordinance was actually amended to permit the previously proscribed use has been held to be *weighty evidence* of the existence (at the time of the taking) of the fact that there was a reasonable probability of an imminent change." 4 Nichols, Eminent Domain (3d ed), § 12C.03[3] (emphasis added). Evidence of a posttaking rezoning "is not *merely marginally probative evidence*, and thus there is no danger that marginally probative evidence will be given undue weight by the jury." *Waknin, supra* at 335 (emphasis added). Further, the trial court repeatedly instructed the jury that it was to value the property as of the date of the taking,[14] and we

[14] The trial court instructed the jury:

> Your award must be based upon the market value of the property *as of the date of taking*. . . .
>
> * * *
>
> The Court has instructed you on the subject of highest and best use. One of the things that must be considered in deciding what the highest and best use of the property was *at the time of the taking* is the zoning clarification — zoning classification of the property *at that time*. However, if there was a reasonable possibility, absent the threat of this condemnation case, that the zoning

must presume that the jurors understood and followed these instructions.[15] *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001).

D. PRACTICAL VALUE OF EVIDENCE OF POSTTAKING REZONING

At trial, MDOT argued that there was no "reasonable possibility" that the property would be rezoned. Not permitting defendants to respond to this argument with the fact that the property has, in fact, been rezoned undermines the integrity of the judicial process by

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> classification would have been changed, you should consider this possibility in arriving at the value of the property *on the date of taking*. . . .
>
> In this case, the market value of the property, both before and after the taking, must be determined *as of December 7th, 1995*, and *not at an earlier or later date*. [Emphasis added.]

[15] Justice KELLY contends that admission of evidence of a posttaking rezoning would be too confusing for a jury to handle, and the plurality concludes that such evidence "cannot be . . . easily 'confined.' " *Ante* at 159, 160, 161; *ante* at 145 n 42. I believe that a jury is quite capable of making a distinction between the fair market value of the property at the time of the taking and the fair market value of the property at some later time. I also believe that a jury is quite capable of understanding that just because the property today is zoned commercial does not necessarily mean that there was a "reasonable possibility" of the property being rezoned commercial $2\frac{1}{2}$ years earlier. If jurors can be trusted sufficiently to determine what constitutes "just compensation," or the fair market value of property, they can also be trusted to pay heed to the trial court when it plainly instructs them on proper and improper uses of evidence.

Justice KELLY has determined that "the jury was overwhelmed with the evidence of the posttaking rezoning," that it "ignored significant evidence that rezoning was not foreseeable," and that it "likely gave the posttaking evidence far more weight than it merited." *Ante* at 161. There is no evidence to sustain this determination, other than the fact that the jury's calculation of fair market value was closer to that proposed by defendants than by plaintiff. Moreover, "just compensation" is a factual question that is normally left to the jury to decide, not the judges of this or any other court.

requiring a jury to ignore reality. That is, the majority would require the jury to ignore the skyscraper that looms over a property, or the crowds milling about the new sports stadium. Such a determined obliviousness to reality brings no honor to a justice system when there are customary and traditional means—a trial court that precisely instructs on the law and a jury that faithfully abides by the instructions—by which to ensure that the skyscraper or the sports stadium is evaluated only for proper purposes. The majority is correct that evidence of a posttaking rezoning is not dispositive concerning whether there existed at the time of the taking a "reasonable possibility" of a rezoning. However, it is incorrect that such rezoning can never be of any relevance in this regard. Rather, just as with all other aspects of the "just compensation" determination, the relevance of a particular posttaking rezoning must be assessed on a case-by-case basis.

The premise of our justice system is that providing more, rather than less, information will generally assist the jury in discovering the truth. Relevant evidence sustains the truth-seeking process. "In the American judicial system, a jury is called upon to assume the important role of fact-finder and the massive responsibility that the role entails: searching for the truth. 'The purpose of trial is to find the truth and exact justice through the transmission of information to the jury.' " Comment, *Speaking out: Is Texas inhibiting the search for truth by prohibiting juror questioning of witnesses in criminal cases?*, 32 Tex Tech L R 1013, 1014 (2001) (citation omitted). The costs to our justice system are almost always much greater, in my judgment, when the jury is deprived of relevant evidence than when the consideration of such evidence is enabled and a risk incurred that it will be considered for improper pur-

poses. For we can reasonably protect against the latter risk through careful instructions and thoughtful deliberations. By contrast, lost evidence will forever taint a decision that could have been enhanced by the consideration of such evidence. While recognizing that posttaking rezoning evidence can be abused, such evidence also carries the potential to ensure a truer and better-informed calculation of fair market value. To deprive the jury in this case of the ability to consider the rezoning is to undermine its ability to determine the truth in this matter, and thereby to produce the most accurate possible determination of "just compensation" to which defendants are constitutionally entitled.[16]

Finally, knowing that a jury will be apprised of all relevant information also may serve felicitously to encourage those who testify and who argue before the jury to do so in a more accurate and precise fashion. For example, a government witness may be more hesitant to tell the jury that there was no "reasonable possibility" of a rezoning if the witness knows that the jury will eventually be informed that the property has, in fact, been rezoned. In other words, a government witness may well be less cocksure in his or her assertion that there was no "reasonable possibility" of a rezoning if there is a real-world check upon the witness's testimony. Under the majority's approach, the government will remain free to tell the jury that absolutely no

[16] Contrary to Justice KELLY's criticism, I am not attempting to "negate[] the trial court's role as a gatekeeper." *Ante* at 159. I agree that it is the trial court's role to exclude evidence with regard to which "its probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. In view of her criticism, it is ironic that it is Justice KELLY who would reverse the decision of the trial court admitting evidence, finding this to constitute an abuse of discretion.

possibility of a rezoning existed, and the property owner will be unable to rebut this assertion by being allowed to inform the jury that the property has, in fact, been rezoned.[17] To allow such a distorted picture of the reality surrounding the exercise of a constitutional power, to the benefit of the government and to the detriment of the property owner, is to undermine the integrity of the constitutional process.[18]

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[17] The plurality asserts that the admission of evidence of a posttaking rezoning would "lead to gamesmanship" because it "would give condemning agencies every incentive to postpone zoning plans in order to reduce the price of just compensation." *Ante* at 141 n 35. The plurality, however, fails to give any attention to the fact that the *exclusion* of such evidence will give the government the ability to paint a false or distorted picture of the worth of property in the face of a contrary reality. That is, while the admission of such evidence may lead to gamesmanship *outside* the courtroom, the *exclusion* of the evidence may lead to gamesmanship *inside* the courtroom. Besides the fact that the inclination of a government to engage in gamesmanship outside the courtroom may say much about its inclination within the courtroom, this Court must necessitously be most concerned about conduct within the courtroom. Maintaining the integrity of the legal process is one of our principal charges. Presumably, the political processes are available to address the conduct of governments that seek to thwart evidence in order to deny their own citizens fair market value for their "taken" properties.

Moreover, gamesmanship outside the courtroom is far less likely to arise than gamesmanship within the courtroom. Many factors play a role in a government's decision whether or not to rezone property; how much the government will have to pay for property that has already been condemned is only one of these factors. On the other hand, during a trial in which the exclusive issue is how much does the government have to pay for the condemned property, the government's dominant interest will always be to paint a picture of property of as little market value as possible.

[18] The plurality contends that my concern is misplaced because it was the city of Novi's decision to rezone the property, not MDOT's. *Ante* at 146 n 43. However, regardless of which governmental entity decided to rezone the property, it cannot be disputed that the majority's decision to exclude evidence of the posttaking rezoning is beneficial to the government and detrimental to the private property owner.

For these reasons, I conclude that the trial court did not abuse its discretion in admitting evidence of the posttaking rezoning.[19]

E. EVIDENCE THAT POSTTAKING REZONING WAS CAUSED BY TAKING

A posttaking rezoning is admissible only as evidence that a "reasonable possibility" of a rezoning existed at the time of the taking.[20] A rezoning that was caused by

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[19] Although I conclude that evidence of a posttaking rezoning is admissible, I would caution that in admitting such evidence the trial court must carefully instruct the jury, as it did here, that the jury is to determine the market value at the *time of the taking* and that evidence of a posttaking rezoning is to be used only for the purpose of determining whether there existed at the time of the taking a "reasonable possibility" of rezoning. That is, the trial court must ensure that the jury does not "assign[] inflated significance" to the posttaking rezoning. *Ante* at 142 n 36. As the New Jersey Supreme Court has explained:

> [A]n amendment of the ordinance which came into being after the date of taking should not be excluded solely because of the time sequence. But such evidence should be carefully confined to its proper role. It may serve only to support the reasonableness of the factual claim that on the date of taking the parties to a voluntary sale would have recognized and been influenced by the probability of an amendment in the near future in fixing the selling price. The fact would still remain that on the date of taking the property was otherwise zoned, and the value as of that date must still be reached on the basis of facts as they then would have appeared to and been evaluated by the mythical buyer and seller. [*Gorga*, *supra* at 118.]

[20] In determining the weight to be given to a posttaking rezoning in considering whether there existed a "reasonable possibility" of a rezoning at the time of the taking, the jury should consider the totality of the circumstances, including the time that has elapsed between the taking and the rezoning, the complexity of the project and the extent to which planning for such project must have predated the taking, changed circumstances within the jurisdiction creating or affecting the need for such rezoning, the nature of changes in the composition of the pertinent zoning body and within the relevant political jurisdiction and the extent

the taking obviously does not constitute evidence that a "reasonable possibility" of a rezoning existed at the time of the taking. In other words, a posttaking rezoning that was caused by the taking is simply not relevant evidence in support of fair market value at the time of the taking. Therefore, "[t]he effect on market value of the condemnation proceeding itself may not be considered as an element of value." *Silver Creek, supra* at 379 n 13, citing MCL 213.70(1),[21] and *In re Urban Renewal, Elmwood Park Project,* 376 Mich 311, 318; 136 NW2d 896 (1965). "[A]n actual change in zoning cannot be taken into account if it 'results from the fact that the project which is the basis for the taking was impending.' " *Roach v Newton Redevelopment Auth,* 381 Mass 135, 137; 407 NE2d 1251 (1980), quoting 4 Nichols, Eminent Domain (rev 3d ed), § 12.322[1], n 7.1. See also *State v Kruger*, 77 Wash 2d 105, 108; 459 P2d 648 (1969); *People ex rel Dep't of Pub Works v Arthofer*, 245 Cal App 2d 454, 465; 54 Cal Rptr 878 (1966); *Williams v City & Co of Denver*, 147 Colo 195, 202; 363 P2d 171 (1961). The trial court itself recognized that, if the posttaking rezoning was caused by the taking, the jury should not consider the posttaking rezoning when considering whether a "reasonable possibility" of a rezon-

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to which such changes were foreseeable, the credibility of public authorities on the circumstances surrounding a rezoning, the extent to which the taking itself caused the rezoning, and any reasonable inferences that can be drawn from the fact of an actual rezoning.

[21] MCL 213.70(1) provides, in pertinent part:

> A change in the fair market value before the date of the filing of the complaint which . . . was substantially due to the general knowledge of the imminence of the acquiring by the agency . . . shall be disregarded in determining fair market value. Except as provided in section 23, the property shall be valued in all cases as though the acquisition had not been contemplated.

ing existed at the time of the taking, as it instructed the jury: "if there was a reasonable possibility, *absent the threat of this condemnation case*, that the zoning classification would have been changed, you should consider this possibility in arriving at the value of the property on the date of taking." (Emphasis added.) However, the trial court, for reasons that are unclear, refused to allow MDOT to present evidence that the posttaking rezoning may have been a result of the taking.[22]

The Court of Appeals dissent relied on MCL 213.73 to conclude that the trial court did not abuse its discretion in excluding evidence that the posttaking rezoning was caused by the taking.[23] MCL 213.73 provides, in pertinent part:

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[22] The plurality concludes that the trial court erred in admitting evidence of the posttaking rezoning and that this error was not harmless because: (1) "the jury no doubt believed that the fair market value of the property on the date of the taking was to be calculated as if rezoning were a *fact*," *ante* at 147 (emphasis in the original), a curious conclusion given that the trial court specifically instructed the jury that it was to determine what the fair market value of the property was "as of the date of taking" and the jury was made well aware that the rezoning did not take place until $2\frac{1}{2}$ years after the taking; and (2) "the trial court sorely compounded the error by refusing to allow MDOT to rebut the posttaking evidence by demonstrating that the rezoning was directly attributable to the condemnation itself." *Ante* at 147. As explained above, I agree with the majority that the trial court abused its discretion in refusing to admit MDOT's evidence. However, I disagree with the majority that the appropriate resolution is to remand for a new trial in which both defendants' and plaintiff's evidence is excluded. Instead, I would remand for a new trial in which both plaintiff's and defendants' evidence is admitted.

[23] The Court of Appeals majority did not address this issue, concluding that "[i]n light of our ruling [that the trial court abused its discretion in admitting evidence of the posttaking rezoning], we need not address whether the trial court abused its discretion in prohibiting plaintiff from introducing evidence establishing that the rezoning was caused by the condemnation." Slip op at 3 n 3.

> (1) Enhancement in value of the remainder of a parcel . . . shall be considered in determining compensation for the taking.
>
> (2) When enhancement in value is to be considered in determining compensation, the agency shall set forth in the complaint the fact that enhancement benefits are claimed and describe the construction proposed to be made which will create the enhancement.

The dissent concluded that because MDOT "did not plead in its complaint any benefit to defendants' remaining property as a result of its construction project," the trial court did not abuse its discretion "when it prevented [MDOT] from presenting evidence that the rezoning occurred as a result of its construction project . . . ." Slip op at 4. I respectfully disagree. MCL 213.73 is applicable where the condemning agency attempts to reduce the amount of "just compensation" on the basis that the condemnation actually increased the value of the remaining property that was not condemned. MDOT attempted to introduce evidence here that the rezoning was the *result* of the condemnation, not to show that defendants' remaining property was enhanced by the condemnation, but to show that when the taking occurred there was not a "reasonable possibility" of a rezoning. In other words, MDOT did not contend that it should pay less for the fifty-one acres taken because the remaining 284 acres will be worth more than before the taking. MDOT does not contend that "enhancement in value is to be considered in determining compensation." MCL 213.73. To the contrary, MDOT is arguing that enhancement in value, i.e., the subsequent rezoning, is not to be considered in determining compensation. Therefore, in my judgment, MCL 213.73 simply does not apply here.

III. CONCLUSION

Because I believe that evidence of a posttaking rezoning is admissible to demonstrate that a "reasonable possibility" of rezoning existed on the date of the taking, I do not believe that the trial court abused its discretion in admitting such evidence. However, I do believe that the trial court abused its discretion in prohibiting plaintiff from introducing evidence that the posttaking rezoning was *caused* by the taking. Therefore, I would vacate the decision of the Court of Appeals and remand this case for a new trial, in which defendants would be allowed to introduce evidence of the posttaking rezoning and plaintiff would be allowed to introduce evidence that this posttaking rezoning was the result of the taking.

CITY OF GROSSE POINTE PARK v MICHIGAN MUNICIPAL LIABILITY AND PROPERTY POOL

Docket No. 125630. Argued March 9, 2005 (Calendar No. 8). Decided July 19, 2005.

The city of Grosse Pointe Park brought an action in the Wayne Circuit Court against the Michigan Municipal Liability and Property Pool, seeking a declaratory judgment that the defendant was obligated under a contract of liability insurance to indemnify the city for damages paid by the city in an underlying action brought against the city by residents living near a creek into which the city discharged sewage when the city's sewer system experienced an overload. The defendant had provided a defense in the underlying action under a reservation of rights that stated that coverage might not be available pursuant to the policy's pollution exclusion clause. The trial court, Amy P. Hathaway, J., granted summary disposition in favor of the city, finding that the defendant was equitably estopped from invoking the pollution exclusion clause. The Court of Appeals, WHITE and COOPER, JJ. (O'CONNELL, P.J., concurring in part and dissenting in part), reversed and remanded with regard to the trial court's determination that the defendant was estopped as a matter of law from denying coverage, concluding that a question of fact existed with regard to the issue of estoppel. Unpublished opinion per curiam issued October 30, 2003 (Docket No. 228347). The Supreme Court granted the defendant's application for leave to appeal. 471 Mich 915 (2004).

In separate opinions, the Supreme Court *held*:

The pollution exclusion clause is not latently ambiguous. According to the plain language of that clause, sewage is a pollutant. The clause applies under the facts of this case. The defendant is not estopped from enforcing the clause. The decision of the Court of Appeals must be reversed and the matter must be remanded to the trial court for entry of an order of summary disposition in favor of the defendant.

Justice CAVANAGH, joined by Justices WEAVER and KELLY, stated that there is no patent or latent ambiguity in the pollution exclusion clause. Therefore, extrinsic evidence may not be examined as an aid in the construction of the policy. The discharges by

the city fell within the scope of the pollution exclusion provision and coverage was properly denied on that basis. The defendant was not estopped from enforcing the provision. The judgment of the Court of Appeals must be reversed and the matter must be remanded to the trial court for entry of an order of summary disposition in favor of the defendant.

Justice YOUNG, joined by Chief Justice TAYLOR and Justice MARKMAN, stated that the insurance policy at issue is not latently ambiguous and it therefore must be enforced as written. Sewage is clearly a pollutant under the plain language of the pollution exclusion clause. While extrinsic evidence may generally be introduced to demonstrate the existence of a latent ambiguity, the court must presume that the contracting parties' intent is manifested in the actual language used in the contract itself. The party alleging the existence of a latent ambiguity may rebut this presumption only by proving, through clear and convincing evidence, that such an ambiguity does actually exist. The city failed to meet this burden of proof. The pool is not equitably estopped from denying coverage because estoppel will not be applied to broaden coverage beyond the particular risks specifically covered by the policy itself.

Reversed and remanded.

CORRIGAN, J., did not participate.

Bodman LLP (by *R. Craig Hupp* and *James A. Smith*) for the plaintiff.

Pear Sperling Eggan & Daniels, P.C. (by *Thomas E. Daniels* and *Karl V. Fink*), for the defendant.

CAVANAGH, J. Plaintiff city of Grosse Pointe Park had a practice of discharging sewage into a nearby creek when its sewer system became overtaxed during, for example, heavy periods of rain. As a result of these discharges, the residents who lived near the creek filed a lawsuit against the city. Defendant Michigan Municipal Liability and Property Pool was the city's insurer and provided a defense in the lawsuit under a reservation of rights. Although the pool covered other claims regarding sewage backups into homes and businesses, the pool refused to cover claims regarding the dis-

charges into the creek on the basis of the insurance policy's pollution exclusion clause.

In this insurance coverage case, we must decide whether the insurance policy's pollution exclusion clause is ambiguous and whether extrinsic evidence may be examined in this particular case to aid in the construction of the policy. We hold that this pollution exclusion clause is not ambiguous; therefore, consideration of extrinsic evidence as a construction aid is not appropriate. Further, we conclude that the city's discharges fell within the scope of the pollution exclusion provision and, thus, coverage was properly denied on this basis.

Because we conclude that the pollution exclusion clause applies, we must also decide whether the pool is nonetheless estopped from enforcing this clause because of its practice of covering sewage backup claims or because of the manner in which it provided a defense to the city. We hold that under these facts, the pool is not estopped from enforcing the pollution exclusion clause. The pool timely reserved its rights under the policy, and the city was aware of the reservation. While the city claims to have suffered prejudice as a result of its reliance on a belief that the underlying lawsuit would be covered, this belief was not justifiable under the facts presented in this case. Accordingly, the decision of the Court of Appeals is reversed, and we remand this case to the trial court for entry of an order of summary disposition in favor of the pool.

I. FACTS AND PROCEEDINGS

In 1938, plaintiff city of Grosse Pointe Park entered into a contract with the city of Detroit to use Detroit's sewer system. Under the terms of the contract, Grosse Pointe Park acquired the right to pump the contents of

its sewer line into an interceptor sewer for transport to Detroit's treatment plant. Further, Grosse Pointe Park was permitted under the contract to build a pump station and a discharge pipe. If Grosse Pointe Park's sewer flow exceeded eighty-four cubic feet a second and its line became overtaxed, the discharge pipe would allow Grosse Pointe Park to discharge the overflow into Fox Creek. Fox Creek is a tributary located in Detroit, but rests close to the Detroit-Grosse Pointe Park border.

At the time, Grosse Pointe Park had what is known as a combined sewer system, whereby sewage and rainwater are transported to a treatment plant in a single sewer line. If, for example, there was a heavy rainfall and the capacity of the sewer system became strained, both sewage and rainwater would flow into the basements of buildings connected to the city's sewer line. To relieve the overflow and prevent basement backups, the city would pump sewage and rainwater into Fox Creek. Beginning in about 1940, the city began discharging overflow from the combined sewer system into Fox Creek. Soon after the first discharges, residents near Fox Creek began to complain of this practice. Nonetheless, this practice continued until 1995, roughly fifty-five years.[1]

Defendant Michigan Municipal Liability and Property Pool is a group self-insurance pool created by certain local governments. See MCL 124.5. Every year, beginning in 1985 and running through 1998, Grosse Pointe Park purchased one-year, occurrence-based liability policies from the pool. Each policy period ran from August 1 to July 31. While these

[1] Grosse Pointe Park now uses a separated sewer system, whereby sewage and rainwater are collected and transported in separate sewer lines. Further, the city has blocked the discharge pipe leading into Fox Creek.

policies were in effect, Grosse Pointe Park residents made numerous claims against the city for sewage backups into their homes and businesses, and the pool covered these claims. At issue in this case is the policy issued on August 1, 1994, and effective through July 31, 1995.

Underlying this case is a class action filed in Wayne Circuit Court against the city by residents who lived near Fox Creek, *Etheridge v Grosse Pointe Park* (Docket No. 95-527115NZ).[2] The *Etheridge* complaint was filed on September 14, 1995, and the plaintiffs alleged that their homes were flooded by the city's discharge of sewer overflow into Fox Creek on July 24, 1995. Because of this discharge, as well as the city's long-term practice of discharging into Fox Creek, the plaintiff class alleged claims for trespass, nuisance, trespass/nuisance, gross negligence, and a taking; also alleged were third-party beneficiary claims arising under the contracts between Grosse Pointe Park and Detroit. Grosse Pointe Park submitted the *Etheridge* complaint to the pool for defense and indemnification coverage.

On October 6, 1995, the pool sent a letter to the city, indicating that it would provide the city a defense, but that it was reserving its rights under the policy. The letter provided, in pertinent part:

> Our review of the [*Etheridge*] Complaint reveals that if judgment or damages are awarded based on certain allegations, the judgments based on those allegations may not be covered by the coverage contract. The purpose of this letter is to point out the allegations and exposures that may not be covered, and to formally advise you that we will defend the entire action, with your cooperation, but will not pay

[2] The *Etheridge* complaint also named the city of Detroit as a defendant.

any damages not covered by our contract. In legal terms, we are reserving our rights to restrict payments to those owed under the coverage contract.

* * *

Please be advised that if there is any judgment against the City of Grosse Pointe Park for eminent domain, a discharge of any pollutants, or an intentional act, the Michigan Municipal Liability & Property Pool reserves the right not to indemnify Grosse Pointe Park for said damages.

After noting the allegations and exposures, among other things, the pool's letter referred the city to section V of the insurance policy and specifically quoted the following language from that section—the pollution exclusion clause:

In addition to the specific exclusions in SECTION I–COVERAGES A–BODILY INJURY AND PROPERTY DAMAGE LIABILITY, B–PERSONAL AND ADVERTISING INJURY LIABILITY, C–MEDICAL PAYMENTS, D–PUBLIC OFFICIALS ERRORS AND OMISSIONS, AND E–AUTO, this coverage does not apply to:

d. bodily Injury or Property Damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(1) At or form [sic] any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any Member;

(2) At or from any premises, site or location which is or was at any time used by or fro [sic] any Member or others for the handling, storage, disposal, processing or treatment of waste;

(3) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or fro [sic] may [sic] Member or any person or organization for whom you may be legally responsible, or

(4) At or from any premises, site or location on which any Member or any contractors or subcontractors working directly or indirectly on any Member's behalf are performing operations:

(a) if the pollutants are brought on or to the premises, site or location in connection with such operations by such Member contractor or subcontractor; or

(b) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

* * *

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

The pool received all the pleadings and participated in the *Etheridge* litigation by attending meetings, hearings, and facilitation. Notably, the pool also continued to cover basement backup claims during the *Etheridge* lawsuit. Settlement was ultimately reached in the *Etheridge* lawsuit, whereby Grosse Pointe Park and Detroit would each pay the plaintiffs $1.9 million and take the necessary action to stop the discharges into Fox Creek. The pool then notified Grosse Pointe Park that indemnification coverage would be denied. Nonetheless, Grosse Pointe Park finalized the *Etheridge* settlement and filed this declaratory judgment action.[3] Both parties moved for summary disposition, and the trial

[3] In count I, the city alleged that the pool breached the insurance contract by failing to provide coverage in the *Etheridge* lawsuit. Count II alleged that the pool breached its duty to timely investigate, decide whether the claims were covered, and timely communicate its decision to deny coverage. In counts III through V, the city alleged alternative theories seeking equitable relief. And count VI alleged a violation of the Michigan Consumer Protection Act.

court concluded that the pool was equitably estopped from invoking the pollution exclusion clause to deny coverage because the pool had previously paid basement backup claims without incident.[4] Thus, the trial court granted the city's motions for summary disposition and ordered the pool to indemnify the city for the amount of the *Etheridge* settlement. The pool appealed this decision.

In a two-to-one decision, the Court of Appeals reversed the trial court's determination that the pool was estopped as a matter of law from denying coverage, reasoning that a question of fact existed on this issue. Unpublished opinion per curiam of the Court of Appeals, issued October 30, 2003 (Docket No. 228347). Moreover, the Court of Appeals majority concluded, among other things, that the city presented a question of fact regarding the parties' intent concerning the application and meaning of the pollution exclusion clause. Because of the pool's practice of paying basement backup claims without invoking the pollution exclusion clause, the Court of Appeals held that extrinsic evidence regarding such payments may reveal an ambiguity in the insurance policy, relying on *Michigan Millers Mut Ins Co v Bronson Plating Co*, 197 Mich App 482; 496 NW2d 373 (1992), aff'd 445 Mich 558 (1994), overruled on other grounds in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41 (2003). Judge O'CONNELL dissenting in part, asserted that because the policy was unambiguous and the pool reserved its rights under the policy, (1) consideration of extrinsic evidence was unwarranted, and (2) equitable estoppel did not apply.

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[4] The trial court also dismissed counts II and VI of the complaint and dismissed counts III through V as moot in light of the relief granted under count I.

This Court granted the pool's application for leave to appeal, limited to the issues whether: (1) sewage is a "pollutant" under the applicable insurance policy's pollution exclusion clause; (2) extrinsic evidence may be used to establish an ambiguity in this pollution exclusion clause; and (3) the pool may be estopped from asserting the pollution exclusion clause.[5]

II. ANALYSIS

We review decisions on motions for summary dispositions de novo. *American Federation of State, Co & Muni Employees v Detroit*, 468 Mich 388, 398; 662 NW2d 695 (2003). Similarly, the proper interpretation and application of an insurance policy is a question of law that we review de novo. *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001).

A. EXTRINSIC EVIDENCE AND THE POLLUTION EXCLUSION CLAUSE

The Court of Appeals observed that although an insurance policy is enforced according to its terms, the contracting parties' intent controls. Further, the Court of Appeals reasoned that because the city had presented evidence that the pool repeatedly paid basement backup claims, a question of fact existed with respect to the

[5] 471 Mich 915 (2004). After granting leave to appeal and before this Court heard oral arguments in this case, we granted the pool's motion for immediate consideration but denied its motion to strike the city's brief on appeal. Unpublished order of the Supreme Court, entered March 4, 2005 (Docket No. 125630). In response to the pool's motions, the city filed a brief in opposition to the motions, a motion for immediate consideration, and a motion to supplement the record on appeal. We did not rule on the city's motions before entertaining oral arguments. Thus, we take this opportunity to grant the city's motion for immediate consideration, but deny its motion to supplement the record on appeal.

parties' intent regarding the applicability of the pollution exclusion clause. Relying on *Michigan Millers*, *supra*,[6] the Court of Appeals concluded that the insurance policy was not "so unambiguous that no extrinsic evidence of the parties' intent can be considered." Slip op at 7 n 9. We disagree with the Court of Appeals rationale.

"An insurance policy is much the same as any other contract." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate." *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). In light of this cardinal rule, and to effec-

[6] In *Michigan Millers*, the defendant insured submitted discovery requests to the plaintiff and other insurers, desiring information on the plaintiff's handling of certain types of insurance claims. The insurers denied the requests. The trial court agreed that the information sought was irrelevant and assessed sanctions on the defendant. On appeal, the defendant claimed that how the insurers handled past claims was relevant to show whether the term "suit," as used in the contract, was ambiguous. Stated differently, the defendant argued that extrinsic evidence would tend to show that the insurers' construction of "suit" was wrong, or at least ambiguous. The plaintiff asserted that the requested information was irrelevant because: (1) if the term is unambiguous, extrinsic evidence is not admissible to contradict the insurance policy; or (2) if the term is ambiguous, the term is construed against the insurers and in favor of the defendant. The Court of Appeals agreed with the defendant.

The Court of Appeals noted that the plaintiff's rationale ignored "a third principle of evidence. Extrinsic evidence is admissible to show the *existence* of an ambiguity." *Michigan Millers*, *supra* at 495 (emphasis in original). Accordingly, the Court of Appeals found that the information the defendant sought was relevant to show the insurers' prior interpretations of the term "suit." Thus, the Court of Appeals vacated the trial court's order assessing sanctions. However, the Court of Appeals noted that the purpose for which the defendant wanted the information was rendered moot because the Court of Appeals actually interpreted the term "suit" and concluded that a "suit" had been brought.

tuate the principle of freedom of contract, this Court has generally observed that "[i]f the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning; but if it is ambiguous, testimony may be taken to explain the ambiguity." *New Amsterdam Cas Co v Sokolowski*, 374 Mich 340, 342; 132 NW2d 66 (1965); see also *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). "However, we will not create ambiguity where the terms of the contract are clear." *Id*.

In light of these principles, we note that consideration of extrinsic evidence generally depends on some finding of contractual ambiguity. Ambiguity in written contracts can fairly be said to consist of two types: patent and latent. A patent ambiguity is one "that clearly appears on the face of a document, arising from the language itself." Black's Law Dictionary (7th ed). See also *Hall v Equitable Life Assurance Society*, 295 Mich 404, 409; 295 NW 204 (1940). Accordingly, resort to extrinsic evidence is unnecessary to detect a patent ambiguity. A latent ambiguity, however, is one "that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." Black's Law Dictionary (7th ed). Because "the detection of a latent ambiguity requires a consideration of factors outside the instrument itself, extrinsic evidence is obviously admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist." *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575; 127 NW2d 340 (1964). In other words, "where a latent ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid to the construction of the contract." *Id*. Thus, the question becomes whether an ambiguity exists in this insurance policy's pollution exclusion clause.

This insurance policy provides that coverage is excluded when bodily injury or property damage results from "the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants." The policy further defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The insurance policy, however, does not specifically define "waste." Where a term is not defined in the policy, it is accorded its commonly understood meaning. *Allstate Ins Co v McCarn*, 466 Mich 277, 280; 645 NW2d 20 (2002) (*McCarn I*). "Waste" is commonly understood to include sewage.[7] In other words, "waste" is commonly understood to include urine and feces, bathwater and dishwater, toilet paper, feminine napkins and tampons, condoms, and the countless other substances typically introduced into a sewer system.

We believe that the term "waste" in this policy is not patently ambiguous and the text of the policy fairly admits of but one interpretation.[8] We must observe, however, that we do not make this determination lightly. Again, the cardinal rule in the interpretation of contracts is to ascertain and give effect to the parties' intentions. *McIntosh*, *supra* at 218. We are also mindful of Professor Corbin's warning that when judges attempt to enforce a contract according to their own

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[7] See, e.g., *American Heritage Dictionary* (2d college ed, 1982) (defining "waste" to include "[a] useless or worthless by-product . . . [g]arbage; trash . . . [t]he undigested residue of food eliminated from the body").

[8] See, e.g., *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982) ("Yet if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear."). See also *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 70-73; 467 NW2d 17 (1991); *Auto Club Ins Ass'n v DeLaGarza*, 433 Mich 208, 213; 444 NW2d 803 (1989).

understanding of what is plain and clear, these judges run the risk of substituting their own judgment for the intent of the parties and, thus, making a contract for the parties that was never intended. See *Stark v Budwarker, Inc*, 25 Mich App 305, 314; 181 NW2d 298 (1970).[9] Indeed, such a result would actually undermine the freedom of contract principle. Nonetheless, we conclude that this pollution exclusion clause is not patently ambiguous because an ambiguity does not readily appear in the text of the policy. Again, courts are not permitted to "create ambiguity where the terms of the contract are clear." *Masters*, *supra* at 111. Therefore, we will apply this pollution exclusion clause as written unless we determine that a latent ambiguity arises from a matter outside of the text of the policy.

We initially observe that it is well-established that "[i]n construing [contractual provisions] due regard must be had to the purpose sought to be accomplished

[9] Professor Corbin observes:

> On reading the words of a contract, a judge may jump to the instant and confident opinion that these words have but one reasonable meaning. A greater familiarity with dictionaries and the usages of words, a better understanding of the uncertainties of languages, and a comparative study of more cases in the field of interpretation, will make one beware of holding such an opinion. A judge who believes that contract terms can have a single, reasonable meaning that is apparent without reference to extrinsic evidence of the parties' intentions "retires into that lawyer's Paradise where all words have a fixed, precisely ascertained meaning; where [people] may express their purposes, not only with accuracy, but with fulness [sic]; and where, if the writer has been careful, a lawyer . . . may sit in [a] chair, inspect the text, and answer all questions . . . ." Such a belief is unrealistic, for "the fatal necessity of looking outside the text in order to identify persons and things, tends steadily to destroy such illusions and to reveal the essential imperfection of language, whether spoken or written." [5 Corbin, Contracts, § 24.7, pp 32-33 (rev ed, 1998) (internal citations omitted).]

by the parties as indicated by the language used, read in the light of the attendant facts and circumstances. Such intent when ascertained must, if possible, be given effect and must prevail as against the literal meaning of expressions used in the agreement." *W O Barnes Co, Inc v Folsinski*, 337 Mich 370, 376-377; 60 NW2d 302 (1953). Further, attendant facts and circumstances explain the context in which the words were used and may reveal the meaning the parties intended. *Sobczak v Kotwicki*, 347 Mich 242, 249; 79 NW2d 471 (1956).[10] In this respect, the detection of a latent ambiguity unquestionably requires consideration of factors outside the policy itself. *McCarty*, *supra* at 575. Therefore, extrinsic evidence is admissible to prove the existence of the ambiguity, and, if a latent ambiguity is proven to exist, extrinsic evidence may then be used as an aid in the construction of the contract. *Id*.; see also *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195, 209-210; 220 NW2d 664 (1974). In light of the attendant facts and circumstances of this case, we conclude that a latent ambiguity does not exist.

We are unpersuaded by Grosse Pointe Park's arguments that the pool's practice of covering basement backup claims somehow shows that this pollution exclusion clause is ambiguous. The pool's practice of paying backup claims does not render the clause susceptible to two reasonable, yet mutually exclusive,

[10] See also 5 Corbin, Contracts, § 24.7, p 31 (rev ed, 1998) ("It is therefore invariably necessary, before a court can give any meaning to the words of a contract and can select a single meaning rather than other possible ones as the basis for the determination of rights and other legal effects, that extrinsic evidence be admitted to make the court aware of the 'surrounding circumstances,' including the persons, objects, and events to which the words can be applied and which caused the words to be used." [internal citations omitted]); see also 2 Restatement Contracts, 2d, §§ 200-203.

interpretations. Indeed, the pool's practice does not change our conclusions that the parties intended for coverage to be excluded when property damage results from the actual discharge of pollutants, that pollutants include waste, and that the term "waste" include urine and feces, bathwater and dishwater, toilet paper, feminine napkins and tampons, condoms, and the countless other substances typically introduced into a sewer system. Indeed, a latent ambiguity does not exist under this policy because when we consider how the clause applies or has been applied, it cannot be said that the clause was intended to have a different meaning than that reflected in the text of the policy. Accordingly, after considering factors outside the four corners of this policy, we cannot detect any latent ambiguities.[11] In

[11] We disagree with Justice YOUNG's proposal to adopt a clear and convincing standard with respect to proving the existence of a latent ambiguity. In support of this standard, Justice YOUNG relies on a broad reading of *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362; 666 NW2d 251 (2003). However, *Nagel* was concerned with the circumstances under which a contract can be *waived or modified*. Accordingly, where a party alleges waiver or modification, that party is alleging that both contracting parties mutually assented to *alter or amend* the existing contract. Therefore, a clear and convincing standard in this context makes sense. This standard, however, does not necessarily make sense where a party alleges the existence of a latent ambiguity.

When a party alleges the existence of a latent ambiguity, that party, contrary to Justice YOUNG's implications, is not attempting to alter or amend the bargain struck. Rather, the party argues that application of the contract's terms would be inconsistent with the parties' intent. Thus, the party alleging the existence of a latent ambiguity is arguing that the parties' intent should be effectuated-the cardinal rule of contract interpretation. However, the party alleging the existence of a latent ambiguity is not arguing that the contract was altered or amended.

Accordingly, *Nagel* is distinguishable and we believe that Justice YOUNG's broad reading of that decision to support his view cannot withstand scrutiny. Further, the other decisions Justice YOUNG uses to support his rationale are distinguishable as well. In our view, none of these cases supports his preference to impose a clear and convincing

other words, the extrinsic evidence introduced by Grosse Pointe Park does not prove the existence of a latent ambiguity. Thus, it is unnecessary to examine outside factors as an aid in construing this policy.

In sum, we conclude that this pollution exclusion clause is not patently ambiguous. Further, review of extrinsic evidence neither leads to the detection nor proves the existence of a latent ambiguity. Thus, because an ambiguity does not exist, extrinsic evidence is inadmissible as an aid in the construction of this policy. Accordingly, we hold that the Court of Appeals erred when it concluded that the insurance policy was not "so unambiguous" and, thus, extrinsic evidence was generally admissible.

Because we believe that this policy's pollution exclusion clause is unambiguous, we will enforce it according to its terms and consistent with the parties' intent. When we accord "waste" the meaning intended by the parties, as well as its commonly understood meaning, we have little difficulty concluding that the city discharged "pollutants" into Fox Creek. Thus, we hold that the city's discharges fell under the purview of this insurance policy's pollution exclusion clause.

B. ESTOPPEL

Having concluded that the discharges fall under the pollution exclusion clause, we must next decide whether the pool is nonetheless estopped from enforcing the clause. "The principle of estoppel is an equitable defense that prevents one party to a contract from enforc-

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standard on a party arguing the existence of a latent ambiguity. While Justice YOUNG may be inclined to broadly extend "common theme[s]," without more we must decline in this instance to adopt Justice YOUNG's preference to impose a clear and convincing standard on contracting parties.

ing a specific provision contained in the contract." *Morales v Auto-Owners Ins Co*, 458 Mich 288, 295; 582 NW2d 776 (1998). For equitable estoppel to apply, the city must establish that (1) the pool's acts or representations induced the city to believe that the pollution exclusion clause would not be enforced and that coverage would be provided, (2) the city justifiably relied on this belief, and (3) the city was prejudiced as a result of its reliance on its belief that the clause would not be enforced and coverage would be provided. See, e.g., *Morales*, *supra* at 296-297.

The city maintains that the pool should be estopped from enforcing the pollution exclusion clause because of the pool's practice of covering basement backup claims before, during, and after the underlying litigation in this case, without ever invoking the pollution exclusion clause. According to the city, the pool's failure to enforce this clause, as well as the manner in which the pool conducted the defense, led the city to believe that the underlying litigation would be covered. The city maintains that were it not for this belief, it would have conducted discovery and settlement negotiations differently. Thus, the city contends that it was prejudiced by its reliance on its belief that coverage would be provided in the underlying suit.

The Court of Appeals, in part, remanded this matter to the trial court for consideration of this issue, concluding that a question of fact remained whether the pool should be estopped from asserting the pollution exclusion clause. We disagree. Under the facts of this case, a reasonable trier of fact could not conclude that the city satisfied its burden.

In this case, it cannot be said that the city's reliance on the pool's actions or representations was justified. At the beginning of the underlying litigation, the pool

notified the city that it would provide a defense in the underlying litigation, "but will not pay any damages not covered by our contract. In legal terms, we are reserving our rights to restrict payments to those owed under the coverage contract." The pool timely notified the city that if any judgment was entered against the city for the discharge of pollutants into Fox Creek, the pool was reserving the right to not indemnify, specifically quoting the pollution exclusion clause. We find the pool's reservation of rights particularly damaging to the city's estoppel theory.

"[W]hen an insurance company undertakes the defense of its insured, it has a duty to give reasonable notice to the insured that it is proceeding under a reservation of rights, or the insurance company will be estopped from denying its liability." *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 593; 592 NW2d 707 (1999). Here, the pool duly reserved its rights, and the city was aware of the reservation. Accordingly, the city was on notice that the pool might not indemnify it. Moreover, by the city's own account, the pool had never before reserved its right to contest coverage under the auspices of the pollution exclusion clause. Yet the city claims that it was justified in believing that the pool would indemnify it. We believe, however, that these facts, when viewed in the light most favorable to the city, weigh against a finding of estoppel.

The city was clearly on notice that the pool might not provide coverage under the pollution exclusion clause. While the city was aware that the pool had never sought to enforce the pollution exclusion clause before the underlying litigation, this Court had not been presented with any evidence that the pool reserved its rights on the basis of the pollution exclusion clause with regard to any other claim.

Because the pool timely notified the city at the start of the underlying litigation that it was reserving its rights, the pool specifically invoked the pollution exclusion clause, the pool had done neither before, and, arguably, the nature of the discharges differed from the nature of the basement backups, we fail to see how the city was justified in believing that indemnification would be provided in this particular case.[12]

In sum, we find the city's position untenable. No reasonable trier of fact could conclude that the city was

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[12] We disagree with Justice YOUNG's expansive reading of *Kirschner*, *supra*. Relying on that decision, Justice YOUNG posits that even if Grosse Pointe Park could prove all the elements for the application of estoppel, the city will still be unprotected because estoppel can never be applied to extend coverage, period. In our view, Justice YOUNG misreads *Kirschner*. *Kirschner* does not set forth the inflexible rule that Justice YOUNG prefers. Indeed, Justice WEAVER's *Kirschner* opinion was careful to avoid making sweeping generalizations or extending *Ruddock v Detroit Life Ins Co*, 209 Mich 638; 177 NW 242 (1920), beyond its intended bounds. Further, *Kirschner*, *supra* at 594-595, prudently observed that in some instances, courts have applied the doctrine of estoppel to bring within coverage risks not covered by the policy. *Kirschner* then provided a few examples–examples that we believe are not exhaustive nor could reasonably be inferred to be exhaustive. Justice YOUNG further laments that we do not give credence to the "prominent language" from *Kirschner* that emphasizes that " '[t]he application of . . . estoppel is limited . . . .' " *Post* at 222 n 35, quoting *Kirschner*, *supra* at 593-594. We respectfully disagree. Rather, we believe that our evenhanded reading of *Kirschner* considers *all* of the opinion's "prominent language." For example, this Court observed that the "application of waiver and estoppel is limited, and, *usually*, the doctrines will not be applied to broaden the coverage of a policy . . . ." *Kirschner*, *supra* at 594 (emphasis added).

In any event, because Grosse Pointe Park's estoppel claim fails and the discharges fall under the purview of the pollution exclusion clause-as Justice YOUNG likewise concludes-it is unnecessary to determine whether estoppel could be used to bring the discharges within coverage. In other words, because Grosse Pointe Park's estoppel claim fails, it is unnecessary to adopt Justice YOUNG's preferred rule, decide whether coverage in this case should be expanded, or depart from this Court's prior precedent.

justified in believing that indemnification was certainly going to be provided in this case when the pool reasonably notified the city to the contrary. Because we find that the city's reliance was unjustified, the estoppel claim fails and it is unnecessary for us to consider whether the city was prejudiced by its reliance. Moreover, we believe that the manner in which the pool provided a defense in this particular case was not inconsistent with the reservation of rights or the pool's practice of paying basement backup claims. Thus, the pool is not estopped from enforcing the pollution exclusion clause, and the trial court erred in concluding otherwise.[13]

Accordingly, the decision of the Court of Appeals is reversed and we remand this case to the trial court for entry of an order of summary disposition in favor of the pool. MCR 7.302(G)(1).

III. CONCLUSION

Under the facts of this case, we hold that the city's discharges fell within the purview of the pollution exclusion clause. This pollution exclusion clause is not ambiguous; therefore, consideration of extrinsic evidence as aid in the construction of the policy is not appropriate. Further, we hold that under these facts, the pool is not estopped from enforcing the pollution exclusion clause. Therefore, the decision of the Court

[13] In *Kirschner*, *supra*, I joined Justice KELLY's concurrence. I do not retreat from the view expressed in that opinion. Our state would be well-served by a rule that requires an insurer to timely notify the court, the insured, and other parties that it is reserving its rights under the policy. Further, a court should be empowered to refuse to effectuate an untimely reservation of rights when the court determines that the insured was prejudiced. In this case, however, the pool timely reserved its rights and the city was made aware of the reservation of rights.

of Appeals is reversed and we remand this case to the trial court for entry of an order of summary disposition in favor of the pool.

WEAVER and KELLY, JJ., concurred with CAVANAGH, J.

YOUNG, J. Although this Court is equally divided on the appropriate legal analysis, this Court is unanimous regarding the proper result. All members of this Court agree that the insurance policy at issue is not latently ambiguous and that it must therefore be enforced as written. According to the plain language of the policy's pollution exclusion clause, it is clear that sewage is a "pollutant." Moreover, this Court is in unanimous agreement that equitable estoppel is not applicable. Accordingly, all members of this Court agree that the judgment of the Court of Appeals must be reversed and this case remanded to the trial court for entry of an order granting the Michigan Municipal Liability and Property Pool's motion for summary disposition.[1]

While all justices conclude that sewage is a "pollutant" under the clear and unambiguous language of the policy's pollution exclusion clause, the justices joining this opinion believe that principles of contract enforcement require special proofs when a contracting party seeks to vary the terms of a written agreement by alleging latent ambiguity. Thus, while extrinsic evi-

[1] It is important to note that neither Justice CAVANAGH's opinion nor ours has garnered a majority. Therefore neither establishes binding precedent. As we stated in *People v Anderson*, 389 Mich 155, 170; 205 NW2d 461 (1973), overruled in part on other grounds by *People v Hickman*, 470 Mich 602 (2004)," The clear rule in Michigan is that a majority of the Court must agree on a ground for decision in order to make that binding precedent for future cases. If there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not authority beyond the immediate parties."

dence generally may be introduced to demonstrate the existence of a latent ambiguity, we conclude that a court must presume that the contracting parties' intent is manifested in the actual language used in the contract itself unless the party alleging the existence of the latent ambiguity rebuts this presumption by proving with clear and convincing evidence that such an ambiguity does indeed exist. Here, we conclude that the city of Grosse Pointe Park has not presented clear and convincing evidence to demonstrate that a latent ambiguity actually exits. We further conclude that the Pool is not equitably estopped from denying coverage because, under the well-established rule articulated by this Court in *Ruddock v Detroit Life Ins Co*[2] and reiterated in *Kirschner v Process Design Assoc, Inc*,[3] estoppel will not be applied to expand coverage beyond the particular risks covered by the actual insurance policy itself.

I. FACTS & PROCEDURAL HISTORY

In 1938, Grosse Pointe Park and the city of Detroit entered into an agreement under which Grosse Pointe Park was permitted to discharge overflow sewage into Fox Creek, a tributary near the Grosse Pointe Park-Detroit border. Release of excess sewage into Fox Creek was necessary because Grosse Pointe Park's "combined" sewer system—a single sewer line used to transport both sewage (e.g., from toilets) and storm water runoff—would become overtaxed during periods of heavy rainfall. If Grosse Pointe Park did not use Fox Creek as a release valve during such periods, sewage would back up into the basements of homes and businesses. It is undisputed that from

[2] 209 Mich 638; 177 NW 242 (1920).

[3] 459 Mich 587; 592 NW2d 707 (1999).

1940 to 1995, Grosse Pointe Park released overflow rainwater and sewage into Fox Creek hundreds of times.[4]

Each year from 1985 to 1998, Grosse Pointe Park purchased annual "occurrence-based" commercial general liability policies from the Pool, a self-insurance pool comprised of local governments.[5] During this period, under successive annual policies, the Pool paid numerous insurance claims submitted by Grosse Pointe Park residents for sewage backups that occurred in their

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[4] Grosse Pointe Park has built and now operates a "separate" sewer system, which uses different lines for sewage and rainwater runoff. As such, Grosse Pointe Park no longer releases overflow sewage into Fox Creek.

[5] Municipal insurance pools are statutorily authorized under MCL 124.5, which provides:

> (1) Notwithstanding any other provision of law to the contrary, any 2 or more municipal corporations, by intergovernmental contract, may form a group self-insurance pool to provide for joint or cooperative action relative to their financial and administrative resources for the purpose of providing to the participating municipal corporations risk management and coverage for pool members and employees of pool members, for acts or omissions arising out of the scope of their employment, including any or all of the following:
>
> (a) Casualty insurance, including general and professional liability coverage.
>
> (b) Property insurance, including marine insurance and inland navigation and transportation insurance coverage.
>
> (c) Automobile insurance, including motor vehicle liability insurance coverage and security for motor vehicles owned or operated, as required by section 3101 of the insurance code of 1956, 1956 PA 218, MCL 500.3101, and protection against other liability and loss associated with the ownership of motor vehicles.
>
> (d) Surety and fidelity insurance coverage.
>
> (e) Umbrella and excess insurance coverages.

basements. It did so without issuing reservation of rights letters based on the policies' pollution exclusion clauses, unlike in the present case. The particular insurance policy at issue covers the period from August 1, 1994, to August 1, 1995.

The current dispute derives from an underlying class action (the *Etheridge* litigation) brought by Grosse Pointe Park residents against the city for discharges made into Fox Creek in July 1995. In the *Etheridge* complaint, filed on September 14, 1995, the class action plaintiffs sued Grosse Pointe Park under various trespass, nuisance, and negligence theories for sewage backups that occurred in their homes and businesses. In addition to basement backup claims, the *Etheridge* plaintiffs also submitted insurance claims for alleged damage caused to boats, docks, seawalls, garages, lawns, shrubbery, and outdoor furniture resulting from the city's release of sewage into Fox Creek.

On October 6, 1995, three weeks after the *Etheridge* suit was filed, the Pool provided the city a defense under a reservation of rights letter. In the letter, the Pool specifically quoted the insurance policy's pollution exclusion clause and warned the city that it had not yet determined whether it would cover any liability arising from the *Etheridge* suit. The letter concluded by stating:

> Please be advised that if there is any judgment against the City of Grosse Pointe Park for eminent domain, *a discharge of any pollutants,* or an intentional act, the Michigan Municipal Liability & Property Pool *reserves the right not to indemnify* Grosse Pointe Park for said damages. [Emphasis added.]

The Pool subsequently assigned an outside adjusting firm to monitor the *Etheridge* lawsuit. During the course of the *Etheridge* litigation, the Pool's adjuster

received copies of all pleadings and attended meetings with the litigants. The Pool also paid in-house sewage backup claims involving residences and businesses unrelated to the *Etheridge* suit while the *Etheridge* litigation was proceeding. After several facilitation sessions, in August 1997, the *Etheridge* plaintiffs agreed to settle with Grosse Pointe Park for $1.9 million.[6]

Before the *Etheridge* settlement was finalized, however, the Pool informed the city that the Pool's outside counsel did not believe that the Pool was obligated to indemnify the city given the policy's pollution exclusion clause. Subsequently, the Pool formally notified the city that coverage would be denied. Nevertheless, the city proceeded to approve the $1.9 million settlement with the *Etheridge* plaintiffs a few months later.

The city then filed suit in the Wayne Circuit Court seeking a declaratory judgment that the Pool was obligated to indemnify the city for the *Etheridge* settlement. After lengthy discovery, both the Pool and the city filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10). Ruling in favor of the city, the trial court held that the Pool was equitably estopped from denying coverage under the pollution exclusion clause because the Pool had paid prior backup claims made by Grosse Pointe Park residents.[7]

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[6] A similar settlement was reached with the city of Detroit, which was also named as a defendant in the class action, for $1.9 million.

[7] Ruling from the bench, Judge Amy P. Hathaway stated:

> It's clearly an issue of equity, which I'm not sure is going to necessarily trump the contract claim, at least in front of the Court of Appeals. But in this case we have a contract that was paid and paid and paid again under this pollutant, this sewage, and now there's a reservation of rights issue. I've got a big problem. To the

In a two-to-one decision, the Court of Appeals reversed the trial court's holding that the Pool was equitably estopped from invoking the pollution exclusion clause.[8] The Court of Appeals held that a question of fact existed with regard to the estoppel claim and therefore remanded the case to the trial court for further proceedings. It also held that the Pool's payment of prior backup claims was "extrinsic evidence" of ambiguity in the insurance policy and remanded the case to the trial court to determine "the parties' intent as to the exclusion's applicability . . . ." Judge O'CONNELL dissented, arguing that extrinsic evidence should not be considered because the insurance policy was clear and unambiguous. He further argued that equitable estoppel was not applicable because the Pool timely provided the city a reservation of rights letter. We granted the Pool's application for leave to appeal.[9]

II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim, is reviewed by this Court de novo.[10] Similarly, the interpretation of an insurance policy is also a question of law that is reviewed by this Court de novo.[11]

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point where I'm going to deny the motion, the Defendant's motion, and grant the inapplicability of the pollution exclusion based on estoppel.

[8] Unpublished opinion per curiam of the Court of Appeals, issued October 30, 2003 (Docket No. 228347).

[9] 471 Mich 915 (2004).

[10] *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 250-251; 632 NW2d 126 (2001); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

[11] *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003); *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

III. ANALYSIS

A. IS SEWAGE A "POLLUTANT" UNDER THE INSURANCE POLICY'S POLLUTION EXCLUSION CLAUSE?

The insurance policy at issue provides:

Section V — General Exclusions

In addition to the specific exclusions in SECTION I—COVERAGES A—BODILY INJURY AND PROPERTY DAMAGE LIABILITY, B—PERSONAL AND ADVERTISING INJURY LIABILITY, C—MEDICAL PAYMENTS, D—PUBLIC OFFICIALS ERRORS AND OMISSIONS, AND E—AUTO, *this coverage also does not apply to:*

* * *

d. bodily Injury or Property Damage *arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants*:

* * *

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed. [Emphasis added.]

As this Court has previously held, "The principles of construction governing other contracts apply to insurance policies."[12] As such, the foremost duty of a court in construing an insurance policy is to determine the intent of the contracting parties.[13] In doing so, a

[12] *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999).

[13] *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003); see also *Nikkel*, *supra* at 566; *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

court must always begin with the actual language used by the parties in the insurance policy itself.[14] If the text of the insurance policy is clear and unambiguous, the contract must be enforced as written.[15] "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law."[16]

It is difficult to imagine an insurance policy that is clearer or more explicit than the one found in the present case. The pollution exclusion clause defines "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant . . . ." The word "contaminant," given its plain and ordinary meaning,[17] is "something that contaminates," and "contaminate" is defined as "to make impure or unsuitable by contact or mixture with something unclean, bad, etc.; pollute; taint . . . ."[18] It is undeniable that Fox Creek was "made impure" and "tainted" by the sewage that the city released. The record indicates that the sewage contained dirt, debris, garbage, condoms, feminine hygiene products, urine, feces, dishwater, toilet paper, cleaning fluids, and compounds containing E. coli. Therefore, because these "solid" and "liquid" materials are "contaminants," the sewage the city released is necessarily a "pollutant" under the plain terms of the insurance policy.

This conclusion is bolstered by the fact that the pollution exclusion clause also provides specific ex-

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[14] *Quality Products, supra* at 375.

[15] *Id.*; *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003); *Nikkel*, *supra* at 566.

[16] *Quality Products, supra* at 375.

[17] In *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 112; 595 NW2d 832 (1999), this Court unanimously held that courts are to "interpret [undefined] terms of an insurance contract in accordance with their 'commonly used meaning.' " (Citations omitted.)

[18] *Random House Webster's College Dictionary* (1995).

amples of "pollutants," such as "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Given the composition of the sewage described above, it is clear that most, if not all, of these specific examples of "pollutants" were found in Fox Creek. We conclude, therefore, that the sewage released by the city into Fox Creek is within the scope of the policy's pollution exclusion clause.

B. THE ROLE OF EXTRINSIC EVIDENCE IN ILLUMINATING A LATENT AMBIGUITY

The city argues that the word "pollutant" is latently ambiguous and that extrinsic evidence must be introduced to give the word the true meaning that the parties intended. According to the city, the Pool's payment of prior basement backup claims demonstrates that the parties intended the word "pollutant" to have a meaning different than the one used in the insurance policy itself.

We find the city's argument unpersuasive. The argument that the city is advancing is actually one of equitable estoppel, not contract interpretation. The city is attempting to rely on the Pool's payment of similar basement sewer backup claims as a way to require the Pool to cover the present claim. Accordingly, the city's argument sounds more in equity than in the law of contracts. For the reasons discussed in part III(C) of this opinion, we are unpersuaded by the city's equitable estoppel argument. Nonetheless, to the extent that the city argues that a latent ambiguity exits, we disagree.

There are generally two categories of ambiguity that may arise in a contract: patent and latent.[19] A *patent* ambiguity is one that is "apparent upon the face of the

[19] See 11 Williston, Contracts (4th ed), § 33:40, p 816.

instrument, arising by reason of inconsistency, obscurity or an inherent uncertainty of the language adopted, such that the effect of the words in the connection used is either to convey no definite meaning or a double one."[20] In contrast, a *latent* ambiguity " 'arises not upon the words of the will, deed, or other instrument, as looked at in themselves, but upon those words when applied to the object or to the subject which they describe.' "[21]

By asserting the existence of a latent ambiguity, the city illustrates an inherent tension found in contract law. On the one hand, it is well-settled law that when a contract is clear and unambiguous on its face, a court will not consult extrinsic evidence and will enforce the contract as written.[22] On the other hand, a party generally is permitted to introduce extrinsic evidence to demonstrate the existence of a latent ambiguity—one that is not apparent on the face of the contract.[23]

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[20] *Zilwaukee Twp v Saginaw-Bay City R Co*, 213 Mich 61, 69; 181 NW 37 (1921); 11 Williston, Contracts (4th ed), § 33:40, p 816 ("Patent ambiguities are those that are apparent on the face of the document . . . .").

[21] *Zilwaukee Twp, supra* at 69 (citation omitted); 11 Williston, Contracts (4th ed), § 33:40, p 816 ("[L]atent ambiguities are those which appear only as the result of extrinsic or collateral evidence showing that a word, thought to have but one meaning, actually has two or more meanings.").

The classic example of a latent ambiguity is found in the traditional first-year law school case of *Raffles v Wichelhaus*, 2 Hurl & C 906; 159 Eng Rep 375 (1864). In *Raffles*, two parties contracted for a shipment of cotton "to arrive ex Peerless" from Bombay. However, as it turned out, there were two ships sailing from Bombay under the name "Peerless." Thus, even though the contract was unambiguous on its face, there was a *latent* ambiguity regarding the ship to which the contract referred.

[22] *Quality Products, supra* at 375; *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002); *Nikkel, supra* at 566; *Morley, supra* at 465.

[23] *Hall v Equitable Life Assurance Society of the United States*, 295 Mich 404, 408; 295 NW 204 (1940) ("It is a well-settled rule that extrinsic evidence is admissible to show that a latent ambiguity exists.").

In balancing these two seemingly conflicting principles of contract law, a court must never cross the point at which the written contract is *altered* under the guise of contract *interpretation*.[24] Indeed, it is during litigation that a party's motivations are the most suspect and the party's incentives the greatest to attempt to achieve that which the party could not during the give-and-take of the contract negotiation process. As this Court stated in *Nikkel*, a "court may not read ambiguity into a policy where none exists."[25] Therefore, in clarifying the proper role of extrinsic evidence in illuminating a latent ambiguity, it is helpful to turn to basic principles of contract law.

As stated, the primary goal of contract interpretation is to ascertain and effectuate the intent of the contracting parties.[26] The law presumes that the contracting parties' intent is embodied in the actual words used in

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[24] *Wilkie*, *supra* at 51 ("This approach, where judges . . . rewrite the contract . . . is contrary to 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 . . . .").

[25] *Nikkel*, *supra* at 568.

[26] *Quality Products, supra* at 375 ("In interpreting a contract, our obligation is to determine the intent of the contracting parties."); *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924) ("The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate."); *Mills v Spencer*, 3 Mich 127, 135 (1854) ("In the construction of a contract, we are to look at the intention of the parties."); 17A CJS, Contracts, § 308, p 321 ("'The primary and overriding purpose of contract law is to ascertain and give effect to the intentions of the parties . . . ."); 17A Am Jur 2d, Contracts, § 345, p 332 ("[T]he fundamental and cardinal rule in the construction or interpretation of contracts is that the intention of the parties is to be ascertained, and effect is to be given to that intention . . . ."); 1 Restatement Contracts, 2d, §201(1), p 83 ("Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.").

the contract itself.[27] A rule to the contrary would reward imprecision in the drafting of contracts. More significant, it would create an incentive for an aggrieved party to enlist the judiciary in an attempt to achieve a benefit that the party itself was unable to secure in negotiating the original contract—a proposition this Court flatly rejected in *Wilkie*.[28] These principles require that, when a party asserts that a latent ambiguity exists, a court presume that the contracting parties' intent is manifested in the actual language used in the contract. The party alleging the existence of the latent ambiguity may rebut this presumption only by proving, through clear and convincing evidence, that such an ambiguity does indeed exist.

This Court emphasized these same bedrock principles of contract law in *Quality Products*, which held that contracting parties are free, with *mutual* assent, to modify a contract notwithstanding a written anti-modification or anti-waiver clause present in the original agreement.[29] We recognized that the anti-modification clause contained in the written contract was presumptive of the parties' intent as a matter of law, but also that "the parties possess, and never cease to possess, the freedom to contract even after the original contract has been executed."[30] We held, therefore, that contracting parties are always entitled mutually to modify the underlying contract, but the party

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[27] *Michigan Chandelier Co v Morse*, 297 Mich 41, 49; 297 NW 64 (1941) (" 'The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest.' " [citation omitted]); see also *United States ex rel Int'l Contracting Co v Lamont*, 155 US 303, 310; 15 S Ct 97; 39 L Ed 160 (1894); 17A Am Jur 2d, Contracts, § 348, p 336 ("[T]he parties are presumed to have intended what the terms clearly state.").

[28] *Wilkie*, *supra* at 51.

[29] *Quality Products, supra* at 372-373.

[30] *Id*. at 372.

asserting that a modification has occurred must present *clear and convincing evidence* to that effect.[31]

Although *Quality Products* involved contract *modification*, not contract *interpretation*, the same core principles of contract law apply in the present case. It must be presumed that the city and the Pool intended the actual language that they used in the insurance policy. We conclude, therefore, that the city, in asserting the existence of a latent ambiguity, bears the burden of proving by clear and convincing evidence that such an ambiguity actually exists.[32]

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[31] *Id*. at 373.

[32] Justice CAVANAGH asserts that we are relying on a "broad reading" of *Quality Products* and that the principles adopted by this Court in *Quality Products* should be limited to cases involving contract modification or waiver and not to cases when one party asserts the existence of a latent ambiguity. *Ante* at 202 n 11. There is no principled basis for the distinction Justice CAVANAGH draws. In both cases—a claimed contract modification/waiver and the claimed existence of a latent ambiguity—a party to a contract is asserting that the written terms of the contract should not be enforced. This Court has gone to great lengths in the past few terms to clarify the law so that contracts will be enforced *as written*. See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003); *Klapp v United Ins Group Agency, Inc*, 468 Mich 459; 663 NW2d 447 (2003). By applying a clear and convincing standard of proof for latent ambiguities, this Court would simply be adhering to the common theme we articulated in *Quality Products* and all our other recent contract cases: that contracts will be enforced *as written* unless substantial evidence to the contrary is presented.

Justice CAVANAGH also states that we do not cite decisions other than *Quality Products* for the clear and convincing rule discussed above. We are unaware of the bedrock jurisprudential rule on which Justice CAVANAGH relies: that a legal principle duly adopted by this Court is not binding unless there are other related cases with the same holding. *Quality Products* is a binding decision of this Court and the doctrinal underpinnings of that case are applicable here. As such, it must be given due regard. Nevertheless, as we indicate above, the clear and convincing rule regarding latent ambiguities is not a new concept, but an embodiment of the precise contract principle to which this Court has steadfastly adhered in our recent contract jurisprudence: that contracts will be

The city has failed to satisfy that burden of proof. The reality is that none of the parties to this insurance contract asserts that the term "pollutant" contained in the exclusion clause means something different when city sewage is discharged into Fox Creek or when it backs up into individual Grosse Pointe Park residences. Indeed, the Pool has conceded that the source of the pollution in both cases is the same.[33] Thus, the record reflects no evidence that one party contends that "pollutant" means something different from how that term is defined in the policy.

That being the case, there is no "latent ambiguity" requiring the introduction of extrinsic evidence to show that "pollutant" means something other than how it is defined in the contract. Rather, the city is attempting to bootstrap its estoppel argument—that the Pool paid similar claims involving pollutants so it is precluded from denying indemnification on this claim—to manufacture a latent ambiguity claim. Such a tactic violates basic contract construction principles and should be rejected for that reason.

C. EQUITABLE ESTOPPEL

The city argues that, even if sewage is a "pollutant" under the policy's pollution exclusion clause, the Pool should nonetheless be equitably estopped from denying coverage. It asserts that the Pool's payment of prior basement backup claims and the Pool's involvement in monitoring the *Etheridge* litigation

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enforced *as written* unless compelling evidence to the contrary is offered. See *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003); *Klapp*, *supra* at 467; *Wilkie*, *supra* at 51-52, 62-63; *Rednour v Hastings Mut Ins Co*, 468 Mich 241, 251; 661 NW2d 562 (2003); *Nikkel*, *supra* at 566-568.

[33] Pool reply brief at 4.

led the city to believe that the Pool would indemnify any eventual settlement that was reached. According to the city, it would have altered its strategy in the *Etheridge* litigation had it known that the Pool would not cover the settlement and, therefore, it was prejudiced by the Pool's actions.

In general, "[t]he principle of estoppel is an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract."[34] Although equitable estoppel appears to be broad in theory, the doctrine is rather limited in practice. As then-Chief Justice WEAVER stated in writing for the Court in *Kirschner,* "The application of . . . estoppel is limited, and, usually, the doctrine[] will not be applied to broaden the coverage of a policy to protect the insured against risks that were not included in the policy or that *were expressly excluded from the policy*."[35]

Indeed, the rule discussed in *Kirschner* is well established in Michigan law. In *Ruddock,* the beneficiary of a life insurance policy sought to estop the insurer from invoking the policy's "military service" exclusion clause as a basis for denying payment. This Court expressly rejected the beneficiary's equitable estoppel argument, holding that estoppel will not be applied to broaden coverage beyond the specific risks covered by the policy itself. This Court stated:

> To apply the doctrine of estoppel and waiver here would make this contract of insurance cover a loss it never

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[34] *Morales v Auto-Owners Ins Co*, 458 Mich 288, 295; 582 NW2d 776 (1998).

[35] *Kirschner*, *supra* at 593-594 (emphasis added). While Justice CAVANAGH cites *Kirschner* for the proposition that an insurer may be equitably estopped from denying coverage if the insurer does not timely reserve its rights, Justice CAVANAGH omits the prominent language from *Kirschner* that emphasizes that "[t]he application of . . . estoppel is limited . . . ." *Ante* at 206.

> covered by its terms, to create a liability not created by the contract and never assumed by the defendant under the terms of the policy. In other words, by invoking the doctrine of estoppel and waiver it is sought to bring into existence a contract not made by the parties, to create a liability contrary to the express provisions of the contract the parties did make.[36]

By asking this Court to hold that the Pool is equitably estopped from denying coverage for the *Etheridge* settlement, the city is essentially requesting this Court to ignore the policy's pollution exclusion clause that the Pool specifically invoked in its reservation of rights letter. To do so, however, would be to alter fundamentally the nature of the bargain struck between the city and the Pool and to protect the city "against risks that were . . . expressly excluded from the policy."[37] This Court explicitly rejected this argument in *Ruddock* and *Kirschner*. We do so again today. Equitable estoppel must not be applied to expand coverage beyond the scope originally contemplated by the parties *in the insurance policy as written*. A court must not bestow under the veil of equity that which the aggrieved party itself failed to achieve in negotiating the contract.[38]

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[36] *Ruddock*, *supra* at 654.

[37] See *Kirschner*, *supra* at 594.

[38] Justice CAVANAGH states that we are giving *Kirschner* and *Ruddcok* an "expansive reading" and setting forth an "inflexible rule" regarding the application of estoppel. *Ante* at 206 n 12. To the contrary, we are merely applying the well-established rule this Court adopted in *Ruddock* and reiterated in *Kirschner* that estoppel will not be applied to give the insured a benefit that was never negotiated in the first place. *Ruddock*, *supra* at 654; *Kirschner*, *supra* at 594. Indeed, in our view, it is Justice CAVANAGH who is unduly limiting the holding of *Kirschner* by implying exceptions to the *Kirschner* rule beyond the two explicitly recognized: (1) misrepresentation by the insurer and (2) the insurer's failure to provide a timely reservation of rights. *Id.* at 594-595.

Because we believe that *Kirschner* and *Ruddock* are fatal to the city's estoppel claim, unlike Justice CAVANAGH, we would not apply the test articulated in *Morales*. Nevertheless, to the extent that the city relies on the principles in *Morales*, its reliance is misplaced. In *Morales*, this Court applied a three-part test to determine whether equitable estoppel should apply: (1) the defendant's acts or representations induced the plaintiff's belief, (2) the plaintiff justifiably relied on its belief, and (3) the plaintiff was prejudiced as a result of its belief.[39]

Even assuming, arguendo, that the Pool's payment of prior basement backup claims and its involvement in monitoring the *Etheridge* suit led the city to hope that the settlement would be covered, and that the city actually relied on its mistaken belief, the city's equitable estoppel claim must fail because its reliance was not *justifiable*. Three weeks after the *Etheridge* suit was filed, the Pool sent the city a reservation of rights letter that specifically quoted the policy's pollution exclusion clause. The letter concluded by stating, "Please be advised that if there is any judgment against the City of Grosse Pointe Park for . . . a discharge of any pollutants, . . . the Michigan Municipal Liability & Property Pool reserves the right not to indemnify Grosse Pointe Park for said damages." Moreover, the Pool frequently reminded the city during the *Etheridge* litigation that "serious coverage issues" remained. Despite all this, and *after* being notified by the Pool that coverage was formally denied, the city still proceeded to finalize the settlement with the *Etheridge* plaintiffs.[40] Any reliance

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[39] *Morales*, *supra* at 296-297.

[40] The City Attorney for Grosse Pointe Park testified in his deposition that "a decision [was made] by the city that it was in the best interests of the city if there was to be no coverage to proceed with a settlement because we were where we were."

on the part of the city, therefore, was unjustified.[41] Because there was no *justifiable* reliance, we need not consider whether the city suffered any prejudice on the basis of its reliance; the city's estoppel claim fails as a matter of law.

IV. CONCLUSION

Sewage is clearly a "pollutant" under the plain language of the policy's pollution exclusion clause. Moreover, while extrinsic evidence may generally be introduced to demonstrate the existence of a latent ambiguity, we conclude that a court must presume that the contracting parties' intent is manifested in the actual language used in the contract itself and that the party alleging the existence of the latent ambiguity may rebut this presumption only by proving, through clear and convincing evidence, that such an ambiguity does actually exist. The city has failed to meet this burden of proof. Moreover, any reliance on *Morales* is misplaced. Under *Ruddock* and *Kirschner*, the Pool is not equitably estopped from denying coverage because estoppel will not be applied to broaden coverage beyond the particular risks specifically covered by the policy itself.

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[41] Since at least 1911, in the case of *Sargent Mfg Co v Travelers' Ins Co*, 165 Mich 87; 130 NW 211 (1911), this Court has adhered to the rule that a timely reservation of rights letter will protect an insurer against an insured's claims of estoppel. This Court reiterated this fundamental rule of insurance law in *Kirschner* by noting that an insurer who complies with its "duty to give reasonable notice . . . that it is proceeding under a reservation of rights" will be shielded from subsequent claims of estoppel or waiver. *Kirschner*, *supra* at 593. Accordingly, if an insurer timely reserves its rights, an insured will generally not be able to sustain a claim of estoppel on the basis that it altered its litigation strategy in reliance on the insurer's payment of previous claims. To conclude otherwise would be to emasculate completely the entire purpose of the reservation of rights process.

The judgment of the Court of Appeals is reversed, and this matter is remanded to the trial court for entry of an order granting the Pool's motion for summary disposition.

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

CORRIGAN, J., took no part in the decision of this case.

PEOPLE v STARKS

Docket No. 126756. Argued April 13, 2005 (Calendar No. 5). Decided July 19, 2005.

Kimberly Starks was charged with assault with intent to commit criminal sexual conduct involving sexual penetration. The complainant was a thirteen-year-old boy who was a resident of the detention facility where the defendant worked. The 36th District Court, Ruth Ann Garrett, J., refused to bind the defendant over for trial. The Wayne Circuit Court, Vonda R. Evans, J., affirmed. The Court of Appeals initially denied the prosecution's application for leave to appeal, but the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 467 Mich 889 (2002). On remand, the Court of Appeals, MARKEY, P.J., and WILDER and METER, JJ., affirmed in an unpublished opinion per curiam, issued June 22, 2004 (Docket No. 244478), but urged the Supreme Court to reexamine and overrule *People v Worrell*, 417 Mich 617 (1983), which held that consent is always a defense to the crime of assault with intent to commit criminal sexual conduct involving sexual penetration. The Supreme Court granted the prosecution's application for leave to appeal. 471 Mich 904 (2004).

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

The prosecution presented sufficient evidence to bind the defendant over on the charge of assault with intent to commit criminal sexual conduct involving sexual penetration. The evidence suggests more than mere preparation to commit the act; it suggests a great degree of proximity to the completed act. The thirteen-year-old complainant could not consent to sexual penetration, and his consent is not a defense to the crime of assault with intent to commit criminal sexual conduct involving sexual penetration. The holding in *Worrell* that consent is always a defense to that crime must be overruled. The decision of the Court of Appeals must be reversed and the matter must be remanded to the circuit court with the instruction that the circuit court remand the case to the district court for further proceedings.

Justice CAVANAGH, joined by Justices KELLY and MARKMAN, concurring, agreed that the prosecution presented sufficient evidence to bind the defendant over on the charge of assault with intent to commit criminal sexual conduct involving sexual penetration. The evidence supported both an apprehension-type assault and an attempted-battery assault. Therefore, the district court abused its discretion by not binding the defendant over for trial. It is unnecessary to reach the issue of whether the complainant could consent to the underlying act and unnecessary to overrule *Worrell* because there was sufficient evidence showing that the complainant did not consent.

Reversed and remanded.

CRIMINAL LAW — ASSAULT — BATTERY.

An assault may be established by a showing that one has attempted an intentional, unconsented, and harmful or offensive touching of a person; an assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery; a battery is an intentional, unconsented, and harmful or offensive touching of the person of another, or of something closely connected with the person; the use of force against a person is not battery if the recipient consents to what is done; such consent cannot be coerced or fraudulently obtained, must be given by one who is legally capable of consenting to the deed, and cannot relate to a matter regarding which consent will not be recognized as a matter of law.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Joseph A. Puleo*, Assistant Prosecuting Attorney, for the people.

Burkett & Woods (by *Arlene F. Woods*) for the defendant.

WEAVER, J. The issue presented is whether the prosecution presented sufficient evidence in this case to establish criminal assault and thus bind defendant over on the charge of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL

750.520g(1). The district court dismissed the charge against defendant, and the circuit court affirmed. On remand from this Court for consideration as on leave granted, the Court of Appeals also affirmed. We reverse the dismissal of the charge against defendant, concluding that the prosecution presented sufficient evidence to bind defendant over on the charge of assault with intent to commit criminal sexual conduct involving sexual penetration.

An assault may be established by showing that one has attempted an intentional, unconsented, and harmful or offensive touching of a person. The evidence presented at the preliminary examination suggests that after defendant sent another person out of the room and closed the automatically locking door to that room, she asked the complainant whether he wanted her to perform fellatio on him, instructed the complainant to remove his pants, and was observed bending over in front of the complainant, who had unzipped and unbuttoned his pants at the defendant's request, less than two feet from him. The complainant testified that defendant was about to commit fellatio when another employee entered the room and that when that employee entered the room, defendant pretended to put clothes in the washing machine. Thus, the evidence presented suggests more than mere preparation to commit the act; it suggests a great degree of proximity to the completed act.

Further, we reject the argument that the complainant could consent to the act and overrule the incorrect conclusion in *People v Worrell,* 417 Mich 617; 340 NW2d 612 (1983), that consent is always a defense to the crime of assault with intent to commit criminal sexual conduct involving sexual penetration. The complainant, who was thirteen years old at the time of the incident,

could not consent to an act of fellatio. Because a thirteen-year-old child cannot consent to sexual penetration, consent by such a victim is not a defense to the crime of assault with intent to commit criminal sexual conduct involving sexual penetration.

Therefore, there was probable cause to believe that defendant committed assault with intent to commit criminal sexual conduct involving sexual penetration and defendant should have been bound over on the charge. We remand this case to the circuit court with the instruction that the circuit court remand this case to the district court for proceedings consistent with this opinion.

I

Defendant was charged with assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1), following an incident at the Pause Program at Herman Kiefer Hospital, a detention facility for delinquent boys. Defendant was an employee of the program. The complainant was a resident of the program and was thirteen years old at the time of the incident.[1]

At the preliminary examination, the complainant testified that he and another boy were in the laundry room with defendant doing laundry. Donavonne Manigault, another employee of the program, testified that the laundry room door locked automatically when it was shut. Manigault further explained that the door to the laundry room was kept open if laundry was "being done, or something like that," and was kept closed at any other times so that residents would not have access to the room.

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[1] The incident occurred on June 30, 2001. The complainant was born on February 19, 1988.

The complainant testified that defendant asked the other boy to leave the laundry room and then closed the door behind him. She then asked the complainant whether he would like her to perform fellatio on him like she had on another resident in the program[2] and told him to pull down his pants. The complainant complied, unbuckling his belt and undoing his pants. The complainant stated that as defendant was about to perform fellatio, Manigault opened the door and interrupted them. Defendant then began yelling at the complainant, acting as if the complainant had done something to her, and tried to look as though she were putting clothes in the washing machine.

Manigault testified that after taking a break from the floor, he returned and noticed that defendant was not on the floor, so he began looking for her. When he approached the laundry room door, it was shut and locked. Manigault used his key to open the door and, when he entered the laundry room, he saw defendant bending over in front of the washing machine and the complainant standing behind her less than two feet away. He stated that the complainant's belt was unbuckled, his pants were unbuttoned and unzipped, and the complainant was holding his pants up so that they would not fall down.

After hearing the testimony offered by the complainant and Manigault, the district court refused to bind defendant over on the charge, finding that there was not probable cause to believe a crime was committed. The district court explained that there was not evidence that the complainant had been placed in fear of any battery and therefore dismissed the charge.

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[2] The complainant testified that he had observed defendant perform fellatio on another resident of the program in that resident's room.

The prosecutor appealed, and the circuit court affirmed the dismissal of the charge. The circuit court reasoned that there was no evidence that defendant touched the complainant or threatened him with violence or force and that there was no overt act done in perpetration of the alleged crime. Therefore, there was not probable cause concerning the assault element.

The prosecutor appealed to the Court of Appeals, which initially denied leave to appeal. But this Court remanded the case to the Court of Appeals for consideration as on leave granted.[3] On remand, the Court of Appeals affirmed the dismissal of the charge.[4] In determining whether defendant committed an assault, the Court of Appeals stated:

> The evidence showed that after arranging to be alone with a thirteen-year-old boy, defendant offered to perform fellatio on him and told him to pull down his pants, which he started to do. Defendant did not expressly threaten to harm the boy; there is no evidence that she made any threatening gestures; the boy gave no indication that he was apprehensive of being injured or harmed in any way or that he was complying with defendant's plan against his will. Although this evidence may have established probable cause to believe defendant attempted to commit criminal sexual conduct, MCL 750.92; *Worrell, supra*, that was not the charge the prosecutor sought to bind over to circuit court for trial. The evidence presented at the preliminary examination failed to establish probable cause to believe that defendant committed an assault. Therefore, the district court did not err in dismissing that charge, and the circuit court properly affirmed that ruling.

But despite its ruling, the Court of Appeals urged this Court to reexamine and overrule the *Worrell* decision

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[3] 467 Mich 889 (2002).

[4] *People v Starks,* unpublished opinion per curiam of the Court of Appeals, issued June 22, 2004 (Docket No. 244478).

because it believed that Justice BOYLE's dissent in *Worrell* offered the better analysis. The Court of Appeals agreed with Justice BOYLE that "the complainant's consent, or lack of consent, is not germane in a prosecution for assault with intent to commit criminal sexual conduct involving penetration with a child under the age of sixteen."

The prosecutor sought leave to appeal, and this Court granted leave to appeal, instructing the parties to include among the issues 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 penetration, MCL 750.520g(1). [471 Mich 904 (2004).]

II

A trial court's decision whether to bind a defendant over for trial is reviewed for an abuse of discretion. *People v Stone,* 463 Mich 558, 561; 621 NW2d 702 (2001). "A magistrate has a duty to bind over a defendant for trial if it appears that a felony has been committed and there is probable cause to believe that the defendant committed the felony." *Id.,* citing MCL 766.13.[5]

MCL 750.520g(1) provides that "[a]ssault with intent to commit criminal sexual conduct involving sexual penetration shall be a felony punishable by imprison-

[5] In this case, the magistrate was bound by this Court's decision in *People v Worrell*. Under *Worrell*, the magistrate may not have abused his discretion in refusing to bind defendant over. But as will be explained, *Worrell* was wrongly decided. Because we overrule that decision, it does not bar binding defendant over on the charge of assault with intent to commit criminal sexual conduct involving sexual penetration.

ment for not more than 10 years." The elements of the crime are "(1) an assault, and (2) an intent to commit [criminal sexual conduct] involving sexual penetration." *People v Nickens,* 470 Mich 622, 627; 685 NW2d 657 (2004). It is the first element that is disputed in the present case.

An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *Id.* at 628. The first type of assault is characterized as "attempted-battery assault"; the second is characterized as "apprehension-type assault." *Id.* Battery has been defined as " 'an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.' " *Id.,* quoting *People v Reeves,* 458 Mich 236, 240 n 4; 580 NW2d 433 (1998). The use of force against a person is not considered a battery if the recipient consents to what is done. *Nickens, supra* at 630. But the consent cannot be coerced or fraudulently obtained, must be given by one who is legally capable of consenting to such a deed, and cannot " 'relate to a matter as to which consent will not be recognized as a matter of law.' " *Id.,* quoting Perkins & Boyce, Criminal Law (3d ed), p 154. Thus, when one attempts an intentional, unconsented, and harmful or offensive touching of a person, one has committed an assault.

In *Worrell, supra* at 622, this Court concluded that consent is always a defense to assault with intent to commit criminal sexual conduct, reasoning that "[i]f the other person is a willing partner to the physical act, there can be no assault because there is no reasonable apprehension of immediate injury." We disagree.

As explained in *Nickens,* one is guilty of an assault when one attempts an intentional, unconsented, and

harmful or offensive touching. Moreover, consent must be given by one who is legally capable of giving consent to the act. *Nickens, supra* at 630. MCL 750.520d(1)(a) states that a person is guilty of third-degree criminal sexual conduct if the person engages in sexual penetration with another person and that person is at least thirteen but younger than sixteen years old.[6] Accordingly, a thirteen-year-old child cannot legally consent to sexual penetration with another person because sexual penetration of a thirteen-year-old child is automatically third-degree criminal sexual conduct.[7] Therefore, the complainant in this case, who was thirteen years old, could not consent to the attempted touching in this case—fellatio—and defendant's attempt to commit fellatio, if proven, would amount to an attempt to commit an intentional, *unconsented*, and harmful or offensive touching, which, by definition, is an assault. As noted by Justice BOYLE in her dissent in *Worrell:*

> [I]n the case of a victim under 16 years of age and [at least] 13 years of age[,] the elements of assault with intent to commit third-degree criminal sexual conduct may be made out by evidence sufficient to permit the factfinder to conclude that the defendant had the specific intent to commit sexual penetration, and that a showing of force or coercion is not required in the case of an underage victim. If force or coercion were necessary elements of the offense in the case of an underage victim, then the young victim would have no greater protection from sexual assaults than an adult victim. We believe this result to be inconsistent with the criminal sexual conduct act's provisions which

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[6] MCL 750.520b(1)(b)(iii) states that a person is guilty of first-degree criminal sexual conduct if he or she engages in sexual penetration with another person, that person is at least thirteen but younger than sixteen years old, and the actor is in a position of authority over the victim and uses this authority to coerce the victim to submit.

[7] And it could be first-degree criminal sexual conduct if other factors are present.

> provide greater protection from sexual conduct for persons under 16 years of age. [*Worrell, supra* at 633.]

Therefore, *Worrell*'s incorrect conclusion that consent is always a defense to the crime of assault with intent to commit criminal sexual conduct involving sexual penetration is overruled.[8]

Defendant asserts that even if *Worrell* is overruled, the district court properly dismissed the charge against her because the evidence at most shows some preparation to commit a crime, but does not demonstrate an "overt act" with the intent to achieve sexual penetration. We disagree. As noted by Justice BOYLE in her dissent, assault with intent to commit criminal sexual conduct involving sexual penetration can be distinguished from attempted third-degree criminal sexual conduct "by the proximity of the defendant to the completed act." *Id.* at 634-635. "[A]ssault with intent to commit criminal sexual conduct involving penetration is an attempt to commit third-degree criminal sexual conduct plus a greater degree of proximity." *Id.* at 635.

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[8] See also *People v McDonald,* 9 Mich 150, 152-153 (1861) (consent does not negate assault with intent to commit rape), and *People v Goulette,* 82 Mich 36, 39; 45 NW 1124 (1890) (the victim's own acts would form no justification for the defendant to assault her with intent to violate her person because the victim was under the age of consent).

As recently noted, the doctrine of stare decisis is not applied mechanically to prevent this Court from overruling previous decisions that are erroneous. Although we overrule precedent with caution, we may overrule a prior decision when we are certain that it was wrongly decided and " ' "less injury will result from overruling it than from following it." ' " *People v Davis,* 472 Mich 156, 168 n 19; 695 NW2d 45 (2005), quoting *People v Moore,* 470 Mich 56, 69 n 17; 679 NW2d 41 (2004), quoting *McEvoy v Sault Ste Marie,* 136 Mich 172, 178; 98 NW 1006 (1904). Additionally, there are no relevant "reliance" interests involved and overruling *Worrell* will not produce any "practical real-world dislocations." See *Robinson v Detroit,* 462 Mich 439, 466; 613 NW2d 307 (2000).

The evidence presented at the preliminary examination suggests that defendant, an employee of the facility, asked the complainant, a resident, whether he wanted her to perform fellatio on him after defendant sent another resident out of the room and closed the automatically locking door. Defendant then instructed the complainant to remove his pants, and the complainant unzipped and unbuttoned his pants at defendant's request. Defendant was observed by another employee bending over in front of the complainant less than two feet from him while the complainant held up his unzipped, unbuttoned pants. The complainant testified that defendant was about to commit fellatio when the other employee walked into the room and that when the other employee entered the room, defendant pretended to put clothes in the washing machine. The evidence suggests that, but for the other employee entering the room, defendant would have completed the act. Further, the complainant was thirteen years old and could not legally consent to an act of fellatio. Thus, the evidence presented suggests more than mere preparation; it suggests a greater degree of proximity to the completed act.

Therefore, there was probable cause to believe that defendant committed assault with intent to commit criminal sexual conduct involving sexual penetration, and the Court of Appeals affirmance of the dismissal of the charge is reversed. This case is remanded to the circuit court with the instruction that the circuit court remand this case to the district court for proceedings consistent with this opinion.

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

CAVANAGH, J. (*concurring*). I agree with the majority that the prosecution presented sufficient evidence to

bind defendant over on the charge of assault with intent to commit criminal sexual conduct (CSC) involving sexual penetration, MCL 750.520g(1). In my view, however, it is unnecessary to reach the issue whether the thirteen-year-old complainant *could* consent to the underlying act as a matter of law for purposes of MCL 750.520g(1), and therefore whether *People v Worrell*, 417 Mich 617; 340 NW2d 612 (1983), must now be overruled. Here, the prosecutor presented sufficient evidence demonstrating that the complainant *did not* consent to the underlying act. Therefore, the evidence was sufficient to bind defendant over on the charge of assault with intent to commit CSC involving sexual penetration. Accordingly, the district court abused its discretion by not binding defendant over for trial.

A district court has a duty to bind a defendant over for trial if, at the conclusion of the preliminary examination, there is probable cause to believe that the defendant committed a felony. MCL 766.13. A district court's decision whether to bind a defendant over for trial is reviewed for an abuse of discretion. *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001).

Here, the evidence introduced at the preliminary examination showed that defendant was one of the complainant's supervisors in a youth detention program. Defendant was monitoring the complainant and another boy while the boys did their laundry. Using her position of authority, defendant ordered the other boy out of the room and arranged to be alone with the thirteen-year-old complainant in the locked laundry room.[1] Once alone, defendant asked the complainant if

[1] Defendant's coworker testified that the door to the laundry room was usually kept open while laundry was being done. But when the coworker later confronted defendant and the complainant in the laundry room, the door was closed.

he wanted her to perform fellatio on him. The complainant did not respond.[2] Defendant then ordered the complainant to pull his pants down. The complainant did as he was told. As defendant was about to perform fellatio, defendant's coworker unlocked and opened the door, interrupting defendant. The complainant testified that defendant then began cursing at him, pretending as if the complainant had done something to her, and also pretending that she was doing laundry.

After considering this evidence, the district court concluded there was not probable cause to believe that an assault was committed, noting:

> Now, the question that is before this Court is was the complainant in fear, and there is no testimony on the record that he was placed in fear of any battery. He pulled down his pants.
>
> * * *
>
> The Court in this particular — If this was a criminal sexual conduct first degree, the authority of the defendant would have been an element or a factor to take a CSC three to a CSC one. However, there is nothing on this record that he was placed in fear.
>
> A battery is a forceful violent touching of a person.

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[2] [*The prosecutor*]: Okay. Now when you say that she said do you want your private part sucked, is that the words that she used, or did she call it something else?

[*The complainant*]: She called it something else.

[*The prosecutor*]: What did she call it?

[*The complainant*]: She used the word private part as dick.

[*The prosecutor*]: Okay. Did you answer her?

[*The complainant*]: No.

> The Court does not believe that the proofs have been established to show that there is probable cause that a crime was committed. There is no — There is no evidence of the defendant [sic, the complainant] being placed in fear.

On the basis of the evidence presented, I would conclude that the district court abused its discretion by not binding defendant over for trial because there was probable cause to believe that defendant committed the crime of assault with intent to commit CSC involving sexual penetration.

The elements of assault with intent to commit CSC involving sexual penetration are (1) an assault and (2) an intent to commit CSC involving sexual penetration. *People v Nickens*, 470 Mich 622, 627; 685 NW2d 657 (2004). The first element, an assault, can occur in one of two ways. First, an assault can occur from an unlawful act that places another in reasonable apprehension of receiving an immediate battery (apprehension-type assault). Alternatively, an assault can occur from an attempt to commit a battery (attempted-battery assault). *Id*. at 628. A " 'battery is an intentional, *unconsented* and harmful or offensive touching of the person of another, or of something closely connected with the person.' " *Id*. (citation omitted; emphasis added). Generally, a battery does not occur when the recipient validly consents to the touching. *Id*. at 630.

Here, the prosecutor presented sufficient evidence that the complainant was placed in reasonable apprehension of receiving an immediate battery, i.e., an unconsented offensive touching, and, thus, there was probable cause to believe that defendant committed an apprehension-type assault. Moreover, even if the district court's conclusion that the complainant was not placed in fear is accorded great weight, there was still sufficient evidence that an attempted-battery assault

nonetheless occurred. On the basis of the prosecutor's proffered evidence, there was probable cause to believe that the complainant did not consent and, thus, there was probable cause to believe that defendant committed an attempted-battery assault. Defendant used her position of authority to isolate the complainant and subsequently ordered him to remove his pants so that she could perform fellatio. In other words, there was probable cause to believe that the complainant's compliance with his supervisor's order was not a manifestation of his consent.

Thus, I agree with the majority that the prosecution presented sufficient evidence to bind defendant over on the charge of assault with intent to commit CSC involving sexual penetration. However, I would not reach the issue whether the complainant could consent to the underlying act because, at the very least, there is probable cause to believe that the complainant did not consent to the act. Therefore, the district court abused its discretion by not binding defendant over for trial on the charge of assault with intent to commit CSC involving sexual penetration.

KELLY and MARKMAN, JJ., concurred with CAVANAGH, J.

CITY OF NOVI v ROBERT ADELL
CHILDREN'S FUNDED TRUST

Docket No. 122985. Argued April 13, 2005 (Calendar No. 6). Decided July 20, 2005.

The city of Novi brought an action in the Oakland Circuit Court against the Robert Adell Children's Funded Trust, the Franklin Adell Children's Funded Trust, the Marvin Adell Children's Funded Trust, and Novi Expo Center, Inc., seeking, pursuant to the Michigan Home Rule City Act, MCL 117.1 *et seq*., and the Uniform Condemnation Procedures Act, MCL 213.51 *et seq*., condemnation of real property owned by the Adell trusts to enable the city to construct a public road. With their answer to the complaint, the Adell trusts filed a motion challenging the city's assertion that the purpose and the necessity of the proposed taking were public in nature and satisfied the requirements of Const 1963, art 10, § 2. The Adell trusts argued that the road would primarily serve the private interests of Wisne Corporation by providing it with access to Grand River Avenue once it loses its current access as a result of a bridge improvement project. The court, Jessica R. Cooper, J., agreed with the Adell trusts and dismissed the action. The city appealed. The Court of Appeals, WHITBECK, C.J., and O'CONNELL and METER, JJ., affirmed, concluding that under the heightened scrutiny test articulated in *Poletown Neighborhood Council v Detroit*, 410 Mich 616 (1981), the plaintiff failed to show that the project was a public use. The Court agreed with the trial court that the private interest predominated over the public interest, making the taking unconstitutional. 253 Mich App 330 (2002). The Supreme Court granted the city's application for leave to appeal. 471 Mich 889 (2004).

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

The proposed condemnation is for a public use. There was no fraud, error of law, or abuse of discretion in the city's determination of necessity. The judgments of the trial court and the Court of Appeals must be reversed and the matter must be remanded to the trial court for the entry of summary disposition in favor of the city.

1. Where a public body establishes a road, pays for it out of public funds, and retains control, management, and responsibility for its repair, private property may be condemned for the project, no matter what the proportional use of the road will be by the public or by private entities. The road proposed by the city is a public use.

2. The lower courts erred in applying the *Poletown* test because no property interest is being transferred to a private entity and because, even if there were such a transfer, the three-factor test of *Wayne Co v Hathcock*, 471 Mich 445 (2004), would apply instead of the *Poletown* test.

3. The determination of necessity is left to the public agency, not the courts. The only justiciable challenge following the agency's determination is one based on fraud, error of law, or abuse of discretion. None of these bases exists in this matter.

Justice WEAVER, concurring, agreed with the majority opinion that the proposed road is a public use for which private property may be condemned. This matter is not controlled by *Wayne Co v Hathcock* because this case does not involve the transfer of private property from one private entity to another through the exercise of eminent domain. The majority properly found that the city did not commit fraud, an error of law, or abuse its discretion in finding the condemnation of the property necessary and that this matter is not moot and this Court cannot avoid addressing the constitutional and statutory questions involved on the basis of the dissent's assumption that the road project will not proceed. She does not, however, join the majority's purported review of the basic principles of mootness law and noted that the majority's importation of a discussion of subject-matter jurisdiction requirements from a case involving standing involves a discussion that has little relevance to the question whether the issues presented in this matter are moot.

Reversed and remanded to the trial court for the entry of summary disposition in favor of the city

Justice CAVANAGH, joined by Justice KELLY, dissenting, concluded that, given the record, the matter is moot and the Supreme Court is without authority to decide it. The case is not the sort that is likely to recur, yet evade judicial review. Because the majority addresses the merits of the moot claim and renders an advisory opinion, Justice CAVANAGH stated that, were the matter not moot, it would be necessary to remand the case for the trial court to address the defendants' claim that the city's determination of public necessity was made on the basis of fraud, error of law, or an abuse of discretion. The defendants' argument regarding fraud

should not be foreclosed on the basis that they showed no reliance or injury resulting from the city's acts. A trial court cannot accept the taking entity's assertion of public necessity when that assertion was fraudulently made. Moreover, further inquiry must be made regarding the evidence of public necessity for the taking beyond the city's assertion that the taking is necessary and that the choice of property is reasonable.

1. EMINENT DOMAIN — HIGHWAYS — PUBLIC USE.

Private land may be condemned for a road where a public body establishes a road, pays for it out of public funds, and retains control, management, and responsibility for its repair, no matter what the proportional use of the road will be by the public or by private entities; it is the right of travel by all, and not the exercise of the right, that makes a road a public highway (Const 1963, art 10, § 2).

2. EMINENT DOMAIN — NECESSITY OF TAKING — APPEAL.

The determination of necessity for the taking of property by eminent domain is left to the public agency, not the courts; an agency's determination of necessity may be challenged only on the basis of fraud, error of law, or abuse of discretion (MCL 213.56[2]).

Secrest Wardle (by *Gerald A. Fisher*, *Thomas R. Schultz*, and *Stephen P. Joppich*) for the plaintiff.

Steinhardt Pesick & Cohen Professional Corporation (by *H. Adam Cohen*, *Jerome P. Pesick*, and *Jason C. Long*) for the defendants.

TAYLOR, C.J. In this land condemnation case where the city of Novi is attempting to take private property to construct a road, the first issue is whether the requirement of a public use, under Const 1963, art 10, § 2, is met when the proposed road will be available for use by the public but will be primarily used by a private entity that has contributed funds to the project. We conclude that such a road does qualify as a public use. The second issue is whether, under MCL 213.56, a court can find the city has abused its discretion in determining there is a public necessity for the condemnation when the city

has not considered alternatives to the taking. We conclude that a failure of the city to consider alternatives was not an abuse of its discretion. Because the Court of Appeals incorrectly decided that the proposed road was not a public use, we reverse that decision. We also find no fraud, error of law, or abuse of discretion in the city's determination that there exists a public necessity to take defendants' property for the proposed project. Accordingly, we remand this matter to the trial court for entry of summary disposition in favor of plaintiff.

I

For many years traffic congestion at the intersection of Grand River Avenue and Novi Road in the city of Novi was a concern to the city because it represented a growing traffic hazard. As early as 1984 a study recommended a "ring road" around the intersection to relieve traffic congestion and provide access to vacant land not fronting on Grand River Avenue or Novi Road. The study also recommended a road, referred to here as the "spur road," from the northwest side of the ring road, that would access industrial establishments that were then accessed from Grand River Avenue. The study recommended the spur road because the employee traffic from the industries with access on Grand River Avenue was resulting in frequent accidents. The study noted that, but for "the need to resolve [this] critical traffic problem," the northwest quadrant of the ring road project "may have been abandoned altogether."

Wisne Corporation was one of the industrial entities that would be served by the spur road.[1] The new spur road was to traverse property owned by defendants,

[1] Wisne Corporation changed ownership and its name several times over the years.

even though Wisne Corporation owned property that could possibly be used for a new access road. Wisne at one point agreed to pay $200,000 toward the funding of the spur road, and the road was to be named A.E. Wisne Drive.

In August 1998, the Novi City Council passed resolutions declaring the necessity for taking defendants' property for the purpose of creating A.E. Wisne Drive. Plaintiff filed a condemnation complaint in September 1998 pursuant to the Uniform Condemnation Procedures Act, MCL 213.51 *et seq*.

Defendants filed a motion challenging the public purpose and necessity of the taking, pursuant to MCL 213.56. Defendants claimed that the taking was for the private purpose of benefiting Wisne, pointing out Wisne's financial support for the road and documents referring to the benefit Wisne would receive from the road. Defendants did not deny that the public would use the street. Rather, the thrust of defendants' argument was that the road was planned to primarily serve private entities and that the city wanted to include it in the plans because the funding Wisne agreed to provide would entitle the city to obtain state funding for the rest of the ring road project. Defendants also alleged that the taking was not necessary, and that the city exceeded its authority because the enabling legislation that gave it authority to condemn did not permit it to take property from one private owner and transfer it to another private owner.

In 1999, the trial court held a three-day evidentiary hearing and bench trial, during which a dozen witnesses testified. The parties stipulated that the existing access drive used by Wisne was hazardous and that it was going to be eliminated as a result of part of a bridge

improvement project undertaken by the Oakland County Road Commission on Grand River Avenue.[2]

The circuit court concluded that the proposed taking was unconstitutional. The court applied the heightened scrutiny test set forth in *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981),[3] concluding that although the project "further[ed] a benefit to the general public," it benefited a specific, identifiable, private interest, and this private benefit predominated over the benefit to the general public. Although the trial court did not expressly say so, presumably it found that under *Poletown* such a predominant private benefit removed the project from the realm of constitutional, public uses. Without further explanation, the court then held that "Plaintiff City's actions evidence a lack of public necessity by fraud, error of law and/or abuse of discretion," and thus the proposed taking was unconstitutional.

In analyzing plaintiff's appeal, the Court of Appeals also relied on *Poletown*, recognizing that it was bound to do so. 253 Mich App 330, 343; 659 NW2d 615 (2002). It noted that both the majority opinion and Justice RYAN's dissent in *Poletown* regarded the concept of public necessity as being separate and distinct from that of public use or public purpose. Although it found that the trial court had erred by conflating the two concepts, the Court found this error harmless because it agreed with the trial court that the private interest predominated over the public interest, making the proposed taking

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[2] Despite eliminating Wisne's access drive, the Oakland County Road Commission did not develop a new access road off Grand River Avenue, relying instead on the access that was to be provided by the planned A.E. Wisne Drive.

[3] On July 30, 2004, *Poletown* was overruled by this Court in *Wayne Co v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004).

unconstitutional. The Court found the public benefit to be "speculative and marginal" and the private interest "specific and identifiable," primarily to the benefit of Wisne. It affirmed the judgment of the trial court, concluding that, under the *Poletown* heightened scrutiny test, plaintiff failed to show the project was a public use.

We granted the city of Novi's application for leave to appeal after issuing our decision in *Wayne Co v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004). 471 Mich 889 (2004).

II

Under the Michigan Constitution, private property shall not be taken for public use without just compensation. Const 1963, art 10, § 2. This provision precludes condemnation of private property for private use, even though some "public interest" may be said to be served by such private use. *Hathcock, supra* at 472; *Portage Twp Bd of Health v Van Hoesen*, 87 Mich 533; 49 NW 894 (1891). We review de novo the question whether a proposed taking is constitutional. *Hathcock, supra* at 455.

The statutes under which plaintiff was proceeding are the Home Rule City Act, MCL 117.1 *et seq.*, and the Uniform Condemnation Procedures Act, MCL 213.51 *et seq*. The former authorizes plaintiff to condemn private land for boulevards and streets, among other uses, MCL 117.4e, and the latter provides the procedures plaintiff must follow for condemnation. Defendants' challenge to the proposed taking was made pursuant to MCL 213.56, which allows the owner of the property to be taken "to challenge the necessity of acquisition of all or part of the property for the purposes stated in the complaint" by filing a motion asking that the necessity be reviewed.

MCL 213.56(1). The statute also provides that when the proposed taking is 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." MCL 213.56(2). We review the trial court's factual findings for clear error, but its legal conclusions are reviewed de novo. *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 106; 649 NW2d 383 (2002).[4]

III

There does not appear to be any dispute that plaintiff, in its charter, has claimed for itself the condemnation powers granted it by the Legislature under the Home Rule City Act. The act authorizes plaintiff to take private property for the purpose of a public road. MCL 117.4e. Defendants also do not question that the ring road part of the project is a public road. The heart of this case is whether the spur road part of the project constitutes a private use requiring rejection of part or all of the road project. Plaintiff asserts that the planned spur road is a public use and that defendants have not successfully challenged the necessity of the project. We agree.

This Court recently clarified Michigan's law concerning public use in *Hathcock, supra*. However, we declined to provide a "single, comprehensive definition of 'public use . . . .' " *Hathcock*, *supra* at 471. We overruled *Poletown's* heightened scrutiny test because it violates our Constitution, and instead set forth the three-factor test

[4] Cases stating that the trial court's determinations in condemnation cases are reviewed for clear error are correct only to the extent that this standard applies to *factual* findings. See, e.g., *City of Troy v Barnard*, 183 Mich App 565, 569; 455 NW2d 378 (1990); *Nelson Drainage Dist v Filippis*, 174 Mich App 400, 403; 436 NW2d 682 (1989).

proposed by Justice RYAN in his dissenting opinion in *Poletown*. Under *Hathcock*, when land condemned by a public agency is transferred to a private entity, we do not weigh the relative benefits but instead analyze the facts to see if any of three conditions are met.[5] However, such a transfer of property is not proposed here; the city will retain ownership of the land. Thus, although *Hathcock* informs us that we are not to use *Poletown's* heightened scrutiny test, it does not provide us with the elements to apply when the public agency retains ownership and control.

Plaintiff urges us to hold that any road project is unquestionably a public use. In *Poletown, supra* at 672, Justice RYAN quoted *Rindge Co v Los Angeles Co*, 262 US 700, 706; 43 S Ct 689; 67 L Ed 1186 (1923), where the United States Supreme Court said, " 'That a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial.' " However, we agree with defendants that the single fact that a project is a road does not per se make it a *public* road.

In *Rogren v Corwin*, 181 Mich 53, 57-58; 147 NW 517 (1914), we explained that the difference between public and private use in the context of roads

> "depends largely upon whether the property condemned is under the direct control and use of the government or public officers of the government, or, what is almost the same thing, in the direct use and occupation of the public at

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[5] Under *Hathcock*, the transfer of condemned property to a private entity may be appropriate where: (1) " 'public necessity of the extreme sort' " requires collective action; (2) the property remains subject to public oversight after the transfer to the private entity; or (3) the property is selected because of " 'facts of independent public significance,' " rather than the interests of the private entity receiving the property. *Hathcock, supra* at 476, quoting *Poletown, supra* at 674-681 (RYAN, J., dissenting).

> large, though under the control of private persons or of a corporation . . . ." [Quoting *Varner v Martin*, 21 W Va 534, 552 (1883).]

The *Rogren* Court continued quoting *Varner* for its definition of when a road is a public road and when it is a private road:

> "All agree that, if the road has been established by public authority, and the damages for the condemnation of the land has been paid by the general public, and the road is under the control and management of public officers, whose duty it is to keep it in repair, then it is a public highway, and the legislature may constitutionally authorize the condemnation of land for the route of such a road, though it may have been opened under such act by a county court on the application of a single person to whose house the road led from some public road, and though it may not have been expected when the road was established that it would be used to any considerable extent by any person, except the party for whose accommodation it was opened." [*Rogren, supra* at 58, quoting *Varner, supra* at 554.]

Thus, according to *Rogren*, where the public body establishes a road, pays for it out of public funds, and retains control, management, and responsibility for its repair, the Michigan Constitution allows private land to be condemned for the project, no matter what the proportional use of the road will be by the public or by private entities.

Under the *Rogren* analysis, the spur road proposed by plaintiff is a public use. Plaintiff initiated the project in response to the growing traffic problems in the area. Ownership, control, and maintenance will remain with that public body. The public will be free to use and occupy the spur, and although Wisne may be the primary user of the spur, "[i]t is the right of travel by all the world, and not the exercise of the right, which constitutes a way a public highway." *Road Dist No 4 v*

Frailey, 313 Ill 568, 573; 145 NE 195 (1924). Wisne is to be granted no interest in the property and will have no ability to control use of or access to the road. We therefore find the proposed project a public road, and thus a public use.

We do not find the fact that Wisne was expected to contribute to the funding of the road dispositive of the question of public use. "The fact that a private individual pays for the right of way does not change the character of the road." *Id*. at 574. See also 2A Nichols, Eminent Domain (3d ed), § 7.03[5][e], p 7-51. The county's role in the hazardousness of the original driveway, and in its removal, is also not relevant. In sum, when the public body that establishes a road retains ownership and control of it, and the public is free to use and occupy it, that proposed use is a public use.

Therefore, in accord with the characteristics of public use identified in *Rogren*, the project proposed by plaintiff is a public use. The lower courts erred in applying the *Poletown* test to this case because no property interest is being transferred to a private entity and because, even if there were such a transfer, *Hathcock*'s three-factor test would apply, rather than *Poletown's* heightened scrutiny test.[6]

IV

Defendants also have challenged the proposed taking on the basis of public necessity. It is required pursuant to MCL 213.56 that there be a public necessity for the taking to be permitted. Specifically, there must be a

[6] We note that the Court of Appeals attempted to apply such a test by looking to Justice RYAN's *Poletown* dissent. However, the test applies when there is a transfer of property to a private entity, which did not occur here.

necessity for the taking "of all or part of the property for the purposes stated in the complaint . . . ." MCL 213.56(1); *State Hwy Comm v Vanderkloot*, 392 Mich 159, 175; 220 NW2d 416 (1974). Yet, pursuant to the statute, the determination of necessity is left not to the courts but to the public agency, which in this case is the city. The only justiciable challenge following the agency's determination is one based on "fraud, error of law, or abuse of discretion." MCL 213.56(2). None of these bases is shown to exist here.[7]

Fraud does not provide defendants a basis for relief in this case because the requisite elements are not supported by the record.[8] Moreover, under the Home Rule City Act, plaintiff has the legal authority to condemn this land for a public road, so it has not made an error of law.[9] We are left to review whether plaintiff

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[7] We agree with the dissent that we first must review the trial court's decision on this issue for clear error. *Post* at 271. However, the trial court's conclusion that the project was not necessary was clearly based on an erroneous legal theory (i.e., that there was no public use and thus no necessity). Moreover, both parties assured the Court at oral argument that the record was sufficient for us to make a determination on the necessity issue without a remand.

[8] The elements of fraud are: (1) that the charged party made a material representation; (2) that it was false; (3) that when he or she made it he or she knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he or she made it with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; and (6) that the other party thereby suffered injury. *Scott v Harper Recreation, Inc*, 444 Mich 441, 446 n 3; 506 NW2d 857 (1993). Defendants at most have asserted that plaintiff made "untrue" statements and behaved in an "unseemly" manner. Nowhere does the record show any reliance or injury resulting from these acts.

[9] Defendants claim that plaintiff's condemnation complaint is not supported by appropriate enabling legislation. This claim is based on the assertion that plaintiff is not authorized to take private land for a private use. Because we conclude that the road is a public use, defendants' argument is without merit.

abused its discretion in determining that plaintiff's property was necessary to complete this project.

An abuse of discretion occurs when an unprejudiced person considering the facts upon which the decision was made would say that there was no justification or excuse for the decision. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761-762; 685 NW2d 391 (2004). Discretion is abused when the decision results in "an outcome falling outside this principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Here, defendants' objections to the necessity of taking their property for the proposed road are based on the assertion that the city never considered any alternatives and that reasonable alternative locations were available. Even if that were so, such facts would not remove the proposed road from the "principled range of outcomes."[10] The city's decision-making process is not what we review; rather, we look at the resulting outcome. The city is not obligated to show that its plan is the best or only alternative, only that it is a reasonable one.[11] The dissent's insistence that plaintiff has the burden of proving necessity is clearly contrary to the deference the Legislature requires of us. The statute

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[10] Although defendants contend that plaintiff could have built an alternative to the proposed Wisne drive on land actually owned by Wisne, the record indicates that such an alternative would still have exited onto Grand River Avenue. We note in passing that such an "alternative" would likely have defeated the purpose of relocating the access road, because it would have done nothing to eliminate the "critical traffic problem" posed by the exit onto Grand River Ave.

[11] In *Vanderkloot*, *supra* at 172-173, we identified numerous factors that might play a role in determining the routing of a road, including "comparative costs of construction, directness, comparative costs of maintenance, safety, probable amount of travel, convenience, topography, aesthetics, etc." That is why these legislative determinations are entitled to a highly deferential standard of judicial review, and will not be disturbed except where there is evidence of fraud, error of law, or an abuse of discretion.

not only limits the grounds for reversal and by its language places that burden on defendants, but also allows only thirty days between when defendants file a necessity motion and when the hearing is held, implicitly limiting discovery on the issue. MCL 213.56. The Legislature adds a final hurdle for defendants by permitting appellate review of the trial court's decision only by leave granted. MCL 213.56(6). Because defendants have not shown that the proposed route of the public road is outside the zone of reasonable alternatives, we find plaintiff did not abuse its discretion in determining that the taking of defendants' property is necessary for the ring road project.

V

In his dissent, Justice CAVANAGH sua sponte raises the question of mootness,[12] concluding that the city does not intend to pursue this project. To make this argument, he relies exclusively on the colloquy at oral argument. While we do not think that that argument supports his conclusion, which we will discuss below, a

[12] Where the facts of a case make clear that a litigated issue has become moot, a court is, of course, bound to take note of such fact and dismiss the suit, even if the parties do not present the issue of mootness. " ' "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." ' " *Daniels v Peterson*, 462 Mich 915, 917-918; 615 NW2d 14 (2000) (KELLY, J., dissenting) (quoting *Fox v Univ of Mich Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 [1965], quoting *In re Fraser Estate*, 288 Mich 392, 394; 285 NW 1 [1939]). Because " '[t]he judicial power . . . is the right to determine actual controversies arising between adverse litigants,' " *Anway v Grand Rapids R Co*, 211 Mich 592, 616; 179 NW 350 (1920) (citation omitted), a court hearing a case in which mootness has become apparent would lack the power to hear the suit. This is not such a case.

brief review of the basic principles of mootness law also shows that it is premature to declare this matter moot.

When a complaint is filed and an actual injury is alleged, a rebuttable presumption is created that there is a genuine case or controversy. See *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 631; 684 NW2d 800 (2004). The case may be dismissed as moot if the moving party satisfies the "heavy burden" required to demonstrate mootness. *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc*, 465 Mich 303, 306; 633 NW2d 357 (2001), citing *Los Angeles v Davis*, 440 US 625, 631; 99 S Ct 1379; 59 L Ed 2d 642 (1979). If such a motion is brought, "the plaintiff must further support the allegations of injury with documentation" and must sufficiently support its claim if it goes to trial. *Nat'l Wildlife, supra* at 631.

These procedural requirements are entirely lacking in this case at this time. No motion or other pleading has claimed mootness and there has been no "support" so as to meet *any* burden, much less the "heavy burden" required to demonstrate mootness.

Notwithstanding this, the dissent evidently feels that the record here is sufficient so that we sua sponte can proceed. We think the record cannot support that conclusion. The dissent, relying entirely on the oral argument here, infers that several statements by plaintiff's counsel support a finding of mootness. The essence of the first statement made in response to Justice CORRIGAN's query about whether the ring road part of the project could be split off was that it could not because plaintiff did not want the project built piecemeal. This does not indicate abandonment; rather, it refers to a desire to consolidate all parts of the project before getting underway. Certainly in the absence of

contradictory evidence, of which none has been presented, the draconian reading given by the dissent is unwarranted.

The second claim is that the plaintiff, in rebuttal argument, failed to "contest or deny that there are currently no plans to pursue the project." *Post* at 262. Yet, plaintiff had no reason to respond in such a way because the defense counsel did not say the city had no intention of completing the *spur* road for which defendants' property was being condemned; he merely said the *ring* road project, with its rescinded state funding, was "gone." This appears to be nothing more than a reference to the lapse of funding, which happens invariably when there is extended litigation. With this understanding, a rebuttal would not, for a person conversant with this process, call for a full vindication of continued interest in the whole project. Thus, that one did not come is unexceptional and in no event establishes mootness.

Finally, the dissent faults plaintiff for its response to the defense counsel's observation that the reason plaintiff continued the litigation was because it wants a rule of law reversing the decision of the Court of Appeals. How surprising is it that an appellant would concede that it wanted the Court of Appeals decision reversed? Not very, we believe. Surely it says nothing about mootness.

We conclude therefore that plaintiff's complaint is a matter of current controversy because there is no evidence here presented, indeed only defendants' speculation, that plaintiff would not proceed with the condemnation upon prevailing in this Court. On remand, should the defendants conclude that mootness actually is an issue, they can raise it in the normal course and let the trial court determine if they have met their burden.

Such has not been shown on the record before us, and thus we conclude that this matter is not moot and is appropriate for adjudication.

VI

We hold that the proposed road and spur are for a public use, and therefore the proposed condemnation does not violate Const 1963, art 10, § 2. We also hold that plaintiff's determination that defendants' property is necessary to complete the ring road project does not violate the UCPA because it does not indicate fraud, error of law, or an abuse of discretion. Accordingly, the decisions of the Court of Appeals and the circuit court are reversed, and this matter is remanded to the circuit court for further proceedings not inconsistent with this opinion.

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

WEAVER, J. *(concurring).* I concur in the majority opinion that the road proposed by the city of Novi is a public use under Const 1963, art 10, § 2 and private property may be condemned for the construction of the road because the road will be established, paid for, and controlled and managed by a public body and because the public at large will be able to use the road. See *Rogren v Corwin*, 181 Mich 53, 57-58; 147 NW 517 (1914).

The majority correctly notes that this case does not involve the transfer of private property through the exercise of eminent domain from one private entity to another and thus is not controlled by this Court's recent decision in *Wayne Co v Hathcock,* 471 Mich 445; 684 NW2d 765 (2004). But then the majority suggests

that the lower courts also erred because if there had been such a transfer, the lower courts should have applied *Hathcock's* three-factor test. *Ante* at 252. However, because the lower courts' decisions in this case preceded this Court's decision in *Hathcock,* the lower courts could not have erred by not applying *Hathcock*. *Id*.

I also concur in the majority opinion that the city of Novi did not commit fraud, an error of law, or abuse its discretion when it declared that the condemnation of the property in question was necessary under MCL 213.56.

Finally, I agree with the majority that the case before us is not moot and that this Court cannot avoid addressing the constitutional and statutory questions presented on the basis of the dissent's assumption that the proposed road project will not proceed. However, I do not join the majority's purported "review of the basic principles of mootness law . . . . " *Ante* at 256. The majority does not in fact review Michigan's law regarding moot cases. Instead, the majority imports a discussion of subject-matter jurisdiction requirements from a case that involved standing. See *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 631; 684 NW2d 800 (2004). As I stated in my opinion concurring in the result only in *Nat'l Wildlife*, the cited discussion had little to do with the question of standing that was at issue in *Nat'l Wildlife.* The cited discussion similarly has little relevance to the question whether the issues presented in this case are moot.

CAVANAGH, J. *(dissenting).* I respectfully dissent from the majority opinion. This matter is moot and, consequently, we are without authority to decide it. With regard to the majority's substantive analysis, the ma-

jority erroneously decides a matter that should first be addressed by the trial court. Further, by improperly diminishing the degree of inquiry that should be made into the city's condemnation decision, the majority erroneously concludes that the city's taking met the standard for public necessity.

I. MOOTNESS

"The principal duty of this Court is to decide actual cases and controversies." *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002), citing *Anway v Grand Rapids R Co*, 211 Mich 592, 610; 179 NW 350 (1920). "To that end, this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before us unless the issue is one of public significance that is likely to recur, yet evade judicial review." *Id.,* citing *Anway*, *supra* at 610, and *In re Midland Publishing Co, Inc*, 420 Mich 148, 152 n 2; 362 NW2d 580 (1984).

Today the majority grants the city's request for entry of a judgment on its condemnation suit, despite the fact that the relief granted has no practical legal effect on the parties to this claim. The city sued to condemn defendants' land so that it could pursue a particular project. As identified in its condemnation complaint, the city's project involved constructing a ring road and a connecting spur, the latter of which was designed to rest on defendants' property.[1] A review of both parties' statements of facts in their briefs to this Court reveal that the funding for the ring road project was rescinded

[1] The parties' nomenclature for the whole project is the "ring road project." The majority's assertion, *ante* at 257, that plaintiff represented "merely" that the "ring road project" was gone, and this meant that the *spur* road portion is still pending, is not borne out by the facts.

by the funding agency in 1999. In the briefing, there is nothing declaring, and nothing from which to infer, that if the city prevails on its condemnation claim, it has the present ability and the present intent to pursue the originally intended project.

At oral argument, this Court made several inquiries regarding the project's status and the potential mootness of this appeal. First, Justice CORRIGAN asked whether there was any reason why this Court could not issue an order allowing the ring road portion of the project to proceed while the spur portion of the project was still under consideration. Counsel for the city responded:

> We are now, Your Honor, *several years removed from the road project*. This was not a piecemeal kind of project. Part of the reason for the industrial spur, for example was that the Ring Road where it was proposed to connect to Grand River would have been too close to this driveway on Grand River that currently served the Wisne property. That was one of the reasons to have the industrial spur. [Emphasis added.]

Counsel elaborated, "It was difficult at the trial and in addition now, 6 years, 7 years removed from when the project was started, *the project itself has kind of been uncertain*." (Emphasis added.)

During defense counsel's argument, Justice KELLY asked:

> You began to develop an idea and you didn't complete it because you were interrupted. Were you telling us that when Wisne was sold the whole project became uninteresting to the city?

Counsel replied:

> It is gone forever and what [counsel for the city] will tell you probably because he has to is that maybe someday it will get built. *The reality of the situation, and there were*

> *depositions on this point, that Ring Road is gone. And the driveway that they are proposing now would extend to nothing*. [Emphasis added.]

Interestingly, on rebuttal, counsel for the city did not contest or deny that there are currently no plans to pursue the project. Rather, he attempted to proffer *alternative reasons* why this Court should decide this case:

> Very briefly, and I'll stay within the two minutes, the question was raised kind of a mootness kind of question. Here is the city's response on that. It is true that *we have a published Court of Appeals opinion that we think is very much wrong on the issue of public use and what the standard of review is with regard to public use in this kind of case. It's relevant not just for the future and how trial courts are going to apply it, it's relevant to this case with regard to is there a responsibility for the attorney fees that were incurred on behalf of the property owner if that case is not dealt with and found to have been correct or incorrect, so there is a reality for this case that needs to be dealt with*. It's not moot. [Emphasis added.][2]

Our jurisprudence regarding mootness has been established for well over a century. There is no question but that a court " 'will not take jurisdiction, unless it can afford immediate relief, and certainly will not undertake, where there is no matter in dispute, to *declare future rights*.' " *Anway*, *supra* at 609, quoting *Woods v Fuller*, 61 Md 457, 460 (1884), citing *Heald v Heald*, 56 Md 300 (1881). " 'It will never undertake to decide upon and determine a contingency *that may never arise*, unless such determination is necessary for the decision of some immediate relief to be granted, and

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[2] It is not surprising at all that counsel for plaintiff wants this Court to reverse the decision of the Court of Appeals. See *ante* at 257. What is surprising is that counsel for plaintiff offered nothing more than this desire in response to the questions that were raised regarding mootness.

which the court can enforce by a decree.' " *Id.* at 609-610, quoting *Woods*, *supra* at 460 (emphasis added). " 'Where a complainant has sustained no injury and the *object of the action is merely to obtain a declaration as to the constitutionality of a legislative act*, the question presented to the court is merely an abstract one and the action will be dismissed.' " *Id.* at 610, quoting *Hanrahan v Buffalo Terminal Station Comm*, 206 NY 494, 504; 100 NE 414 (1912) (emphasis added).

Counsel for the city expressly stated that relief is sought in this case not because the city intends to pursue the road project, but to overturn what it perceives as an erroneous Court of Appeals opinion and to render guidance for trial courts addressing this issue in the future.[3] We are constitutionally proscribed from granting declarations of this sort, despite whether the mootness inquiry originates from a party. See *id.*; see also *Sibron v New York*, 392 US 40, 57; 88 S Ct 1889; 20 L Ed 2d 917 (1968) (recognizing the constitutional genesis of the mootness doctrine). In many instances, both parties may strongly desire a court ruling, despite the moot nature of the case. But where the ruling is purely advisory and has no effect on the parties' rights, a court is without jurisdiction to entertain the claim. Thus, the majority's puzzlement over the dissent's effort to address mootness is puzzling in and of itself.

Although it has been aptly recognized that 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," it is simultaneously true that we nonetheless "cannot ignore such impediments for purposes of our appellate review without simultaneously affecting the principles that govern district

[3] Such a reading is hardly "draconian." See *ante* at 257.

courts in their assertion or retention of original jurisdiction." *Honig v Doe*, 484 US 305, 341-342; 108 S Ct 592; 98 L Ed 2d 686 (1988) (Scalia, J., dissenting). See also the collection of cases noted in *City of Warren v Detroit*, 471 Mich 941 (2004) (MARKMAN, J., concurring).

The city, having failed to confirm or present any supporting facts that it is currently pursuing the road project for which this taking was ostensibly required, leaves us no choice but to declare that there is simply no controversy remaining and no relief available to the parties. It is unfortunate that the majority does not recognize this. Instead, the majority remands this case for entry of a judgment that the city can condemn defendants' property. But that judgment is meaningless. The basis for the city's condemnation complaint, in which it declared that it required defendants' property for its ring road project, simply no longer exists because the project is defunct. As defense counsel noted, constructing the spur on defendants' property would be an exercise in futility because there is no ring road with which to connect it. Consequently, the trial court will enter judgment on the city's condemnation complaint, but the only effect of that judgment will be that the city will know that, if, at some time *in the future* it decides to pursue the road project, it has a Supreme Court advisory opinion in its favor.

Because of the tremendous restrictions a potential taking puts on a property owner's ability to use or dispose of his land, the city should not get the benefit, and defendants should not get the detriment, of today's ruling. In *Horton v Redevelopment Comm'n of High Point*, 262 NC 306; 137 SE2d 115 (1964), a concurring justice of the North Carolina Supreme Court commented on the appropriateness of requiring a city to show that it has present intent and present ability to

begin and complete an urban redevelopment project when the project involves taking private property. The principles espoused in the justice's thoughtful analysis are equally applicable in the case at hand, and bear repeating:

> The urban redevelopment law and the decisions of this Court have given ample notice that the City must show present ability to finance the project. This may be done by the use of funds on hand derived from sources other than taxation, or the City must have the present authority to get the money by means other than by pledging the credit of the City. This is so because the filing of the plan prevents the owner of the property from dealing with it as his own. He cannot improve it, or rent it, or sell it, except at the hazard of being ejected at the will of the Commission. His property is virtually frozen by the plan. The filing of a lawful plan is equivalent to a restriction of the owner's right to use his property as of the date of the taking of any interest therein. The law wisely provides that authorities may not acquire property until the plan shows financial ability to complete the project. The taking of private property is in derogation of a common law right of the owner, and the act which authorizes the taking must be strictly construed. [*Horton, supra* at 328 (Higgins, J., concurring).]

Likewise in this case, the majority's ill-conceived advisory opinion will place defendants' property in a perpetual state of uncertainty, thus effectively depriving them of their common-law right to use their property as they see fit. Despite that fact, the majority apparently does not feel bound by the well-established principles set out by both the United States Supreme Court and this Court that dictate against reaching the merits of this claim.

The city's request for this Court's legal guidance to combat what it alleges is an incorrect Court of Appeals analysis is an insufficient basis on which to disregard

the moot nature of this claim. And because the majority insists on issuing an opinion, its grant of "permission" to the parties to raise this matter before the trial court is too little, too late. Plaintiff gets what plaintiff wants: an advisory opinion from this Court on public use and necessity.

Further, the city's plea for us to decide the matter so that a determination regarding attorney fees can be made is easily rejected. I am unaware of any such exception to the mootness doctrine. Indeed, such an exception would wholly obviate the doctrine because a party to a moot appeal would invariably advance the argument that a decision is required so that one party can seek attorney fees.

Nor is it dispositive that neither party briefed the mootness issue. Because of the constitutional dimensions of jurisdiction, it is incumbent on this Court to identify and reject moot claims even absent a party's request for us to do so. And it is ascertainable from the existing record that this moot matter, while of arguable public significance, is not susceptible to evading judicial review. While the state funding agency required the city to submit an explanation if the project had not moved forward within two years, and reserved its right to rescind the funding if progress was not being made, rescinding was neither a requirement nor a foregone conclusion.[4] And there is no indication that the agency would have rescinded the funding, rather than granting an extension because of a pending lawsuit, had the city requested such an extension. Thus, there is no sufficient showing that this case is the sort that is "likely to recur, yet evade judicial review."

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[4] This is contrary to the majority's assertion that a "lapse of funding . . . happens *invariably* when there is extended litigation." *Ante* at 257 (emphasis added).

Moreover, it is worth noting that in its grant application, the city misrepresented that defendants had *agreed to donate* the property on which the spur road would be built. By misrepresenting defendants' intention, the city became entwined in a self-created dilemma. It had to sue for condemnation to fulfill what it alleged was already true, i.e., that property had been donated by the community, and, at the same time, avoid exhausting the funding agency's patience. Rather than giving the city the benefit of the doubt that, by virtue of a *possible* time limitation, this case is likely to evade review, I would simply suggest that a taking entity has any number of alternative options available to it. For instance, it could first condemn property and *then* apply for project funding. Or it could forthrightly inform the agency that condemnation is being pursued so the agency would be aware that the lawsuit may bear on the project's timing. But the city cannot, as the majority will apparently allow, place itself, by misrepresentation, in its present predicament and obtain judgment on the merits where it has made no showing that it would otherwise be continually precluded from doing so.

With respect to the majority's statement that defendants have come up with no evidence that the project is not moving forward, I would simply point the majority to the documentary evidence contained in the record, which consists of letters discussing the funding withdrawal for the road project. I believe that evidence, coupled with the statements made at oral argument, should give the majority pause.

Because I believe that the existing record demonstrates that there is no present case or controversy, no meaningful relief to be afforded the parties, and no showing that this matter is likely to evade judicial review, and because the inevitable result of deciding the

claim is to shackle defendants' ability to freely use their land, I would decline to exercise jurisdiction and dismiss the city's claim as moot.

II. PUBLIC NECESSITY

Because the majority insists on addressing the merits of this moot claim and rendering an advisory opinion that will now control the state of the law, I find it incumbent on me to respond to its analysis.

The majority correctly recognizes that a trial court's realm of permissible inquiry in a condemnation case is limited to whether a taking entity's decision regarding public necessity was based on fraud, an error of law, or an abuse of discretion. MCL 213.56(2). The Court of Appeals reviews the trial court's determination regarding public necessity for clear error. *City of Troy v Barnard*, 183 Mich App 565, 569; 455 NW2d 378 (1990); *Nelson Drainage Dist v Filippis*, 174 Mich App 400, 403; 436 NW2d 682 (1989). Likewise, this Court may only reverse a decision of the Court of Appeals if we find the decision clearly erroneous. MCR 7.302(B)(5). Thus, it is our task to determine whether the Court of Appeals clearly erred in affirming the trial court's decision.

Although the trial court concluded its written opinion by stating that defendants "met their burden of showing that Plaintiff City's actions evidence a lack of public necessity by fraud, error of law and/or abuse of discretion," the substance of its opinion demonstrates that it analyzed not public necessity, but public use. The paragraph preceding the trial court's conclusion summarized the basis for its ruling:

> The Court does not dispute the fact that the project proposed by the City of Novi furthers a benefit to the general public. Nonetheless, the Court is persuaded that Plaintiff City's proposed action will benefit a specific,

> identifiable private interest and, therefore, the Court is compelled to inspect with heightened scrutiny as outlined by the Michigan Supreme Court in *Poletown Neighborhood Council v Detroit*, 410 Mich 616 [304 NW2d 455] (1981). The question thus becomes whether the public interest is the predominant interest being advanced; the public benefit of which can be neither speculative nor marginal, but clear and significant. *Id.* at 635. Applying heightened scrutiny to the overwhelming evidence before this Court, the Court finds that the proposed industrial spur, A.E. Wisne Drive, is primarily for the benefit of Wisne, which benefit predominates over those to the general public.

Thus, the trial court, despite erroneously citing the standard of review for a public necessity challenge, found that the city had not demonstrated that its condemnation was for a public use. Having found so, it was unnecessary for the trial court to inquire into public necessity. Likewise, the Court of Appeals focused solely on public use. Consequently, this Court is without the benefit of any lower court findings on public necessity.[5]

Therefore, were this case not moot, I would first agree with the majority that the Court of Appeals holding that the taking was not for a public use was clearly erroneous for the reasons the majority states. But I would then remand this case to the trial court and instruct it to address defendants' claim that the city's determination of public necessity was made on the basis of fraud, error of law, or abuse of discretion.

I would not foreclose defendants' argument regarding fraud on the basis that defendants showed no "reliance or injury resulting from these acts." *Ante* at 253 n 8. A trial court cannot accept the taking entity's

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[5] The fact that the trial court based its decision regarding public use on an erroneous legal theory, see *ante* at 253 n 7, does not negate the fact that the trial court made no findings regarding public necessity.

assertion of public necessity when that *assertion* was fraudulently made. The record shows that plaintiff submitted a grant application misrepresenting that defendants donated their property toward the project. On the basis of that misrepresentation, the state pledged the funding. When the state granted the funding, plaintiff then had no choice but to condemn defendants' land. And in pursuit of the condemnation, plaintiff claimed that the taking was "necessary." But plaintiffs' assertion of necessity was not grounded in a decision that the land in question was "reasonably suitable and necessary" for the project and that this particular piece of property, rather than some other, was required. See *State Hwy Comm v Vanderkloot*, 392 Mich 159, 176-177; 220 NW2d 416 (1974). Its assertion was made because plaintiff had to make good on its misrepresentation.[6]

Last, I wholeheartedly disagree with the amount of deference the majority affords the government in determining that the taking of a particular piece of property is necessary. As stated, the precise legal question is whether, to complete the project, the government needs all the property involved or needs one particular piece of property rather than some other property. *Vanderkloot*, *supra* at 176-177. That review encompasses variables such as "whether the land in question is reasonably suitable and necessary for the 'improvement' and whether there is the necessity for taking particular property rather than other property for the purposes of accomplishing the 'improvement.' " *Id.* at 177-178. Nec-

[6] Defendants need not claim that plaintiff directly defrauded *defendants*. Such a task would be difficult in a condemnation case, in which a decision regarding necessity is presumably made before a private property owner even knows of a looming condemnation. Rather, a trial court must determine whether a plaintiff's assertion of necessity was, in a general sense, fraudulently made.

essarily, then, there must be some factual demonstration that would allow a court to determine whether an agency abused its discretion in condemning a particular piece of property.

With regard to public necessity, the majority's first analytical error is in failing to properly apply the clear error standard. *City of Troy, supra* at 569; *Nelson Drainage*, *supra* at 403. Where the trial court did not reach the issue of necessity, it is impossible to determine whether its nonexistent findings were clearly erroneous, despite whether the parties believe that the record is sufficient for us to do so.[7]

In its next analytical error, rather than actually assessing whether the facts demonstrate that the city even undertook a necessity analysis, the majority concludes that even if there were other suitable locations for the spur, the decision to take defendants' property was not outside the " 'principled range of outcomes.' " *Ante* at 254, quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). But defendants presented evidence that the city did not examine *any* range of outcomes, but rather fixated on this particular piece of property to the exclusion of considering other parcels or even alternatives to condemnation.[8] Thus, a conclusion that the city's outcome fell within an acceptable

[7] See also n 8 of this opinion.

[8] The majority's suggestion that one of defendants' proposed alternatives—building the spur road on Wisne's own land—was unworkable because the spur still would have exited onto Grand River is not useful to resolving the abuse of discretion claim. As an initial matter, without knowing the logistical details, I would not make a factual determination that the alternative was unworkable. But even if the alternative would not have sufficed, defendants offered other alternatives as well. Invalidating one alternative says nothing about whether other alternatives were available, viable, and preferable to the drastic measure of condemnation.

"range" is unsupportable. The majority's overly deferential viewpoint permits a city to prevail against a challenge to public necessity by simply claiming that its taking of a particular piece of property was, in fact, necessary. While deference to a taking agency's finding is certainly warranted, it cannot be said that as long as an agency claims necessity, its decision cannot be disturbed. Such an approach does not venerate the constitutional principle on which the UCPA is based: a taking can only occur on proof that the taking was both for a public purpose and that *the taking of a particular piece of property was truly necessary*.

This is especially true here, where defendants presented evidence that, during the negotiation phase, they proffered several alternatives to taking their property. The city refused those avenues because to be eligible for the funding it sought, some portion of the ring road project had to consist of a "community donation." The city decided that to fulfill the community donation portion, it would simply require defendants to unwillingly sacrifice their land. Thus, the city never answered the question whether *the particular piece of property was necessary* for the purposes stated in its complaint, i.e., safety and welfare. Rather, it is clear only that the taking was a "necessary" means to an end.

The majority further states that "[t]he city is not obligated to show that its plan is the best or only alternative, only that it is a reasonable one." *Ante* at 254. Again, a taking agency's mere claim that the choice was "reasonable" is not conclusive. When defendants challenged public necessity, they put forth evidence that there were alternatives to taking their particular piece of property. Other than a road project plan that incorporated defendants' property, nothing in the record demonstrates that the city chose defendants' property

in lieu of other alternatives because other alternatives were inferior, or because there were no available alternatives. Thus, the city's assertion of public necessity is bare. If it is enough for the city to say that it needs a particular piece of property and that its choice is a reasonable one, judicial review of public necessity is essentially foreclosed, and an abuse of discretion could never or only rarely be found.

Under the majority's rationale, a necessity hearing hardly seems meaningful. The majority accuses my dissent of reversing the burden of proof, but nothing could be further from the truth. If the city is required to do no more than sit back and assert public necessity, what, then, is the hearing's purpose? Generally, in civil matters, one party begins with the burden of proof and must present evidence in support of its position. The other party must then somehow diminish, rebut, or contest that evidence with evidence of its own. Only then can a trial court decide which party should prevail under the appropriate standard. But the majority's position allows the following scenario. A property owner disputes public necessity and requests a hearing. At that hearing, the owner puts forth evidence that, if believed, would support his claim that the taking of his particular parcel was not necessary. The taking entity rebuts the allegation not with evidence, but merely by affirming that the taking was necessary. Under the novel rule of law set forth by today's majority, the taking entity prevails, despite the fact that it produced nothing more than an unsupported assertion of public necessity.

This unquestioning ceding of power is not what was contemplated by the constitutional or statutory prohibitions against the unnecessary taking of private property. Contrary to the majority's position, a reviewing

court has an obligation to determine whether, in the face of evidence to the contrary, the taking entity produced *evidence*—not assertions—of necessity. And this is true despite the fact that the burden of disproving necessity is on the property owner. When a trial court must determine whether there was an abuse of discretion, defendants raise a compelling argument that the taking entity's failure to use any discretion at all is, in itself, an abuse of discretion.

Were this case not moot, in the complete absence of trial court findings on necessity, I would remand for the trial court to determine whether the city's decision to take defendants' property was based on fraud, error of law, or an abuse of discretion.

III. CONCLUSION

The doctrine of mootness should preclude this Court from reaching the merits of this claim. As such, the city's appeal should be dismissed. Moreover, the majority's public necessity analysis dilutes the power and obligation of a reviewing court to protect a private property owner from an unlawful taking by conferring unchecked deference on a taking entity's declaration of necessity. Accordingly, I dissent.

KELLY, J., concurred with CAVANAGH, J.

PEOPLE v BELL

Docket No. 125375. Argued December 8, 2004 (Calendar No. 2). Decided July 21, 2005. Amended and rehearing denied 474 Mich 1201.

Marlon Bell was convicted by a jury in the Wayne Circuit Court, Leonard Townsend, J., of two counts of first-degree felony murder, two counts of armed robbery, and one count of conspiracy to commit armed robbery. During jury selection, the trial court disallowed the defendant from exercising his statutory right to peremptorily challenge two empaneled jurors. Both the trial court and the prosecutor raised the issue whether the attempted peremptory challenges were racially discriminatory and prohibited by *Batson v Kentucky*, 476 US 79 (1986), and the trial court determined that they were. The defendant appealed. The Court of Appeals, WILDER, P.J., and FITZGERALD and ZAHRA, JJ. (ZAHRA, J., and WILDER, P.J., concurring), in an opinion on reconsideration, held that the trial court improperly denied defendant his statutory right to two peremptory challenges and that the error required automatic reversal. 259 Mich App 583 (2003). The Supreme Court granted the prosecution's application for leave to appeal. 470 Mich 870 (2004).

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

A peremptory challenge to strike a juror may not be exercised on the basis of race. A three-step process, as outlined in *Batson*, is employed to determine whether a challenger has improperly exercised peremptory challenges. First, the opponent of the challenge must make a prima facie showing of discrimination based on race. Second, once the prima facie showing is made, the burden shifts to the challenging party to come forward with a neutral explanation for the challenge. Finally, the trial court must decide whether the opponent of the challenge has proven purposeful discrimination. To establish a prima facie showing of discrimination based on race, the opponent of the challenge must show that the defendant is a member of a cognizable racial group, that peremptory challenges are being used to remove members of a

certain racial group from the jury pool, and that the circumstances raise an inference that the exclusions are based on race.

The Court of Appeals did not err in holding that a trial court may raise a *Batson* issue sua sponte. The Court of Appeals did err in holding that it could not determine whether a prima facie case of discrimination was made because the record was inadequate. A prima facie case was established. The trial court did permit the defendant to provide race-neutral reasons for his challenges and the trial court found that the reasons propounded were not race-neutral. The trial court did perform the steps required by *Batson* and, therefore, did not improperly deny defendant the right to exercise two of his statutorily prescribed peremptory challenges. The trial court's initial error does not require automatic reversal.

The opinions in *People v Miller*, 411 Mich 321 (1981), and *People v Schmitz*, 231 Mich App 521 (1998), must be repudiated to the extent that they hold that a violation of the right to a peremptory challenge requires automatic reversal. The right to a peremptory challenge is not of constitutional dimension. A violation of the right does not warrant automatic reversal. A violation is reviewed for a miscarriage of justice if the error is preserved and for plain error affecting substantial rights if the error is forfeited.

Justice WEAVER, concurring, joined the lead opinion except for part IV, which addresses whether the violation of a right to a peremptory challenge requires automatic reversal, and the last paragraph of part V, which concludes that it is proper to address the issue as a response to the dissent. This discussion is unnecessary to the opinion and therefore is dicta.

Chief Justice TAYLOR, dissenting in part and concurring in part, concurred with the lead opinion that the denial of a statutory peremptory challenge is subject to harmless error review and that *People v Schmitz* must be repudiated to the extent that it held to the contrary. The defendant is not entitled to a new trial under this analysis. He also joined the lead opinion in questioning the continuing viability of *People v Miller*. He dissented from the lead opinion's conclusion that defense counsel provided race-conscious reasons for two peremptory challenges and concluded that the trial court erroneously deprived the defendant of two of his peremptory challenges. However, to the extent that the trial court's error violated the court rule, the defendant is not entitled to a new trial because a refusal to grant a new trial is not inconsistent with substantial justice. The Court of Appeals decision must be reversed and the defendant's convictions should be reinstated.

Reversed.

Justice KELLY, dissenting, would affirm the decision of the Court of Appeals because the trial court erred by failing to follow the three-step procedure required by *Batson* and, in fact, completed none of the steps. A prima facie case of discrimination was never established, and the trial court improperly placed the burden on the defense counsel to show that the peremptory challenges should be allowed. Absent a prima facie case of discrimination, there was no reason to require the defense counsel to offer race-neutral reasons for the peremptory challenges. The failure to follow the *Batson* procedure in disallowing the peremptory challenges was a structural error that affected the fundamental framework of the trial, altering the makeup and deliberative process of the jury, and requires automatic reversal. Errors in the denial of a peremptory challenge infect the entire case and are not subject to harmless error analysis. Automatic reversal is required in such circumstances. Furthermore, the majority's discussion of *People v Miller*, constitutes dictum because *Miller* does not apply to the facts of this case, and there is no legal basis to overrule *Miller*.

Justice CAVANAGH, dissenting, stated that the trial court erred in collapsing the three *Batson* steps into one and in failing to allow the defendant an opportunity to articulate race-neutral explanations for the challenges. The defendant is entitled to a new trial because the trial court erroneously denied the peremptory challenges on *Batson* grounds and *Batson* error is subject to automatic reversal and not amenable to harmless error review. The majority's dicta regarding *Miller* and *Schwartz* is inappropriate given the majority's conclusion that the trial court ultimately did not err. The decision of the Court of Appeals should be affirmed.

1. CRIMINAL LAW — JURY — PEREMPTORY CHALLENGES — RACIAL DISCRIMINATION.

A trial court may raise sua sponte the issue whether a party is violating the prohibition against race-based peremptory challenges.

2. CRIMINAL LAW — JURY — PEREMPTORY CHALLENGES — RACIAL DISCRIMINATION.

The three-step process employed to determine whether a challenger has improperly exercised race-based peremptory challenges requires the opponent of the challenge to make a prima facie showing of discrimination based on race; once a prima facie showing is made, the burden shifts to the challenging party to come forward with a neutral explanation for the challenge; finally, the trial court must decide whether the opponent of the challenge has proven purposeful discrimination.

3. CRIMINAL LAW — JURY — PEREMPTORY CHALLENGES — RACIAL DISCRIMINATION.

To establish a prima facie showing of race-based discrimination, the opponent of a peremptory challenge must show that the defendant is a member of a cognizable racial group, that peremptory challenges are being used to remove a certain racial group from the jury pool, and that the circumstances raise an inference that the exclusions are based on race.

4. CRIMINAL LAW — JURY — PEREMPTORY CHALLENGES — APPEAL.

A violation of the right to peremptory challenge does not require automatic reversal on appeal, but instead is reviewed for a miscarriage of justice if the error is preserved and for plain error affecting substantial rights if the error is forfeited.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the people.

State Appellate Defender (by *Douglas W. Baker*) for the defendant.

CORRIGAN, J. In this case, we consider whether the trial court failed to follow the three-step process of *Batson v Kentucky,* 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), when it prohibited defendant from exercising his right to two peremptory challenges and, if so, whether that error is structural and, thus, requires automatic reversal. In *Batson,* the United States Supreme Court held that a peremptory challenge to strike a juror may not be exercised on the basis of race. *Id.* at 89, 96-98. The Court set forth a three-step process for determining whether a challenger has improperly exercised peremptory challenges. First, the opponent of the challenge must make a prima facie showing of discrimination based on race. *Id.* at 94-97. Next, once the prima facie showing is made, the burden then shifts to the challenging party to come forward with a neutral explanation for the challenge. *Id.* at 97. Finally, the trial

court must decide whether the opponent of the challenge has proven purposeful discrimination. *Id.* at 100.

In this case, a prima facie showing was made that two of defendant's peremptory challenges were based on race. The trial court initially erred in failing to allow defendant to provide race-neutral reasons for the challenges. The trial court subsequently cured this error by allowing defendant to provide reasons for the challenges. Defendant's reasons were race-conscious rather than race-neutral. Accordingly, the trial court disallowed the challenges. Because the trial court's initial error was subsequently cured and because defendant's reasons were race-conscious, we conclude that the trial court did not fail to follow the three-step *Batson* procedure and did not err in disallowing the challenges in question. We further conclude that the trial judge's initial error does not require automatic reversal. We thus reverse the judgment of the Court of Appeals.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

On July 29, 1999, defendant was involved in the robbery and shooting deaths of Chanel Roberts and Amanda Hodges. Following a jury trial, defendant was convicted of two counts of first-degree felony murder, MCL 750.316; two counts of armed robbery, MCL 750.529; and one count of conspiracy to commit armed robbery, MCL 750.529 and MCL 750.157a. Defendant was sentenced to concurrent terms of mandatory life imprisonment without parole for the first-degree felony murder convictions and life imprisonment for the armed robbery and conspiracy to commit armed robbery convictions.

Defendant is African-American and the two victims were Caucasian. During jury selection, defense counsel attempted to exercise a peremptory challenge to strike potential juror number ten, who is Caucasian. Juror ten

stated during voir dire that three of his friends were high-ranking police officers, but that he "wouldn't think" that this fact would affect his ability to be fair and impartial. When defense counsel attempted to excuse this juror peremptorily, the trial court disallowed the challenge, concluding that counsel had exercised the challenge on the basis of race. The trial court initially refused to allow defense counsel to make a record, but reconsidered after defense counsel expressed dissatisfaction with the trial court's refusal. Defense counsel then furnished a race-conscious, rather than race-neutral, reason for the challenge and the trial court continued to disallow the challenge.

Jury selection continued. After several more defense peremptory challenges, the prosecutor objected when defense counsel attempted to excuse juror number five. The prosecutor claimed that defense counsel was attempting to strike juror five on the basis of race, contrary to *Batson*. The trial court excused the jury in order to make a record regarding the challenge. The prosecutor noted that the current challenge was defense counsel's third consecutive strike on a Caucasian male and that defense counsel was attempting to exclude Caucasian males from the jury. Defense counsel replied that the prosecution's argument would have some merit if no other Caucasian males remained on the jury. Defense counsel also noted that the majority of the remaining jurors was Caucasian. Defense counsel offered no other explanation for his challenge. The trial court found defense counsel's explanation race-conscious and disallowed the challenge. Consequently, both jurors five and ten sat on the jury that convicted defendant.

On appeal, defendant raised several claims of error, including the claim that the trial court failed to follow

the three-step procedure mandated in *Batson* in disallowing his peremptory challenges of jurors five and ten. The Court of Appeals, in a split decision, agreed that the trial court failed to follow the *Batson* procedure, but, nevertheless, upheld defendant's convictions.[1] Judges ZAHRA and WILDER concluded that the trial court's *Batson* error was not of constitutional dimension and was subject to harmless error analysis, while Judge FITZGERALD would have held that the error was structural and required automatic reversal.

Defendant sought reconsideration. The Court of Appeals granted defendant's motion and vacated its prior opinion.[2] On reconsideration, the Court held that a denial of the statutory right to a peremptory challenge is error per se.[3] Judges ZAHRA and WILDER concurred, stating that they were "duty-bound" to follow the holdings in *People v Miller,* 411 Mich 321; 307 NW2d 335 (1981), and *People v Schmitz,* 231 Mich App 521; 586 NW2d 766 (1998).

The prosecutor applied for leave to appeal, contending that the alleged denial of defendant's statutory right to remove prospective jurors peremptorily was not error requiring automatic reversal.

We granted the prosecution's application for leave to appeal.[4] The prosecution contends that the trial court did not err in failing to follow the procedures set forth in *Batson*. Alternatively, the prosecution argues that even if the trial court erred in failing to follow the *Batson* procedures, the error was harmless.

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[1] Unpublished opinion per curiam, issued October 2, 2003 (Docket No. 233234).

[2] Unpublished order of the Court of Appeals, entered October 30, 2003 (Docket No. 233234).

[3] *People v Bell* (*On Reconsideration*), 259 Mich App 583; 675 NW2d 894 (2003).

[4] 470 Mich 870 (2004).

Defendant argues that the trial court denied him his right to exercise two peremptory challenges by arbitrarily disallowing the challenges without following the mandated *Batson* procedures. Defendant further argues that the denial of this right requires automatic reversal.

II. STANDARD OF REVIEW

This case requires us to determine whether the trial court failed to follow the procedures set forth in *Batson* in disallowing two of defendant's peremptory challenges. We review de novo issues regarding a trial court's proper application of the law. *People v Goldston,* 470 Mich 523, 528; 682 NW2d 479 (2004). We review for clear error a trial court's decision on the ultimate question of discriminatory intent under *Batson*. *Hernandez v New York*, 500 US 352, 364-365; 111 S Ct 1859; 114 L Ed 2d 395 (1991); *United States v Hill*, 146 F3d 337, 341 (CA 6, 1998).

III. ANALYSIS

A. *BATSON* RULE

In *Batson,* the United States Supreme Court made it clear that a peremptory challenge to strike a juror may not be exercised on the basis of race. *Batson, supra* at 89, 96-98. The prosecution in *Batson* attempted to exclude African-American jurors solely on the basis of their race. *Id.* at 82-83. The Court determined that the prosecution's actions violated the Equal Protection Clause. It set forth a three-step process for determining an improper exercise of peremptory challenges. First, there must be a prima facie showing of discrimination based on race. *Id.* at 94-97. To establish a prima facie case of discrimination based on race, the opponent of the challenge must show that: (1) the defendant is a

member of a cognizable racial group; (2) peremptory challenges are being exercised to exclude members of a certain racial group from the jury pool; and (3) the circumstances raise an inference that the exclusion was based on race. *Id.* at 96. The *Batson* Court directed trial courts to consider all relevant circumstances in deciding whether a prima facie showing has been made. *Id.*

Once the opponent of the challenge makes a prima facie showing, the burden shifts to the challenging party to come forward with a neutral explanation for the challenge. *Id.* at 97. The neutral explanation must be related to the particular case being tried and must provide more than a general assertion in order to rebut the prima facie showing. *Id.* at 97-98. If the challenging party fails to come forward with a neutral explanation, the challenge will be denied. *Id.* at 100.

Finally, the trial court must decide whether the nonchallenging party has carried the burden of establishing purposeful discrimination. *Id.* at 98. Since *Batson*, the Supreme Court has commented that the establishment of purposeful discrimination "comes down to whether the trial court finds the . . . race-neutral explanations to be credible." *Miller-El v Cockrell*, 537 US 322, 339; 123 S Ct 1029; 154 L Ed 2d 931 (2003). The Court further stated, "Credibility can be measured by, among other factors, the . . . [challenger's] demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id.* at 339. If the trial court finds that the reasons proffered were a pretext, the peremptory challenge will be denied. *Batson, supra* at 100.

B. APPLICATION OF *BATSON* TO THE FACTS IN THIS CASE

In Michigan, the right to exercise a peremptory challenge is provided by court rule and statute. Accord-

ing to MCR 6.412(E)(1), a defendant is entitled to five peremptory challenges unless an offense charged is punishable by life imprisonment, in which case a defendant being tried alone is entitled to twelve peremptory challenges. Further, under MCL 768.13, "[a]ny person who is put on trial for an offense punishable by death or imprisonment for life, shall be allowed to challenge peremptorily twenty of the persons drawn to serve as jurors, and no more . . . ."[5]

The trial court followed the court rule, which entitled defendant to twelve peremptory challenges because he was on trial for an offense punishable by life imprisonment. Defendant claims that the trial court violated his right to two of the peremptory challenges by failing to follow the three-step procedure mandated in *Batson* in disallowing the challenges.

Applying the above rules to the facts in this case, we conclude that no such error occurred.[6]

1. PRIMA FACIE SHOWING OF DISCRIMINATION BASED ON RACE

Here, defense counsel had already exercised several peremptory challenges and was attempting to challenge juror ten when the trial court interrupted and requested that counsel for both parties proceed to chambers. While in chambers, the trial court stated that it was going to disallow the challenge because defense

[5] MCR 6.412(E) departs from the statute by reducing the number of peremptory challenges to which a defendant is entitled. We need not resolve the discrepancy between the statute and the court rule because this issue is not before us.

[6] In *Georgia v McCollum*, 505 US 42, 59; 112 S Ct 2348; 120 L Ed 2d 33 (1992), on remand 262 Ga 554; 422 SE2d 866 (1992), the United States Supreme Court extended the *Batson* rule to govern the conduct of criminal defendants ("the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges").

counsel had based his challenges on the race of the juror. The trial court reached this conclusion because defense counsel had established a pattern of excusing Caucasian males.[7]

After defense counsel's peremptory challenge of juror five, the prosecution objected, reasoning that juror five was Caucasian and the two previous challenges by defense counsel were of Caucasian males. The trial court agreed and disallowed the challenge.

On appeal, defendant argued that the trial court erred by raising *Batson* sua sponte to question defense counsel's reasons for peremptorily challenging juror number ten. Defendant further maintained that neither the trial court nor the prosecution established a prima facie showing of discrimination based on race for either challenge.

The Court of Appeals held that a trial court may raise a *Batson* issue sua sponte, noting that virtually all state courts have concluded that a trial court may raise a *Batson* issue sua sponte. The Court of Appeals, however, concluded that because the record did not reveal the racial identities of the prospective jurors, it could not determine whether a prima facie case of discrimination had been established.

We have not previously addressed the question whether a trial court may raise a *Batson* issue sua sponte. The rationale underlying *Batson* and its progeny, however, supports the Court of Appeals position that the trial court may make an inquiry sua sponte after observing a prima facie case of purposeful discrimination through the use of peremptory challenges.

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[7] The challenge to juror ten was defense counsel's ninth challenge. Of the nine challenges, defense counsel exercised seven against Caucasian males and two against females whose race could not be determined from the record.

Batson and its progeny[8] make clear that a trial court has the authority to raise sua sponte such an issue to ensure the equal protection rights of individual jurors. See *Batson, supra* at 99 ("In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."); *Georgia v McCollum,* 505 US 42, 49-50; 112 S Ct 2348; 120 L Ed 2d 33 (1992), quoting *State v Alvarado*, 221 NJ Super 324, 328; 534 A2d 440 (1987) (" 'Be it at the hands of the State or the defense,' if a court allows jurors to be excluded because of group bias, '[it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it.' ").

The United States Supreme Court, in *Powers v Ohio*, 499 US 400, 416; 111 S Ct 1364; 113 L Ed 2d 411 (1991), held that a criminal defendant has standing to object to a prosecutor's peremptory challenges. It reasoned:

> The barriers to a suit by an excluded juror are daunting. Potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion. Nor can excluded jurors easily obtain declaratory or injunctive relief when discrimination occurs through an individual prosecutor's exercise of peremptory challenges. Unlike a challenge to systematic practices of the jury clerk and commissioners such as we considered in *Carter* [*v Jury Comm of Greene Co,* 396 US 320; 90 S Ct 518; 24 L Ed 2d 549 (1970)], it would be difficult for an individual juror to show a likelihood that discrimination

[8] The Court of Appeals correctly noted that the following cases have held that a trial court may raise a *Batson* issue sua sponte to protect the rights secured by the Equal Protection Clause: *State v Evans*, 100 Wash App 757, 765-767; 998 P2d 373 (2000); *Commonwealth v Carson*, 559 Pa 460, 476-479; 741 A2d 686 (1999); *Brogden v State*, 102 Md App 423, 430-432; 649 A2d 1196 (1994); *Lemley v State*, 599 So 2d 64, 69 (Ala App, 1992).

> against him at the *voir dire* stage will recur. And, there exist considerable practical barriers to suit by the excluded juror because of the small financial stake involved and the economic burdens of litigation. The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights. [*Id.* at 414-415 (citations omitted).]

The *Powers* Court further stated:

> The statutory prohibition on discrimination in the selection of jurors, enacted pursuant to the Fourteenth Amendment's Enabling Clause, makes race neutrality in jury selection a visible, and inevitable, measure of the judicial system's own commitment to the commands of the Constitution. The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition. [*Id.* at 416 (citation omitted).]

The Supreme Court's rationale for allowing a defendant to raise a *Batson* issue supports our conclusion that a trial court may sua sponte raise a *Batson* issue. Trial courts are in the best position to enforce the statutory and constitutional policies prohibiting racial discrimination. Further, wrongly excluded jurors have little incentive to vindicate their own rights. We thus conclude, for the foregoing reasons, that a trial court may sua sponte raise a *Batson* issue.

We reject the Court of Appeals assertion that it could not establish whether a prima facie case of discrimination had been made regarding the challenges because of the inadequacy of the record. It is undisputed that defendant is an African-American male. While the challenged jurors were not of defendant's racial group, it is equally harmful to challenge only members outside a defendant's racial group. *Powers*, *supra* at 415-416. The trial court specifically stated that it was disallowing the

challenges because defense counsel, for the better part of the day, had only excused Caucasian male jurors.[9] Defense counsel did not dispute that he had only excused Caucasian males. Instead, he pointed to the racial make-up of the remaining jurors to justify his challenges.

The trial court rejected defense counsel's challenge of juror ten because defense counsel had exercised seven of nine peremptory challenges against Caucasian males. The prosecution objected to defense counsel's challenge of juror five because defense counsel consecutively excused three Caucasian male jurors. In both instances, defense counsel's challenges created a pattern of strikes against Caucasian males. This pattern was sufficient to raise an inference that defense counsel was indeed excluding potential jurors on the basis of their race. See *Batson, supra* at 97 (a pattern of strikes against jurors of a specific race may give rise to an inference of discrimination). We thus conclude that the Court of Appeals erred in failing to find a prima facie showing of discrimination based on race.

2. NEUTRAL EXPLANATION FOR THE CHALLENGE

Once a prima facie showing is made, the burden shifts to the challenger to provide a neutral explanation for the challenge. Upon the trial court's finding that defense counsel's challenge of juror ten was based on race, defense counsel requested an opportunity to make a record. The trial court initially denied defense counsel's request, but reconsidered upon defense counsel's objection. Defense counsel stated:

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[9] We recognize that the trial court's statement is not entirely accurate because defense counsel peremptorily challenged two females. We conclude, however, that this fact does not diminish defense counsel's pattern of peremptorily challenging Caucasian males.

> I would bring to the Court's attention that the number of white males on that panel still exceeds the number of the minorities on that panel. Why don't you talk about the whole racial composition of that panel? There's still a vast majority of white members on that panel than it is [sic] black members on that panel.

The trial court responded by stating that defense counsel's reason supported its prima facie finding that counsel had exercised the challenge on the basis of race and upheld its disallowance of the challenge.

After the prosecutor objected to defense counsel's peremptory challenge of juror five, the trial court disallowed the challenge "for the same reasons as asserted before." Defense counsel objected and attempted to make a record, but the trial court interrupted him. The trial court then allowed defense counsel to make a record, but only after the prosecutor asked to approach the bench. The prosecutor stated that defense counsel's three previous peremptory challenges, including juror five, were of Caucasian males. Defense counsel responded by giving race-neutral reasons for two of the challenges. The trial court noted that it was only concerned with defense counsel's reasons for challenging juror five. Defense counsel replied:

> Judge, again, if there were no other white males on that jury, or white males were a minority on that jury, then there may be some persuasive force to [the assistant prosecutor's] argument about a *Battson* [sic] challenge.
>
> That simply is not the case. The demographics of that jury do not hold up to that kind of a challenge.
>
> And I think I don't have to have a reason for exercising a peremptory challenge.

Defense counsel gave no other reason for his challenge. The trial court stated that peremptory challenges

could not be based on race and found that defense counsel's peremptory challenge of juror five had been based on gender and race.

The Court of Appeals concluded that even if a prima facie case had been established, the trial court failed to comply with steps two and three of the *Batson* process. It found that the trial court erred by denying defense counsel the opportunity to make a record before disallowing the peremptory challenge of juror ten. It further found that the trial court failed to inquire whether defense counsel had a race-neutral reason for striking juror five.

We agree that the trial court initially erred in denying defense counsel the opportunity to provide race-neutral reasons for his challenges. We conclude, however, that these errors were cured when the trial court, almost immediately after each challenge, permitted defense counsel to make a record. It then based its ultimate conclusion to disallow the challenges on defendant's race-conscious reasons. Because the trial court did perform the steps required by *Batson*, albeit somewhat belatedly, it did not improperly deny defendant the right to exercise two of his statutorily prescribed peremptory challenges.

We reject the claim that the trial court failed to inquire whether defense counsel had a race-neutral reason for striking juror five because the record shows otherwise. Defense counsel provided only one reason for his challenges, which was not race-neutral and did not refute the prima facie showing that his challenges were based on race. Just as a challenger may not exclude a prospective juror on the basis of race, it is equally improper for a challenger to engineer the composition of a jury to reflect the race of the defendant.

Finally, defendant claims on appeal that his responses were not given as race-neutral reasons for his challenges, but, rather, as attempts to disprove the trial court's and the prosecution's prima facie showings of racial discrimination. We are not persuaded by this argument. Defense counsel never contended that the trial court and the prosecution had not made a prima facie case of racial discrimination. If he was merely attempting to disprove the prima facie showings, defense counsel would not have stopped there, but would have also provided race-neutral reasons for the challenges in the event that the trial court refused to accept his argument. Additionally, the record indicates that defense counsel understood that he was to provide race-neutral reasons. The prosecution objected to the challenge of juror five because defense counsel's three previous peremptory challenges, including juror five, were of Caucasian males. Defense counsel then furnished race-neutral reasons for two of the challenges. But with respect to juror five, defense counsel merely stated that the prosecution's argument failed because Caucasian males still remained on the jury. Defendant clearly demonstrated his understanding and ability to provide race-neutral reasons when needed. In juror five's case, he failed to do so.[10] While defense counsel may not have effectively used his opportunity to provide

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[10] Defense counsel's failure to provide race-neutral reasons for his challenges, especially after demonstrating his ability to do so, provide additional support for the inference of discrimination. See *Johnson v California*, ___ US ___; 125 S Ct 2410; 162 L Ed 2d 129 (2005), in which the United States Supreme Court stated:

> In the unlikely hypothetical in which the prosecutor declines to respond to a trial judge's inquiry regarding his justification for making a strike, the evidence before the judge would consist not only of the original facts from which the prima facie case was established, but also the prosecutor's refusal to justify his strike in light of the court's request. Such a refusal would provide addi-

race-neutral reasons for his challenges, he had the opportunity. Defendant cannot complain now that the opportunity was insufficient.

3. TRIAL COURT'S DECISION REGARDING PURPOSEFUL DISCRIMINATION

Finally, the trial court must determine whether the opponent of the challenge has carried the burden of establishing purposeful discrimination. This decision may hinge on the credibility of the challenger's race-neutral explanations, but only if the challenger provided race-neutral explanations. Here, defense counsel provided race-conscious, rather than race-neutral, reasons for his challenges. This reinforces the prima facie showings that the challenges were based on race. Consequently, the trial court did not clearly err in finding purposeful discrimination.

IV. STANDARD OF REVIEW FOR DENIALS OF PEREMPTORY CHALLENGES

In light of our conclusion that the trial court's initial

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tional support for the inference of discrimination raised by a defendant's prima facie case. [*Id.*, ___ US ___ n 6; 125 S Ct 2418 n 6; 162 L Ed 2d 140 n 6.]

Justice KELLY claims that defendant did not provide race-neutral reasons for his challenges because he was never asked for his reasons. The trial transcript, however, indicates that defendant did provide reasons, which the trial court found to be race-conscious. After the prosecutor's objection to the exclusion of prospective juror five, defense counsel volunteered race-neutral reasons for excluding the two prospective jurors preceding prospective juror five. The trial court then stated, "That's not an issue. The issue is the last juror." Defense counsel responded, "Judge, again, if there were no other white males on the jury, or white males were a minority on that jury, then there may be some persuasive force to [the prosecutor's] argument about a Battson [sic] challenge." The trial court then indicated, "[b]ut you cannot use a racial basis or a gender basis for excusing jurors." Defense counsel responded, "And I've given my reasons on the record, and . . . none of them were related to race or gender."

error was cured, we need not address whether a denial of a peremptory challenge is subject to automatic reversal. Had we concluded, however, as do our dissenting colleagues, that defendant's peremptory challenges had been improperly denied, we would have applied a harmless error standard to the error, because *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981), and *People v Schmitz*, 231 Mich App 521; 586 NW2d 766 (1998), are no longer binding, in light of our current harmless error jurisprudence, to the extent that they hold that a violation of the right to a peremptory challenge requires automatic reversal.

We arrive at this conclusion by recognizing the distinction between a *Batson* error and a denial of a peremptory challenge. A *Batson* error occurs when a juror is actually dismissed on the basis of race or gender.[11] It is undisputed that this type of error is of constitutional dimension and is subject to automatic reversal.[12] In contrast, a denial of a peremptory challenge on other grounds amounts to the denial of a statutory or court-rule-based right to exclude a certain number of jurors. An improper denial of such a peremptory challenge is not of constitutional dimension.[13]

In *Miller*, this Court held that "a defendant is entitled to have the jury selected as provided by the rule. Where, as here, a selection procedure is challenged

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[11] *Batson, supra*.

[12] See *Johnson v United States*, 520 US 461, 468-469; 117 S Ct 1544; 137 L Ed 2d 718 (1997); *J E B v Alabama ex rel T B*, 511 US 127, 142 n 13; 114 S Ct 1419; 128 L Ed 2d 89 (1994).

[13] *United States v Martinez-Salazar,* 528 US 304, 311; 120 S Ct 774; 145 L Ed 2d 792 (2000); *Ross v Oklahoma,* 487 US 81, 88; 108 S Ct 2273; 101 L Ed 2d 80 (1988)(the United States Supreme Court recognized that peremptory challenges are not of constitutional dimension and are merely a means to achieve the end of an impartial jury).

before the process begins, the failure to follow the procedure prescribed in the rule requires reversal.[14] In *Schmitz*, the Court of Appeals relied on *Miller* to hold that a denial of a peremptory challenge requires automatic reversal.[15] Following *Miller* and *Schmitz*, however, our harmless error jurisprudence has evolved a great deal, as has that of the United States Supreme Court. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).[16] Under *Carines*, a nonconstitutional error does not require automatic reversal. *Id.* Rather, if the error is preserved, it is subject to reversal only for a miscarriage of justice under the *Lukity*[17] "more probable than not" standard. *Id.* See also MCL 769.26. If the error is forfeited, it may be reviewed only for plain error affecting substantial rights. *Carines*, *supra.*

Because the right to a peremptory challenge in Michigan is not provided by the Michigan Constitution but, rather, by statute and court rule, we conclude, as

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[14] *Miller, supra* at 326.

[15] *Schmitz, supra* at 530-532.

[16] See, also, *Martinez-Salazar, supra* at 317 n 4, in which the Supreme Court recognized that the rule of automatic reversal for an erroneous denial of peremptory challenges makes little sense in light of its recent harmless error jurisprudence. It stated:

> Relying on language in *Swain v Alabama* . . . Martinez-Salazar urges the Court to adopt a remedy of automatic reversal whenever a defendant's right to a certain number of peremptory challenges is substantially impaired. . . . Because we find no impairment, we do not decide in this case what the appropriate remedy for a substantial impairment would be. We note, however, that the oft-quoted language in *Swain* was not only unnecessary to the decision in that case—because *Swain* did not address any claim that a defendant had been denied a peremptory challenge—but was founded on a series of our early cases decided long before the adoption of harmless-error review.

[17] *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

did the United States Supreme Court, that the right is of non-constitutional dimension.[18] Thus, under our jurisprudence, a violation of the right is reviewed for a miscarriage of justice if the error is preserved and for plain error affecting substantial rights if the error is forfeited.[19]

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[18] Although courts in other jurisdictions have reached contrary conclusions, we believe their analyses are unpersuasive. In *United States v McFerron*, for example, the Sixth Circuit Court of Appeals held that the erroneous denial of a peremptory challenge is a structural error. 163 F3d 952, 956 (CA 6, 1998). But *McFerron* predated *Martinez-Salazar* and is therefore of questionable weight.

The Washington Supreme Court also held that the denial of a peremptory challenge in a so-called "reverse-*Batson*" context is structural error. *State v Vreen*, 143 Wash 2d 923; 26 P3d 236 (2001). While *Vreen* acknowledges *Martinez-Salazar,* the court dismisses that case with a cursory and, in our view, unpersuasive analysis. Indeed, all the cases cited by the *Vreen* court for its assertion that "the vast majority [of courts] have found harmless error doctrine simply inappropriate in such circumstances" predate *Martinez-Salazar*. See *id.* at 929.

We agree with the Court of Appeals for the Seventh Circuit that *Martinez-Salazar* marked a significant shift in the standard of review applicable to the erroneous denial of a peremptory challenge. *United States v Harbin,* 250 F3d 532, 546 (CA 7, 2001), citing *United States v Patterson,* 215 F3d 776 (CA 7, 2000), vacated in part by *Patterson v United States,* 531 US 1033 (2000). In *Harbin*, the Seventh Circuit noted that it had been "[f]reed from the *Swain* language by the Court's footnote in *Martinez-Salazar* . . . ." *Harbin, supra* at 546 (holding, however, that the prosecution's mid-trial use of a peremptory challenge was a structural error). *United States v Jackson,* 2001 US Dist LEXIS 4900, *7 n 1 (SD Ind, 2001) ("The bottom line is that [the] discussion of the need for a clear understanding of the peremptory challenge [in *United States v Underwood,* 122 F3d 389, 392 (CA 7, 1997)] process remains good law, but the automatic reversal standard is no longer applicable.").

Given the standard of harmless error review that now prevails in both the United States Supreme Court and this Court, we believe that the erroneous denial of a peremptory challenge is not subject to automatic reversal.

[19] Justice KELLY inaccurately states that we are departing from the trend set by most other courts that have considered harmless error

V. RESPONSE TO THE DISSENT

Justice KELLY's dissent asserts that the trial court's failure to follow the three-step *Batson* procedures was incurable and requires automatic reversal. She states that the trial court failed to complete a single step of the three-step *Batson* procedures and collapsed all three steps into one. In reaching this conclusion, Justice KELLY states that the trial court failed to scrutinize carefully whether a prima facie case had been made.

Even if the trial court's prima facie findings were inadequate, that inadequacy would not be outcome determinative because defendant subsequently offered an explanation for his challenges. Further, the trial court ruled on the ultimate question of intentional discrimination. See *Hernandez v New York*, 500 US 352, 359; 111 S Ct 1859; 114 L Ed 2d 395 (1991) ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."); see also *Saiz v Ortiz*, 392 F3d 1166, 1179 n 8 (CA 10, 2004) (the existence or absence of a prima facie case is moot where the trial court refused to make a finding regarding

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application to denials of peremptory challenges. We do not depart from that trend, however, because the trend leans toward application of harmless error analysis to improper denials of peremptory challenges.

Justice KELLY further states that we rely on *Martinez-Salazar* to support our alleged departure. We, however, rely on current Michigan harmless error jurisprudence to support our conclusion that an improper denial of a peremptory challenge is subject to harmless error analysis. We discuss *Martinez-Salazar* to merely show that the United States Supreme Court's harmless error jurisprudence is evolving, which strongly indicates that in the federal system nonconstitutional errors, such as an improper denial of peremptory challenges, would be subject to harmless error analysis.

whether a prima facie case had been established, but proceeded to hear the prosecution's explanation for the challenge). Justice KELLY states that our reliance on *Hernandez* is misplaced. She notes that *Hernandez* observes that a defendant may concede the first *Batson* step by moving to the second step. We agree and suggest that is exactly what occurred in this case. Both the trial court and the prosecutor objected to defense counsel's use of peremptory challenges, claiming that he was using them to exclude Caucasian veniremembers. While the trial court did not initially allow defense counsel to provide race-neutral reasons for his challenges, it almost immediately recanted its refusal and allowed defense counsel to provide reasons, which were race-conscious. The trial court ultimately denied defense counsel's challenges, finding that defense counsel's race-conscious reasons supported the initial allegations that he had been excluding veniremembers on the basis of race. The trial court's initial refusal to allow defense counsel to provide race-neutral reasons for his challenges does not amount to a collapsing of the *Batson* steps. Rather, if anything, it amounted to imperfect compliance with the *Batson* procedures. The trial court, however, ultimately conducted each *Batson* step and made a ruling on the basis of defense counsel's race-conscious reasons. Thus, any error that may have occurred in the trial court's *Batson* application was subsequently cured.

Justice KELLY incorrectly assumes that strict adherence to the *Batson* procedures is constitutionally mandated. To the contrary, the purpose of the *Batson* test is to ensure adherence to the "principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L

Ed 2d 834 (1995).[20] Our research reflects that trial courts have failed to comply perfectly with *Batson* in the past. See *United States v Castorena-Jaime*, 285 F3d 916, 929 (CA 10, 2002) ("Notwithstanding the district court's failure to make express findings on the record [regarding the *Batson* steps] in the present case, the district court's ultimate conclusion on discriminatory intent was not clearly erroneous."); *Saiz, supra* (the United States Court of Appeals inferred from the record that the trial court did not find a prima facie case of discrimination).[21] Their failure to do so, however, is not error as long as trial courts do not shift the burden of persuasion onto the challenger.

Justice KELLY contends that the trial court, by collapsing the three *Batson* steps into one, placed the burden on defense counsel to counter the trial court's finding of purposeful discrimination. The record does not support this contention. Both the trial court and the prosecution made a prima facie showing that defense counsel had excluded jurors on the basis of race. The trial court initially refused to allow defense counsel to provide race-neutral reasons, but almost immediately reconsidered and allowed defense counsel to make a record. Defense counsel gave race-conscious reasons

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[20] See, also, *Johnson, supra*, ___ US ___ n 7; 125 S Ct 2418 n 7; 162 L Ed 2d 140 n 7, in which the United States Supreme Court compared the *Batson* burden-shifting framework to the framework set forth in *McDonnell Douglas Corp* v *Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). The *Johnson* Court cited *St Mary's Honor Ctr v Hicks*, 509 US 502; 113 S Ct 2742; 125 L Ed 2d 407 (1993), for the proposition that the "burden-shifting framework [set forth in *Batson* and *McDonnell Douglas*] triggered by a defendant's prima face case is essentially just 'a means of "arranging the presentation of evidence." ' " *Johnson, supra,* ___ US ___ n 7; 125 S Ct 2418 n 7; 162 L Ed 2d 140 n 7, quoting *St Mary's*, *supra,* 509-510, quoting *Watson* v *Fort Worth Bank & Trust*, 487 US 977, 986; 108 S Ct 2777; 101 L Ed 2d 827 (1988).

[21] See, also, *United States v Perez*, 35 F3d 632, 636 (CA 1, 1994).

regarding both challenges. Thus, he failed to meet the burden of coming forward with race-neutral explanations. Defense counsel's proffer of race-conscious reasons did not rebut the trial court's and the prosecution's prima facie showings of discrimination. Thus, the trial court neither erred in finding purposeful discrimination nor erred in rejecting defense counsel's challenges.

Justice KELLY further asserts that our discussion regarding *Miller* and *Schmitz* is inappropriate. We recognize that *Miller* and *Schmitz* need not be addressed, because we have concluded that the trial court did not err in denying defense counsel's peremptory challenges. We disagree, however, that our discussion regarding *Miller* and *Schmitz* is inappropriate and has no legal value. Rather, such discussion is in direct response to the arguments of the dissent, and without such discussion our response would be incomplete. That a response to a dissent may encompass discussion that is dictum does not render it inappropriate or of no legal value; otherwise, only dissenting opinions would be able to opine upon decisions such as *Miller* and *Schmitz*.[22] As stated above, in light of our current harmless error jurisprudence, *Miller* and *Schmitz* are no longer precedentially binding. We thus disagree with Justice KELLY's conclusion that our *Miller* and *Schmitz* discussion is inappropriate.

VI. CONCLUSION

We hold that the trial court's initial failure to follow

[22] Although the dissent labors hard to avoid referencing *Miller* and *Schmitz*, it is puzzling why it would do this with regard to two decisions that are so obviously helpful to its conclusion, except that to reference these decisions would only make obvious the asymmetry of the dissent's position, namely, that the dissent, but not the majority, should be able to analyze *Miller* and *Schmitz*.

the three-step process set forth in *Batson* was subsequently cured. Despite our ultimate conclusion that the trial court complied with the requirements of *Batson*, trial courts are well advised to articulate and thoroughly analyze each of the three steps set forth in *Batson*, see pp 282-283 of this opinion, in determining whether peremptory challenges were improperly exercised. In doing so, trial courts should clearly state the *Batson* step that they are addressing and should articulate their findings regarding that step.[23]

We further hold that the trial court did not commit clear error in finding as a matter of fact that defense counsel exercised peremptory challenges on the basis of the race of the prospective jurors. Accordingly, we reverse the judgment of the Court of Appeals.

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

WEAVER, J. *(concurring)*. I concur in the result of the lead opinion and join parts I to III of the opinion. As the lead opinion has explained, the record reflects that any initial error by the trial court was cured when the trial court allowed defendant to provide reasons for the

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[23] Federal courts have encountered similar problems regarding appellate review of a trial court's inadequate *Batson* findings. See *Castorena-Jaime, supra* at 929:

> Although we affirm the district court's ruling, we encourage district courts to make explicit factual findings on the record when ruling on Batson challenges. "Specifically, . . . a district court should state whether it finds the proffered reason for a challenged strike to be facially race neutral or inherently discriminatory and why it chooses to credit or discredit the given explanation." A district court's clearly articulated findings assist our appellate review of the court's Batson ruling, and "ensure[] that the trial court has indeed made the crucial credibility determination that is afforded such great respect on appeal." [Quoting *Perez*, *supra* at 636 (citation omitted).]

peremptory challenges and that the reasons proffered by defendant for the challenges were race-conscious.

I do not join part IV of the lead opinion, which addresses whether the violation of a right to a peremptory challenge requires automatic reversal, nor do I join the last paragraph of part V, which concludes that it is proper to address the issue because it is in response to the dissent. *Ante* at 292-295, 299. In my opinion, such discussion is unnecessary to the opinion and therefore is dicta. I would wait until the issue is squarely before us before determining whether the improper denial of a peremptory challenge is subject to structural error analysis. Therefore, I do not join part IV or the last paragraph of part V.

TAYLOR, C.J. (*dissenting in part and concurring in part*). I respectfully dissent from the lead opinion's conclusion that defense counsel provided race-conscious reasons for the two peremptory challenges the trial court refused to allow him to exercise. Rather, I agree with Justice KELLY's dissent that defense counsel's comments were intended only to challenge the idea that a prima facie showing of discrimination had been made. Thus, defense counsel's comments were legitimate and directed only at *Batson*'s first step. Thereafter the trial court did not follow the *Batson v Kentucky,* 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), requirement that it allow defendant the opportunity to articulate a race-neutral explanation for the challenges. Accordingly, I conclude that the trial court erroneously deprived defendant of two of his peremptory challenges.

As noted by the lead opinion, peremptory challenges are granted to a defendant by statute and by court rule-not by the United States Constitution or the Michigan Constitution. Denial of the statutory right requires

reversal of a conviction only if it resulted in a miscarriage of justice. MCL 769.26. Thus, I concur with the lead opinion that the denial of a statutory peremptory challenge is subject to harmless error review and that *People v Schmitz*, 231 Mich App 521; 586 NW2d 766 (1998), must be repudiated to the extent that it held to the contrary. Applying this standard, I find defendant is not entitled to a new trial. I specifically join footnote 18 of the lead opinion because I am persuaded that foreign cases that have concluded that the denial of a statutory right to a peremptory challenge requires automatic reversal were wrongly decided. An automatic reversal should not be required for the mere violation of a statutory right just because the trial court misperceived defense counsel's effort to peremptorily strike two prospective jurors as a constitutional *Batson* violation.[1]

To the extent that the error is considered to have violated our court rule, the denial is not grounds for granting a new trial unless refusal to grant a new trial is inconsistent with substantial justice. MCR 2.613(A). Applying this standard, I find defendant is not entitled to a new trial.

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[1] I do, however, recognize that if a statutory right is denied in a manner that violates equal protection or due process guarantees that such denial may warrant a new trial. As the United States Supreme Court stated in *Evitts v Lucey*, 469 US 387, 401; 105 S Ct 830; 83 L Ed 2d 821 (1985):

> [A]lthough a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause. Similarly, a State has great discretion in setting policies governing parole decisions, but it must nonetheless make those decisions in accord with the Due Process Clause. In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution — and, in particular, in accord with the Due Process Clause. [Citations omitted.]

I also join the lead opinion in questioning the continuing viability of *People v Miller,* 411 Mich 321; 307 NW2d 335 (1981).

Because I find that the error here was harmless, under both MCL 769.26 and MCR 2.613(A), I agree with the lead opinion that the Court of Appeals decision must be reversed and defendant's convictions should be reinstated.

KELLY, J. (*dissenting*). I dissent from the lead opinion for two reasons. First, the trial judge erred by failing to follow the procedures required by *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Despite the lead opinion's contention to the contrary, the *Batson* errors were incurable. Second, the lead opinion's dictum regarding *Miller*[1] is inappropriate, and, as dictum, has no legal effect or precedential value. There is no legal basis to overrule *Miller*.

I. THE *BATSON* RULE

The United States Supreme Court ruled in *Batson* that, when selecting a jury, a prosecutor may not use a peremptory challenge to remove a juror because of the juror's race. *Batson*, *supra* at 89. The Supreme Court gave trial judges a specific three-step procedure to determine whether a peremptory challenge has an improper racial basis.

First, the objecting party must make a prima facie showing, based on the totality of all relevant circumstances, that the other party discriminated in removing the juror. *Id*. at 93-94. Second, the party exercising the peremptory challenge must give a neutral explanation for the removal, showing that it was not based on race.

[1] *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981).

Id. at 94, 97. Third, the trial judge must determine if the objecting party established purposeful discrimination. *Id*. at 98.

Although *Batson* dealt with a prosecutor's exercise of peremptory challenges, the Supreme Court extended the rule in later cases. For example, in *Georgia v McCollum*,[2] it stated that the United States Constitution prohibits a criminal defendant from engaging in purposeful discrimination in the exercise of peremptory challenges.

A. THE PEREMPTORY CHALLENGES

In this case, each party had made several peremptory challenges before defense counsel challenged Juror No. 10. During voir dire, Juror No. 10 stated that he was a close friend of several police officers, including a "chief." He stated that he "wouldn't think" that his friendships would make a difference in his ability to make a fair decision. He also responded, when asked if he would feel obliged to apologize should he vote to acquit defendant, that he "hope[d] not."

When defense counsel peremptorily challenged Juror No. 10, the trial judge disallowed the challenge because, he said, it and previous defense challenges were based on race. Defense counsel asked to comment, but the judge refused him the opportunity. Counsel then boisterously objected to the refusal, stating that it was "garbage." The judge then relented and allowed a statement.

Defense counsel argued that he had not attempted to eliminate Juror No. 10, a Caucasian male, because of his race. He pointed out that the Caucasians on the jury outnumbered and exceeded the minorities on the panel.

[2] 505 US 42, 59; 112 S Ct 2348; 120 L Ed 2d 33 (1992).

The judge then allowed the prosecution to respond, refused to hear more from defense counsel, and ruled that Juror No. 10 would remain on the jury.

Jury selection continued, and the attorneys made more peremptory challenges. When Juror No. 5 was called, neither side objected for cause, and the prosecution did not exercise a peremptory challenge. Without asking for defense counsel's input, the judge stated, "We have a jury."

Defense counsel approached the bench and an off-the-record discussion ensued. When the proceeding resumed on the record, defense counsel asked to excuse Juror No. 5. The prosecution objected, stating that it was making a *Batson* objection to the defense's peremptory challenge of Juror No. 5.

Without discussion or input from the parties, the judge disallowed the peremptory challenge for the same reasons he had given regarding Juror No. 10. Again, defense counsel sought to comment on the ruling but was refused. After the prosecution evidenced some discomfort with the lack of a record, the judge allowed counsel to make a record outside the presence of the jury.

The prosecutor then observed that the two jurors excused between Juror No. 10 and Juror No. 5 were both Caucasian males. She also indicated that Juror No. 5 was a Caucasian male. She offered no additional basis for her objection to the peremptory challenge of Juror No. 5.

Defense counsel pointed out that there had been no discriminatory pattern to his challenges. He stated that at least as many white males as minority males remained on the jury. He insisted that there were valid reasons to remove the intervening jurors who were excused. One had expressed bias towards police officers.

The other, years before, had resided on the street where the crime was alleged to have occurred, and his home had been broken into. The juror expressed concern about the influence the break-in would have on his decision in this case.

The judge stated that defense counsel's argument was unpersuasive. Without making further rulings, he brought back the jury, and the trial continued.

B. THE TRIAL COURT'S FAILURE TO FOLLOW THE *BATSON* PROCEDURES

The judge failed to follow the three-step procedure required by *Batson*. In fact, he failed to complete a single step of the procedure. He did not make a finding regarding whether there had been a prima facie showing of purposeful discrimination. Instead, it appears that he lumped all three steps into one and made his ruling without further regard to *Batson*.

Trial judges are not at liberty to disregard the *Batson* procedure. *Batson* is United States Supreme Court precedent that is binding on state courts. Moreover, the courts may neither ignore one step nor combine the three steps of *Batson*. *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). Instead, they must carefully and individually consider each. The *Batson* procedure was designed to carefully balance the free exercise of peremptory challenges and the evils of racial discrimination in the selection of jurors. *Batson*, *supra* at 98-99. It was crafted specifically to enforce the mandate of equal protection as well as to further the ends of justice. *Id*. at 99.

In this case, when the trial judge allowed defense counsel to speak, he erroneously placed the burden on counsel to show that the peremptory challenge should not be disallowed. Although *Batson* provides a burden-

shifting procedure, the party objecting to a peremptory challenge, in this case the prosecutor, has the ultimate burden of proving purposeful discrimination. *Purkett, supra* at 768. Improperly shifting the burden "violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Id*. Therefore, the trial court erred twice in disallowing the peremptory challenges to Jurors No. 5 and No. 10.

The trial court was required to make a ruling on the first step. The court's failure to arrive at a clear conclusion and articulate its findings amounted to error in and of itself. Only if, and when, a trial court concludes that a prima facie case exists does the burden shift to the party exercising the peremptory challenge. Then the trial court must allow that party to articulate race-neutral reasons for the challenge.

In this case, the trial court glossed over the first step, skipped the second step, and jumped to the third. At the third step, the court impermissibly placed on defendant the burden to rebut presumed racial prejudice. These multiple and repeated errors are patently inconsistent with the established *Batson* precedent. They cannot remain uncorrected.

Those on the lead opinion state that their "research"[3] reflects that trial courts often fail to comply with *Batson*. They appear to believe that, because there is a supposed generalized failure of compliance, the seriousness of the trial court's *Batson* errors here is diminished. But an error often repeated is no less an error. In fact, what we should draw from their research is that we must more scrupulously hold our courts responsible

[3] The lead opinion makes no mention of what the "research" consisted of, and I have no knowledge of what it might be. I know of no research project on this subject conducted by this Court.

for following *Batson*. The United States Supreme Court has carefully laid out the steps necessary for determining if a *Batson* error exists. It is for us to see that they are followed.

C. THE TRIAL COURT DID NOT CURE THE ERRORS

The lead opinion concludes that the trial court cured its errors by allowing defense counsel to respond to its ruling. Those on the lead opinion attempt to fit the facts of this case into *Batson,* rather than apply *Batson* to the facts. They conclude that defense counsel should have used his opportunity to respond to offer race-neutral reasons for the peremptory challenges. The record does not support this conclusion.

The trial court never articulated that a prima facie case of discrimination had been made. Therefore, when it allowed defense counsel to speak, counsel dwelt on the first *Batson* element. He denied the existence of a discriminatory pattern in his peremptory challenges. It appears that he was encouraging the court to refocus and follow the *Batson* procedure. Given that the court had not completed the first step of *Batson*, it was wholly reasonable for defense counsel to direct his comments to that step. And he did just that.

The lead opinion concludes that defense counsel should have surmised that the judge was ignoring *Batson* and tailored his answers accordingly.[4] This un-

[4] The lead opinion also quotes *Johnson v California,* 545 US __; 125 S Ct 2410; 162 L Ed 2d 129 (2005), to contend that defendant's failure to give race-neutral reasons should show support for an inference of discrimination. But defendant did not refuse to provide race-neutral reasons for his challenge. He was *never asked* for his reasons. Therefore, there was no refusal to answer and the quoted material from *Johnson* is inapplicable to this case. *Id*., 545 US ___ n 6; 125 S Ct 2418 n 6; 162 L Ed 2d 140 n 6.

fairly holds defendant responsible for alleviating the court's error. Trial courts have a clear map to follow in *Batson* cases. Given the magnitude of the error when they fail in that endeavor, it is imperative that we hold courts responsible for correctly applying the *Batson* test. *Batson*, *supra* at 99; *Purkett*, *supra* at 768.

The lead opinion concludes that defense counsel should have supplied a race-neutral reason for the challenges. However, a good reason exists why he did not respond. The court never asked for a response and never gave counsel an opportunity to offer one. Instead, after concluding discussion on what should have been the first step of *Batson*, the judge stopped counsel and overruled his challenges. This was clearly erroneous. The judge was required to ask specifically for race-neutral responses pursuant to the second *Batson* step. *Batson*, *supra* at 94, 97.

Instead of that, the judge combined all the *Batson* steps into one and placed the burden on defendant to counter his erroneous ruling. It is impermissible to shift the burden in this manner. *Purkett*, *supra* at 768. Given that shifting the burden is error in itself, it cannot constitute a cure for the judge's other errors as the lead opinion concludes.

The lead opinion states, "Even if the trial court's prima facie findings were inadequate, that inadequacy would not be outcome determinative because defendant subsequently offered an explanation for his challenges." *Ante* at 296. As noted above, this simply did not happen. Defense counsel's comments were directed to the first *Batson* step. Being that a prima facie case was never established, the burden never shifted to defendant, and he was not required to offer race-neutral reasons. Hence, the court's failure must have been outcome determinative.

The lead opinion attempts to support its position by quoting *Hernandez v New York*, 500 US 352, 359; 111 S Ct 1859; 114 L Ed 2d 395 (1991). But this reliance is misplaced. First, the quotation is drawn from a plurality opinion that, under the doctrine of stare decisis, is not binding. *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976).

Second, the quotation is taken out of context. One has only to read the sentence above it to understand the Supreme Court's true meaning. It quotes a Title VII civil rights case: " '[W]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.' " *Hernandez*, *supra* at 359, quoting *United States Postal Service Bd of Governors v Aikens*, 460 US 711, 715; 103 S Ct 1478; 75 L Ed 2d 403 (1983). The Supreme Court plurality in no place states that, as long as a court rules on *Batson's* third step, the first step can be ignored. Rather, it observes that a defendant may concede the first *Batson* step by moving the discussion to the second step. This is a far cry from what the lead opinion claims *Hernandez* stands for.

But even if this section of *Hernandez* were controlling precedent, it would not apply to this case. Here, defendant did not concede the first *Batson* step. Instead, counsel's comments were specifically directed at rebutting the claim of a prima facie case. It was not defendant who moved the process beyond the first step. It was the trial court that improperly passed over the first *and* second steps of *Batson*. Given this situation, the *Hernandez* plurality opinion simply does not apply.

II. A *BATSON* ERROR IS STRUCTURAL

The lead opinion concedes that *Batson* errors are

subject to automatic reversal, but I find it important to explain why nearly every court that has considered the issue reached the same conclusion.[5] This includes the United States Supreme Court, because *Batson* itself ordered an automatic reversal. *Batson*, *supra* at 100.

The Supreme Court gave this reasoning for requiring automatic reversal: "[W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained." *Vasquez v Hillery*, 474 US 254, 263; 106 S Ct 617; 88 L Ed 2d 598 (1986). This is in line with the appropriate handling of all structural errors.

The Supreme Court articulated the difference between trial error and structural error in *Arizona v Fulminante*, 499 US 279; 111 S Ct 1246; 113 L Ed 2d 302 (1991). A trial error occurs during the presentation of the case to the jury. It can be quantitatively assessed in the context of other evidence for the purpose of determining whether it was harmless beyond a reasonable doubt. *Id*. at 307-308.

A structural error, on the other hand, affects the framework of the trial proceeding. It is more than a mere error in presenting the proofs of guilt. *Id*. at 310. When a structural error occurs, a criminal trial cannot serve as a reliable vehicle for the determination of guilt. No criminal punishment could be fair if structural error existed in the framework of the trial. *Id*.

Although no constitutional guarantee exists with regard to them, *Batson* errors resulting in a denial of

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[5] See *United States v McFerron*, 163 F3d 952, 955-956 (CA 6, 1998), *United States v Hall*, 152 F3d 381, 408 (CA 5, 1998), *Tankleff v Senkowski*, 135 F3d 235, 249-250 (CA 2, 1998), *United States v Underwood*, 122 F3d 389, 392 (CA 7, 1997), and *Ford v Norris*, 67 F3d 162, 170-171 (CA 8, 1995).

the use of peremptory challenges must be structural. They attack the fundamental framework of the trial proceeding. They change the very makeup of the jury. And they do not occur during the presentation of evidence. Given that they do not involve evidence, they cannot be quantitatively assessed in the context of other evidence. This fact is a further indicator that they are not in the nature of trial errors. *Id*.

Structural errors require automatic reversal. *Id*. at 309-310; *People v Cornell*, 466 Mich 335, 363 ns 16-17; 646 NW2d 127 (2002). Therefore, once we conclude that a *Batson* error existed, we must automatically reverse a conviction. Because this is exactly what the Court of Appeals did, I would affirm its decision.

Automatic reversal leaves no room for error on the part of trial courts. But, as the United States Court of Appeals for the Ninth Circuit stated, referring to *Batson*:

> It is true that trial courts bear a heavy burden in enforcing *Batson*'s anti-discrimination principle, given that the erroneous denial of a party's peremptory challenge has traditionally warranted automatic reversal. However, this concern was alleviated by a recent Supreme Court decision offering guidance to trial courts faced with deciding whether a particular peremptory challenge has a discriminatory motive. [*United States v Annigoni*, 96 F3d 1132, 1142 (CA 9, 1996), citing *Purkett*, *supra* at 767-768.]

The Supreme Court has carefully laid out the procedure required to satisfy *Batson*. We must insist that trial courts adhere to it.

III. PEREMPTORY CHALLENGES AND AUTOMATIC REVERSAL

Had no *Batson* errors occurred here and were the errors under scrutiny no more than the wrongful denial

of a peremptory challenge,[6] we should nonetheless issue an automatic reversal. The lead opinion's attempt to apply harmless error review is contrary to the decisions of most other courts that have reviewed the issue. Moreover, harmless error review is simply unworkable and cannot logically apply to rulings on peremptory challenges.

The lead opinion departs from the trend set by most other courts that have considered the application of a harmless error analysis to peremptory challenges. It cites *United States v Martinez-Salazar*,[7] to demonstrate that a harmless error analysis is appropriate here. Use of this authority illustrates the dangers in relying on dictum.[8]

It is undeniable that the cited language is dictum given that the Supreme Court concedes that it need not have reached the issue of an appropriate remedy for the claimed error. "Because we find no impairment, we do not decide in this case what the appropriate remedy for a substantial impairment would be." *Id*. at 317 n 4. I disagree with the lead opinion's assertion that the dictum of this footnote can constitute "a significant shift" in the law.

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[6] Of course, I disagree with this assumption because I believe that *Batson* errors occurred. But I also question the assumption for the reason that the judge was considering *Batson* when deciding to deny the challenges. This means that, in denying defendant's challenges, the judge specifically left certain individuals on the jury because of their race. If the judge erred in denying the peremptory challenges, he erroneously empanelled jurors because of their race under the belief that defendant was targeting members of the jurors' race. The issue before us does not involve the typical denial of a peremptory challenge. The lead opinion has not made this distinction.

[7] 528 US 304; 120 S Ct 774; 145 L Ed 2d 792 (2000).

[8] There is unavoidable irony in the lead opinion's reliance on this footnote. The footnote's purpose is to criticize the existence of dicta in *Swain v Alabama*, 380 US 202; 85 S Ct 824; 13 L Ed 2d 759 (1965). *Martinez-Salazar, supra* at 317 n 4.

The lead opinion's reliance on *Martinez-Salazar* is further misplaced given that the case dealt with an issue distinct from the denial of the use of peremptory challenges. In *Martinez-Salazar*, the trial court erroneously refused to remove a juror for cause. The defendant then used a peremptory challenge to remove the juror. *Id*. at 307. The defendant was not denied the use of his peremptory challenges. In fact, he exercised one so that the objectionable juror did not sit in judgment of him. Therefore, *Martinez-Salazar* did not deal with the denial of a peremptory challenge, and its dictum should not be read as a comment on the issue before us.

The distinction between peremptory denial cases and *Martinez-Salazar* makes a real difference when we consider whether harmless error review applies. In *Martinez-Salazar*, the only existing error was the trial court's error in denying a challenge for cause. It was cured when the defendant used a peremptory challenge to remove the juror. Consequently, the juror took no part in the trial proceedings. The error arose and was cured before the trial began.

On the other hand, when a peremptory challenge is denied, the challenged juror stays on the jury and sits in judgment of the defendant. His or her presence permeates the trial, and the error infects the entire case.[9]

The all-encompassing penetration of the error explains why a harmless error analysis is out of place in the review of the wrongful denial of a peremptory challenge. To accurately make a harmless error analysis, the court would have to determine the effect that the challenged juror had on the verdict. In a case directly on point, the United States Court of Appeals for the Ninth Circuit expressed the problem in these words:

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[9] See *State v Vreen*, 143 Wash 2d 923; 26 P3d 236 (2001); *People v Lefebre*, 5 P3d 295 (Colo, 2000).

"To subject the denial of a peremptory challenge to harmless-error analysis would require appellate courts to do the impossible: to reconstruct what went on in jury deliberations through nothing more than post-trial hearings and sheer speculation." *Annigoni*, *supra* at 1145.

Appellate courts have no record of what is said in jury rooms and no record of what potentially subtle influences one juror had on the others. Therefore, no device exists with which to plumb the magnitude of the error.

Unlike the typical error subject to harmless error review discussed in *Fulminante*, errors in leaving individuals on a jury cannot be quantitatively assessed in the context of the evidence presented. *Fulminante*, *supra* at 308. Without a means of comparison or measurement, meaningful harmless error analysis is impossible. For this reason, it is illogical to rule as the majority does. It ignores the plight of courts in future cases that attempt to follow its ruling.

Chief Justice TAYLOR demonstrates in his opinion dissenting in part and concurring in part the difficulty faced in trying to apply the harmless error standard. Although he finds the error harmless, he offers no analysis for his conclusion. Likely, this is because there is no legitimate analysis, beyond mere speculation, that can be applied. In fact, the Chief Justice has demonstrated that the rule now created by the majority is a rule of automatic affirmance. It defies fair appellate scrutiny.

The lead opinion implies that a rule requiring automatic reversal would contradict MCL 769.26.[10] This is

[10] MCL 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on

inaccurate. Allowing a peremptory challenge error to stand would always amount to a miscarriage of justice. A miscarriage of justice exists if it affirmatively appears that the error undermines the reliability of the verdict. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Given that an error in denying a peremptory challenge changes the makeup of the jury, it potentially changes the verdict. It alters the jury deliberation and interaction process. The point of a peremptory challenge is to remove someone who appears biased but who might not be removed for cause. Rejecting the peremptory challenge leaves this potentially biased or prejudiced juror on the jury, undermining the validity of the verdict.

Requiring automatic reversal for peremptory challenge errors is consistent with the plain error standard of review articulated by this Court in *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). *Carines* gave three requirements for plain error: the error (1) must have occurred, (2) must be clear or obvious, and (3) must affect substantial rights. *Id*. at 763. Peremptory challenge errors would always meet this standard.

A peremptory challenge error becomes obvious after the trial court rules on an objection to it. The error is that either a juror who should not be on a jury remains or one who should remain does not.

These errors affect substantial rights because they shape the jury. Peremptory challenges are a means of eliminating extreme beliefs or partiality from a jury.

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the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Batson, *supra* at 91. The right to a peremptory challenge enables the parties to strike jurors who, although not necessarily excusable for cause, appear biased or hostile in some way. Therefore, the right implicates defendant's right to a fair and impartial trial.

Those plain errors require reversal because they " ' "seriously [affect] the fairness, integrity or public reputation of judicial proceedings" . . . .' " *Carines*, *supra* at 763, quoting *United States v Olano*, 507 US 725, 736; 113 S Ct 1770; 123 L Ed 2d 508 (1993), quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 (1936). Given the fundamental nature of the jury process, having an unfairly chosen jury raises serious questions regarding the integrity and public reputation of the judicial proceedings.[11] Therefore, the errors require automatic reversal. *Id*.

Because we have no tools to gauge the effect of errors in denying peremptory challenges, a harmless error analysis of them is simply unworkable. Therefore, such errors must result in automatic reversal.

IV. PRIMA FACIE CASE OF DISCRIMINATION

The trial court erred in failing to follow *Batson*'s three-step process, and the error is subject to automatic reversal. Hence, the issue whether a prima facie case of discrimination actually existed is technically irrelevant to my dissent. But I feel that it is appropriate to respond to the majority's conclusion that a prima facie case existed.

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[11] The lead opinion itself concedes that the exclusion of even one juror undermines public confidence in the fairness of the system. *Ante* at 293, citing *J E B v Alabama ex rel T B*, 511 US 127, 142 n 13; 114 S Ct 1419; 128 L Ed 2d 89 (1994). Therefore, it has conceded the necessity of automatic reversal.

To reach the majority's conclusion requires not only a strained reading of the existing law regarding *Batson*, but also a strained reading of the factual record in this case. The members of the majority attempt to save the trial judge's ruling by using twenty-twenty hindsight to fit his actions into the *Batson* procedure. Initially, they conclude that, despite the fact that the judge never ruled that prima facie discrimination had occurred, his comments equated to such a ruling.

The trial judge stated that he disallowed the peremptory challenges because defense counsel was using his challenges for the purpose of excluding white males. The record does not support his conclusion. First, at least two of the jurors that defense counsel challenged were female. Second, the race of each challenged juror is not in the record. Therefore, we do not know how many of the challenged male jurors were Caucasian.[12] Third, we know from defense counsel's comments regarding the jurors challenged between Jurors No. 10 and No. 5 that valid reasons existed to challenge some of the Caucasian male jurors. Finally, we can tell from the record that the number of Caucasian males left on the jury was either equal to or exceeded the number of minorities on the jury.

Considering all these facts, a prima facie case of discrimination did not exist. *Batson* requires a court to carefully examine all relevant factors as well as the totality of the circumstances in making its decision. *Batson*, *supra* at 93-94, 96-97. The record indicates that

[12] The lead opinion bases its contention that the race of the excused jurors is determinable on the judge's statement that defense counsel had repeatedly excused Caucasian male jurors. Obviously, this statement is unclear. It is well established that at least two of the challenged jurors were female. Hence, the statement is simply too inexact to determine the race of the challenged jurors, and it is inappropriate for the lead opinion to rely heavily on it.

the judge here failed to exercise that careful scrutiny. Instead, he rushed to a conclusion before hearing a thorough discussion and without making an adequate investigation.

It is true that a pattern of strikes against one racial group in jury selection might support an inference of discrimination. *Id*. at 97. But defendant countered this alleged pattern when finally allowed to respond.[13] He indicated that his intervening peremptory challenges fit no pattern. The fact that a large number of Caucasian males remained on the jury, he argued, demonstrates that he was not targeting such jurors. Our courts have held that a showing that the challenged racial group continued to have a strong representation on the jury is significant evidence that no discriminatory intent existed. *People v Eccles*, 260 Mich App 379, 387-388; 677 NW2d 76 (2004); *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989).[14]

Given the weak evidence of a pattern and the fact that Caucasian males constituted a significant portion of the jury, the prosecution failed to make a prima facie case of discrimination. Therefore, defense counsel did not need to offer race-neutral reasons for his peremptory challenges. The burden never shifted to him. The trial judge never concluded the first *Batson* step. Hence, he erred in allowing Jurors No. 10 and No. 5 to remain on the jury.

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[13] The lead opinion contends that the trial judge "almost immediately" allowed defense counsel to respond. *Ante* at 290. The record does not support this. Defense counsel and the prosecution had to demand that the judge allow them to make a record. The judge only belatedly and reluctantly allowed defense counsel to speak.

[14] See also *United States v Sangineto-Miranda*, 859 F2d 1501, 1521-1522 (CA 6, 1988), *United States v Grandison*, 885 F2d 143, 147 (CA 4, 1989), *Commonwealth v Clark*, 551 Pa 258, 280; 710 A2d 31 (1998), and *Valdez v People*, 966 P2d 587, 594 (Colo, 1998).

V. THE LEAD OPINION'S DICTUM REGARDING *MILLER*

Part IV of Justice CORRIGAN's opinion concerns our decision in *Miller, supra,* and the Court of Appeals decision in *People v Schmitz,* 231 Mich App 521; 586 NW2d 766 (1998). As Justice WEAVER points out, the entire section is dictum.

In *Miller*, the trial court diluted the defendant's peremptory challenge rights by using the struck jury method.[15] *Miller*, *supra* at 323. The case before us does not deal with the dilution of a defendant's right to peremptory challenges. It deals with the denial of his peremptory challenges. For this reason, *Miller* is clearly distinguishable from this case.

The lead opinion concedes that its discussion of *Miller* is dictum by stating that "we have concluded that the trial court did not err in denying defense counsel's peremptory challenges." *Ante* at 299. Because it concludes that *Miller* does not apply to its decision, any discussion of *Miller* must be obiter dictum. Part IV lacks the force of an adjudication and is not binding under the principles of stare decisis. *People v Borchard-Ruhland*, 460 Mich 278, 286 n 4; 597 NW2d 1 (1999). Therefore, it is of no value. The issue raised in *Miller* is not before us, and the lead opinion has offered no legal basis to overrule this precedent or to support a conclusion that some former case overruled this precedent.

Oddly enough, the lead opinion claims that I "labor[]" to avoid reference to *Miller* and *Schmitz*. *Ante* at 299 n 22. Nothing can be further from the truth. Even a cursory reading of this section of my dissent indicates

[15] Under the struck jury method, all members of the jury array are called into the courtroom at once. They are questioned collectively, not individually. After the parties exhaust their preemptory challenges, the judge assembles the jury using the remaining members of the array, starting with the lowest numbers. *Miller*, *supra* at 323-324.

that I find *Miller* irrelevant. *Miller* deals with a struck-jury method, which is inapplicable to this case. Nor do I labor to avoid referencing *Schmitz*. I simply found other and more persuasive authority.

Those on the lead opinion state that they may reach *Miller* because I reference it. As stated above, I would not reference either *Miller* or *Schmitz* if the lead opinion had not attempted to overrule them.

Contrary to the lead opinion's statement, nothing in my opinion would prohibit the Court from revisiting *Miller* in the future. If a case actually raising a struck-jury method should come before the Court, the issue in *Miller* could be relevant and the Court could address it. There is nothing novel in my legal conclusion that it is inappropriate to overrule precedent in a case that addresses issues irrelevant to the precedent. But it is inappropriate, as a plurality of the Court does here, to attempt to signal the future demise of the precedent in dictum.

No case has ever explicitly overruled *Miller*. And the lead opinion's attempt today amounts to nothing more than dictum. Therefore, *Miller* should remain valid law.

VI. CONCLUSION

The trial judge erred by failing to follow the *Batson* steps and by shifting the burden to defendant to disprove a presumption of discrimination. He also erred by concluding that a prima facie case of discrimination existed. He did not cure these errors. *Batson* errors and erroneous denials of peremptory challenges are subject to automatic reversal. Therefore, I would affirm the decision of the Court of Appeals, reverse defendant's convictions, and remand the case for retrial.

Also, no legal basis exists to overrule this Court's decision in the *Miller* case. Any comment here on *Miller* is mere dictum without precedential value. I would leave *Miller* unmolested.

CAVANAGH, J. (*dissenting*). I dissent from the majority's decision and I agree with the result reached in Justice KELLY's dissent. I would likewise conclude that the trial court erred by collapsing the three steps of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), into one. See, e.g., *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). Further, the trial court erred when it failed to allow defendant an opportunity to articulate race-neutral explanations for the challenges. When defense counsel was finally allowed an opportunity to speak, I agree with Justice KELLY and Chief Justice TAYLOR that defense counsel's comments were directed at *Batson*'s first step. Thus, I would conclude that the trial court's failure to follow *Batson* was error and defendant was improperly denied the use of his peremptory challenges because the trial court misapplied that decision.

Because the trial court erroneously denied the peremptory challenges on *Batson* grounds, and *Batson* error is subject to automatic reversal and not amenable to harmless error review, I would conclude that defendant is entitled to a new trial. See, e.g., *United States v McFerron*, 163 F3d 952, 956 (CA 6, 1998) ("[W]e find that harmless error analysis is not applicable to the district court's erroneous application of the three-step *Batson* test and the improper denial of [the defendant's] peremptory challenges.").

Further, I agree with Justices WEAVER and KELLY that the majority's dicta regarding *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981), and *People v Schmitz*, 231

Mich App 521; 586 NW2d 766 (1998), is inappropriate given the majority's conclusion that the trial court ultimately did not err.

For these reasons, I must respectfully dissent from the majority's decision. Accordingly, I would affirm the decision of the Court of Appeals.

PEOPLE v KNIGHT
PEOPLE v RICE

Docket Nos. 124996, 125101. Argued March 9, 2005 (Calendar Nos. 9, 10). Decided July 21, 2005.

Jerome L. Knight and Gregory M. Rice were tried jointly before the same jury in the Wayne Circuit Court, Cynthia Gray Hathaway, J. Knight was convicted of first-degree murder and Rice was convicted of first-degree murder and possession of a firearm during the commission of a felony. The Court of Appeals, MURPHY, P. J., and MARKEY and R.S. GRIBBS, JJ., affirmed both defendants' convictions in unpublished opinions per curiam issued October 15, 2002 (Docket Nos. 231845, 225865). The Supreme Court, in lieu of granting leave to appeal, vacated the judgments of the Court of Appeals and remanded the cases to the Court of Appeals for reconsideration in light of *Batson v Kentucky*, 476 US 79 (1986), and *Miller-El v Cockrell*, 537 US 322 (2003). 468 Mich 922 (2003). On remand, the Court of Appeals, MURPHY, P.J., and HOEKSTRA and MARKEY, JJ., again affirmed the convictions, finding no evidence of purposeful discrimination in the prosecution's use of peremptory challenges. Unpublished opinions per curiam, entered October 7, 2003 (Docket Nos. 231845, 225865). The Supreme Court granted leave to appeal and ordered the appeals to be argued and submitted together. 470 Mich 869 (2004).

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

No violation of *Batson* occurred in this case. The trial court neither explicitly nor implicitly found that the prosecutor purposefully discriminated in the exercise of peremptory challenges. The trial court's ambiguous statements were driven by its goal of ensuring a racially mixed jury, not concern with determining whether the prosecution's asserted reasons for exercising peremptory challenges were a pretext. The trial court's only clear statement reflected its finding that neither the prosecution nor defense counsel had engaged in racially discriminatory behavior. The defendants' convictions must be affirmed.

1. A party may not exercise a peremptory challenge to remove a veniremember solely on the basis of the person's race.

2. A three-step process is used under *Batson* for determining

the constitutional propriety of a peremptory challenge. First, the opponent of the challenge must make a prima facie showing of discrimination based on race by showing that the opponent is a member of a cognizable racial group, the proponent has exercised peremptory challenges to exclude members of a certain racial group from the jury pool, and all the relevant circumstances raise an inference that the proponent of the challenge is excluding members on the basis of race. The appellate standard of review applicable to this first *Batson* step is to review questions of law de novo and the factual findings for clear error.

3. Under the second *Batson* step, once the trial court determines that a prima facie showing has been made, the burden shifts to the proponent to articulate a race-neutral explanation for the challenge. Unless a discriminatory intent is inherent in the proponent's explanation, the reason offered will be deemed race-neutral. The appellate standard applicable to this second *Batson* step is review de novo.

4. Under the third *Batson* step, where the proponent has provided a race-neutral explanation as a matter of law, the trial court must then determine whether the explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination. The "clear error" standard of review applies to the trial court's resolution of *Batson*'s third step.

5. *Batson,* as a constitutional decision, is not discretionary. Trial courts must meticulously follow *Batson*'s three-step test. Trial courts should carefully follow each of *Batson*'s three steps and clearly articulate on the record their findings and conclusions with respect to each step.

6. A *Batson* challenge is timely if it is made before the jury is sworn.

7. Protecting a defendant's right to a fair and impartial jury does not entail ensuring any particular racial composition of the jury. The goal of *Batson* and its progeny is to promote racial neutrality in the selection of a jury and to avoid the systematic and intentional exclusion of any racial group. A defendant is not entitled to a jury of a particular racial composition as long as no racial group is systematically and intentionally excluded. The defendants' jury was drawn from a fair cross section of the community and no racial group was systematically excluded.

Justice WEAVER, concurring, stated that a fair reading of the record supports the majority's conclusion that the trial court did not find that a *Batson* violation had occurred. She expressed no

opinion concerning the standard of review for *Batson* violations under steps two and three of the *Batson* test or the appropriate remedies for *Batson* violations.

Justice CAVANAGH, joined by Chief Justice TAYLOR and Justice KELLY, concurring in part and dissenting in part, concurred with the legal principles announced in parts II(A) and II(B) of the majority opinion but did not join part II(C) of the majority opinion because of the belief that these cases are not the proper vehicle to explore when a *Batson* objection must be raised. The majority misreads the record. An evenhanded reading of the record demonstrates that the trial court found that prospective jurors were excluded on the basis of race in violation of *Batson* and its progeny. The trial court correctly made this determination under *Batson*'s three-step test. Upon making this determination, however, the court reasoned that any *Batson* violation was cured by the eventual makeup of the jury. However, the initial *Batson* violation was not cured by the eventual makeup of the jury and, thus, the trial court erred in continuing the proceedings in this manner. The judgments of the Court of Appeals should be reversed and the cases should be remanded to the trial court for new trials.

Affirmed.

1. JURY — PEREMPTORY CHALLENGES — RACE.

A party may not exercise a peremptory challenge to remove a veniremember solely on the basis of race.

2. JURY — PEREMPTORY CHALLENGES — RACE.

A three-step process is used to determine whether a peremptory challenge has been exercised solely on the basis of race: first, the opponent of the challenge must make a prima facie showing of discrimination based on race by showing that the opponent is a member of a cognizable racial group, that the proponent has exercised peremptory challenges to exclude members of a certain racial group, and that the relevant circumstances raise an inference that the proponent is excluding members on the basis of race; second, the burden then shifts to the proponent to articulate a race-neutral explanation for the challenge; third, the court must determine if the explanation is a pretext and whether the opponent has proved purposeful discrimination; the de novo standard of appellate review applies to the questions of law involved in the first step and to the second step while the clear error standard applies to the factual findings involved in the first step and to the third step.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Thomas M. Chambers*, Assistant Prosecuting Attorney, for the people.

Gerald M. Lorence and *Gary Supanich* for Jerome L. Knight.

Neil J. Leithauser for Gregory M. Rice.

CORRIGAN, J. In these consolidated appeals, we are called upon to clarify our *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), jurisprudence and provide guidance to our lower courts. Specifically, this Court must decide whether the trial court in these cases determined that *Batson* had been violated; namely, we must discern whether the trial court concluded that the prosecutor exercised peremptory challenges to exclude certain prospective jurors from the jury pool on the basis of race. On the basis of our reading of the voir dire transcripts, we hold that no *Batson* violation existed in this case and the trial judge neither explicitly nor implicitly found that the prosecutor purposefully discriminated in the exercise of three peremptory challenges. Having reviewed the whole record and the fair inferences to be drawn from it, we cannot conclude that the trial judge implicitly found that the prosecutor purposefully discriminated. Instead, the trial judge's ambiguous statements were driven by her goal of ensuring a racially mixed jury, not concern with determining whether the prosecutor's asserted reasons for exercising peremptory challenges were a pretext. Indeed, the trial judge's only clear statement reflected her finding that neither the prosecutor nor defense counsel

had engaged in racially discriminatory behavior. Accordingly, we affirm defendants' convictions.

I. FACTUAL BACKGROUND

Defendant Knight and codefendant Rice were charged with first-degree murder, MCL 750.316, stemming from the shooting death of defendant Knight's former girlfriend. Codefendant Rice was also charged with one count of possession of a firearm during the commission of a felony, MCL 750.227b. The prosecutor's theory was that defendant Knight had unsuccessfully tried to hire someone to kill his former girlfriend. After his initial efforts failed, according to the prosecutor, defendant Knight bailed codefendant Rice out of jail in exchange for codefendant Rice's killing the former girlfriend. Defendant Knight and codefendant Rice were tried jointly before the same jury.

During the third day of jury selection, defense counsel initially objected to the prosecutor's use of peremptory challenges, claiming that the prosecutor was attempting to exclude African-American veniremembers. Defense counsel expressed particular dissatisfaction with the prosecutor's reason for dismissing veniremember nine, which was that a member of veniremember nine's family had been convicted of rape. Defense counsel then demonstrated his misunderstanding of *Batson* by responding, "I don't believe that whether or not there is assaultive [sic] and battery involved in that particular person's family is a basis on which to exclude someone when you already have a pattern. I have noticed this pattern since day one of the jury trial. That's why seventy-five percent of the exclusions have been black."

The prosecutor immediately interjected that she had excluded three African-American veniremembers and

four Caucasian veniremembers and offered race-neutral reasons for excluding the African-American veniremembers. The trial judge stated, "There have been four whites excluded, exempted by the prosecution and three blacks. So just based on that I don't see a *Batson* problem." Defense counsel then commented on the racial composition of the jury pool, stating, "If you have seventy-five percent white prospective jurors, Your Honor, and twenty-five percent black prospective jurors, now the schedule has turned and that's exactly what we've had in three days of jury selection." Defense counsel appeared to argue here not for the racially neutral exercise of peremptory challenges, but for the exercise of challenges in proportion to the overall racial division of the array. The trial judge then found no *Batson* violation, stating:

> But that's not the prosecution or the defense's fault that we are getting largely white jurors. If that's an issue, that's another issue, and that can be dealt with another way.
>
> *But in this particular case and this particular matter, I do not see a pattern of the prosecution improperly excluding African American males, because they've only excluded one, or African American females where two have been excluded.*
>
> *I think the reasons are acceptable. So I don't see a problem there.*
>
> There's still right now, I don't know if this is going to end up being our jurors, but there are quite a few–I don't know who's left up there. *But the fact that the composition of the jury panel is largely white, it's like I said, another issue. And that can be dealt with in another way.*
>
> *I deny the motion* that the prosecution has improperly excluding [sic] minorities from the jury panel. [Emphasis added.]

The court then recessed for lunch. After lunch, the prosecutor dismissed three African-American women,

veniremembers Bonner, Johnson, and Jones. Defense counsel did not contemporaneously object to the exercise of peremptory challenges against veniremembers Bonner and Johnson. Defense counsel objected only to the dismissal of veniremember Jones, contending that the prosecutor was attempting to exclude black females in violation of *Batson*.[1] He pointed out that the prosecutor had exercised three consecutive challenges against African-American women. Without waiting for the trial judge's ruling regarding whether a prima facie showing of purposeful discrimination had been made, the prosecutor immediately provided race-neutral reasons for the three exclusions, although defense counsel had not objected to the challenges regarding veniremembers Bonner and Johnson. The prosecutor stated that she dismissed veniremember Bonner because Bonner was a close relative of two persons convicted of first-degree murder. She dismissed veniremember Johnson because of Johnson's body language, the tone of her voice, and the hesitant look she gave when she stated that she could be fair. Finally, she dismissed veniremember Jones because Jones was a professional woman who had a daughter close in age to the victim. The prosecutor noted that Jones's daughter was not "similarly situated" to the victim and that Jones might compare and contrast the lifestyles of the victim and her daughter.

The trial judge responded by stating, "Just before we recessed for lunch, I thought that it was very clear that we didn't have a problem here. But now I think we are getting very close to a sensitive issue." The trial judge rejected the prosecutor's reasons for dismissing venire-

[1] Veniremember Jones, believing that she was dismissed, left the courthouse before the trial judge ruled on defense counsel's *Batson* objection.

member Johnson, but stated that she had not objected to Johnson's dismissal because defense counsel had not objected. The trial judge did not accept the prosecutor's reasons for dismissing veniremember Jones:

> The same thing with Miss Jones. I do not see a reason other than–I mean, it seems to me for the prosecution to say, she has a daughter the same age as the victim, that would seem to work in the prosecution's favor, just in terms of thinking in the jury selection. So I don't accept that.
>
> * * *
>
> *I do see that we are getting close, and there are, I don't know[,] two or three minority jurors left on this panel. So I think we are getting close to a serious issue here.*
>
> I wish that somebody had said something about keeping Miss Jones and Miss Johnson. And then we address this matter because I probably would not have excused either one of them. [Emphasis added.]

Defense counsel interrupted the trial judge at that point to clarify that Jones was the last veniremember struck and that he objected to the exclusion of Jones. Despite defense counsel's comment, the trial judge stated, "[I]f an objection had been made as far as Miss Johnson and Miss Jones[,] I probably would have addressed it. And I tend to think I probably would have kept them on the jury."[2]

The prosecutor then stated that dismissal was appropriate as long as she advanced race-neutral reasons for the dismissal. The trial judge replied that she had to either accept or reject the prosecutor's "neutral" reasons. She further stated, "And I'm not, I'm saying that

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[2] It is not clear from the record whether the trial judge mistakenly referred to veniremember Bonner as veniremember Jones, or truly believed that an objection had not been made regarding veniremember Jones's dismissal.

I think we're getting close to a sensitive issue here on Jones and Johnson. That's all I'm saying. I'm making my record too."

The trial judge twice referred to getting close to a "sensitive issue." We do not think this language reflects that the sensitive issue was purposeful discrimination. Instead, we believe the sensitive issue was the looming absence of minorities in the array and on the petit jury.

The prosecutor acknowledged the trial judge's comments. She immediately raised a reverse-*Batson* challenge to defense counsel's exercise of peremptory challenges to exclude five female Caucasian veniremembers and one male Caucasian veniremember. Defense counsel again demonstrated his misunderstanding of *Batson* by stating:

> I would indicate to the Court, Your Honor, that sister counsel fails to recognize that there are at least four white women that are on the jury.
>
> * * *
>
> I don't believe with regards to the fact that they happen to be white women, I think the Court also has to recognize that the greatest number of people that have come through that jury, as potential jurors, have been in fact white people.[3]

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[3] Justice CAVANAGH claims that defense counsel's objections did not demonstrate his misunderstanding of *Batson*. Rather, he states that defense counsel's comments amount to an attempt to establish a prima facie case of purposeful discrimination by asserting that the prosecutor had engaged in a pattern of systematically excluding African-American veniremembers. We disagree. The record, when read as a whole, clearly demonstrates that defense counsel's *Batson* objections were made to prevent the prosecutor from excluding any African-American veniremembers, even if the prosecutor provided race-neutral reasons for doing so, because the majority of the veniremembers, by chance, was Caucasian.

Defense counsel then requested that the trial judge first make a ruling regarding his *Batson* objection. The following colloquy ensued:

> *[Defense Counsel]*: But, I don't think the Court ruled on whether or not you're going to allow Miss Jones to be struck. She's still downstairs, I'm sure.
>
> *[The Trial Judge]*: I don't know if she is or not.
>
> *[The Prosecutor]*: I thought she was held.
>
> *[The Trial Judge]*: If she is still here, I'm going to keep her.
>
> *[Defense counsel]*: Thank you.
>
> *[The Deputy]*: Miss Jones, she has already gone.

The trial judge then allowed defense counsel to make a record regarding the prosecutor's reverse-*Batson* challenge, but never ruled on the challenge. Defense counsel responded by stating, "I believe the answer lies in the panel that's left. There is no pattern . . . ." After further discussion, the trial judge concluded that any *Batson* problems that may have occurred were cured because African-American women were fairly represented on the jury panel. She stated:

> I'm not satisfied with the prosecutor's response as to potential juror Jones and Johnson. But I think they've already left.
>
> So I'm going to say from this point on let's be very careful about the selection. If you think that you, if the defense is not satisfied with me just giving a cautionary instruction to the prosecution, then I'll address any other remedy.
>
> But, realistically *I think all of us are being, trying to be conscientious about the selection of these jurors because of the racial makeup of the jury panels, which we don't have any control over.*

> I'm just saying, I let Jones and Johnson go without holding them, especially Jones. I guess I should have held her and I didn't do that. I'll take the fault for that. But from this point on let's try to be careful with this jury selection. We are to [sic] close to getting this jury selected. [Emphasis added.]

After sending the deputy to search for veniremember Jones again with no success, the trial judge stated, "I don't think it is serious enough at this point. *We do have some minorities left on the jury panel* and I'll be watching this closely." Finally, at the end of jury selection, the trial judge commented:

> *With the panel we ended up with, I think that any Batson problems that may have been there have been cured.*
>
> We have the same number if not more jurors, African American female jurors on the panel as if we had kept [veniremember] Johnson and [veniremember] Jones.
>
> *I don't think either side ended up selecting this panel for any other reason other than I think that these are the ones who will be the fair and impartial persons to hear and try this case.* [Emphasis added.]

In the end, the jury convicted defendant Knight of first-degree murder and codefendant Rice of first-degree murder and felony-firearm.

Both defendants appealed as of right, and the Court of Appeals affirmed.[4] In defendant Knight's case, the Court of Appeals found that the prosecutor presented adequate race-neutral reasons for excusing the prospective jurors and, thus, the trial court did not abuse its

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[4] *People v Knight*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2002 (Docket No. 231845); *People v Rice*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2002 (Docket No. 225865). Both defendants assigned numerous claims of error, but only the *Batson* issue is relevant for purposes of these appeals.

discretion in rejecting defendant's *Batson* challenge. While codefendant Rice's counsel joined in the *Batson* challenge at trial, codefendant Rice did not raise the *Batson* issue in the Court of Appeals. Both defendants sought leave to appeal in this Court.

In lieu of granting leave to appeal, we vacated the judgments of the Court of Appeals and remanded for reconsideration in light of *Batson*, *supra*, and *Miller-El v Cockrell*, 537 US 322, 340; 123 S Ct 1029; 154 L Ed 2d 931 (2003) (*Miller-El I*).[5] On remand, the Court of Appeals again affirmed the convictions, finding no evidence of purposeful discrimination.[6] We granted leave to appeal and further ordered these cases to be argued and submitted together.[7]

II. LEGAL BACKGROUND

A. THE *BATSON* PROCEDURE

Under the Equal Protection Clause of the Fourteenth Amendment,[8] a party may not exercise a peremptory challenge to remove a prospective juror solely on the basis of the person's race. *Swain v Alabama*, 380 US 202, 203-204; 85 S Ct 824; 13 L Ed 2d 759 (1965); see also *Georgia v McCollum*, 505 US 42; 112 S Ct 2348; 120 L Ed 2d 33 (1992); *Edmonson v Leesville Concrete Co*, *Inc,* 500 US 614; 111 S Ct 2077; 114 L Ed 2d 660

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[5] *People v Knight*, 468 Mich 922 (2003); *People v Rice*, 468 Mich 922 (2003).

[6] *People v Knight (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued October 7, 2003 (Docket No. 231845); *People v Rice (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued October 7, 2003 (Docket No. 225865).

[7] 470 Mich 869 (2004).

[8] US Const, Am XIV, § 1 provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

(1991). In *Batson*, *supra* at 96-98, the United States Supreme Court announced a three-step process for determining the constitutional propriety of a peremptory challenge.

First, the opponent of the peremptory challenge must make a prima facie showing of discrimination. *Id*. at 96. To establish a prima facie case of discrimination based on race, the opponent must show that: (1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. *Id*.[9] The United States Supreme Court has made it clear that the opponent of the challenge is not required at *Batson*'s first step to actually prove discrimination. *Johnson v California*, __ US __; 125 S Ct 2410; 162 L Ed 2d 129 (2005).[10] Indeed, "so long as the sum of the proffered

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[9] In *Swain*, *supra* at 223-224, the United States Supreme Court required the defendant to show that the prosecution had a practice or pattern of using peremptory challenges in "case after case." In *Batson*, *supra* at 92-93, however, the Court sought to alleviate *Swain*'s "crippling burden of proof" and eliminated the requirement that the defendant make a prima facie showing by reference to other cases. Further, it must be observed that the striking of even a single juror on the basis of race violates the Constitution. See, e.g., *J E B v Alabama ex rel T B*, 511 US 127, 142 n 13; 114 S Ct 1419; 128 L Ed 2d 89 (1994) ("The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system."). See also *United States v Clemons*, 843 F2d 741, 747 (CA 3, 1988), cert den 488 US 835 (1988); *United States v Lane*, 866 F2d 103, 105 (CA 4, 1989); *United States v Battle*, 836 F2d 1084, 1086 (CA 8, 1987); *United States v Vasquez-Lopez*, 22 F3d 900, 902 (CA 9, 1994); *United States v David*, 803 F2d 1567, 1571 (CA 11, 1986).

[10] In *Johnson*, the United States Supreme Court addressed California's approach to examining *Batson*'s first step. While the Court recognized that the states have some degree of flexibility in formulating appropriate

facts gives 'rise to an *inference* of discriminatory purpose,' " *Batson*'s first step is satisfied. *Id*. at ___ US ___; 125 S Ct 2416; 162 L Ed 2d 138 (internal citation omitted; emphasis added).

Second, if the trial court determines that a prima facie showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike. *Batson, supra* at 97. *Batson*'s second step "does not demand an explanation that is persuasive, or even plausible." *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). Rather, the issue is whether the proponent's explanation is facially valid as a matter of law. *Id*.; *Hernandez v New York*, 500 US 352, 360; 111 S Ct 1859; 114 L Ed 2d 395 (1991) (plurality opinion). "A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. . . . Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.*

Finally, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then

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procedures to comply with *Batson*, the Court concluded that California's approach was inappropriate. *Id*., ___ US ___; 125 S Ct 2416; 162 L Ed 2d 138. The California Supreme Court had concluded that at *Batson*'s first step, the opponent of the challenge must present strong evidence that makes discriminatory intent more likely than not. The United States Supreme Court rejected this approach, observing:

> We did not intend [*Batson*'s] first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. [*Id*., ___ US ___; 125 S Ct 2417; 162 L Ed 2d 139.]

determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination. *Batson*, *supra* at 98. It must be noted, however, that if the proponent of the challenge offers a race-neutral explanation and the trial court rules on the ultimate question of purposeful discrimination, the first *Batson* step (whether the opponent of the challenge made a prima facie showing) becomes moot. *Hernandez*, *supra* at 359.

B. REVIEWING *BATSON* CLAIMS

Generally, we review a trial court's factual findings for clear error. MCR 2.613(C). Further, we review questions of law de novo. *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). As a practical matter, however, appellate courts sometimes struggle with determining whether a particular issue presents a question of law or fact. In some instances, the line can become quite blurred. *Batson* error claims frequently appear to fall into the blurred category, and courts have labored to formulate a generally accepted standard of review for *Batson* cases that applies to all levels of the *Batson* inquiry. The cases at hand give us the opportunity to clarify our own standard for reviewing *Batson* errors. We conclude that the applicable standard of review depends on which *Batson* step is at issue before the appellate court.

1. DETERMINING WHAT THE TRIAL COURT HAS RULED

Before a reviewing court can determine which standard of review applies for purposes of *Batson*'s three steps, the court must first ascertain what the trial court actually ruled. When a trial court methodically adheres to *Batson*'s three-step test and clearly articulates its findings on the record, issues concerning what the trial

court has ruled are significantly ameliorated. See, e.g., *United States v Castorena-Jaime*, 285 F3d 916, 929 (CA 10, 2002). Not only does faithful adherence to the *Batson* procedures greatly assist appellate court review, but the parties, the trial court, and the jurors are well-served by thoughtful consideration of each of *Batson*'s steps as well. Thus, we observe that *Batson*, as a constitutional decision, is not discretionary. Our trial courts must meticulously follow *Batson*'s three-step test, and we *strongly* urge our courts to *clearly* articulate their findings and conclusions on the record.

In the event a trial court fails to clearly state its findings and conclusion on the record, an appellate court must determine on the basis of a fair reading of the record what the trial court has found and ruled. See, e.g., *Mahaffey v Page*, 162 F3d 481, 482-483 (CA 7, 1998). This is not the preferred route. Because of the importance of the right at stake, as well as the societal and judicial interests implicated, we again direct our trial courts to carefully follow each of *Batson*'s three steps, and we further urge the courts to clearly articulate their findings and conclusions with respect to each step on the record. Once it is determined what the trial court has found and ruled, the reviewing court must decide what *Batson* step is at issue in the particular case and how the claim of error should be reviewed.

2. STANDARD OF REVIEW FOR *BATSON*'S FIRST STEP

While there is somewhat of a consensus on the standards of review applicable to *Batson*'s second step, and the scope of review for the third step is well-settled, courts appear to be split with regard to the proper standard of review when examining *Batson*'s first step. For example, the Ninth Circuit Court of Appeals en banc concluded that a trial court's determination

whether the opponent of the peremptory challenge made out a prima facie case of discrimination should be reviewed for clear error. *Tolbert v Page*, 182 F3d 677 (CA 9, 1999). In *Tolbert*, the Ninth Circuit concluded that *Batson*'s first step presented a mixed question of law and fact; however, the *Tolbert* court reasoned:

> At the *Batson* prima facie showing step, the concerns of judicial administration tip in favor of the trial court and, therefore, a deferential standard of review prevails. Our conclusion is based on the language of *Batson* itself, which describes the prima facie analysis as a "factual inquiry," *Batson*, 476 U.S. at 95, and makes clear that the trial court is to be the primary adjudicator of that analysis: "We have confidence that *trial judges*, experienced in supervising voir dire, *will be able to decide if the circumstances* concerning the prosecutor's use of peremptory challenges *create[] a prima facie case* of discrimination." *Id*. at 97 (emphasis added).
>
> Our holding is also consistent with more recent teachings of the Supreme Court, which counsel in favor of applying a deferential standard of review to certain mixed questions. See *Salve Regina College v. Russell*, 499 U.S. 225, 233, 111 S. Ct. 1217, 113 L Ed 2d 190 (1991). Deferential review is appropriate either "when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question," or when "probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Id.* [*Tolbert*, *supra* at 682.]

When faced with the same question, however, the Seventh Circuit Court of Appeals concluded that a de novo standard applies to a trial court's determination whether a prima facie showing of discrimination has been made. *Mahaffey, supra* at 484. The Seventh Circuit likewise observed that whether the facts alleged by the opponent of the peremptory challenge satisfied the opponent's burden under *Batson*'s first step is a mixed question of law and fact. *Id.* Nonetheless, the Seventh

Circuit opined that "[t]he question of whether an inference of discrimination may be drawn from a set of undisputed facts relating to the racial makeup of the jury venire and the prosecutor's exercise of peremptory challenges is . . . one over which the appellate courts should exercise a degree of control that a clear error standard would not afford." *Id*. Moreover, in light of the importance of the constitutional right implicated, the Seventh Circuit reasoned that the de novo standard "would allow for a measure of consistency in the treatment of similar factual settings, rather than permitting different trial judges to reach inconsistent conclusions about the prima facie case on the same or similar facts." *Id*. Thus, the *Mahaffey* Court concluded that the de novo standard of review applies to the prima facie showing of discrimination prong.

Similar to the Seventh Circuit, the Supreme Court of Colorado has also concluded that *Batson*'s first step is subject to review de novo. *Valdez v People*, 966 P2d 587, 591 (Colo, 1998). The *Valdez* court noted that the First, Eighth, and Ninth circuits adhere to a clear error standard when reviewing the prima facie determination under the *Batson* framework. However, the Colorado Supreme Court also observed that the Tenth Circuit Court of Appeals, as well as appellate courts in Kansas, Tennessee, and Utah, have concluded that *Batson*'s first step is subject to review de novo. Weighing the aforementioned cases and turning to Title VII case law for additional guidance, the *Valdez* court concluded:

> Therefore, although we afford deference to the trial court's ultimate determination of a *Batson* challenge in step three, we believe that the first step involves a question of legal sufficiency over which the appellate court must have plenary review. We continue to defer to the underlying factual findings, including any predicate credibility determinations of the trial court upon which its prima facie

> determination under *Batson* is based. However, we hold that the question of whether the defendant has established a prima facie case under *Batson* is a matter of law, and we apply a de novo standard of review to a trial court's prima facie determination of the *Batson* analysis. [*Valdez*, *supra* at 591.]

We agree with those jurisdictions that have concluded that *Batson*'s first step is appropriately categorized as a mixed question of law and fact. We, however, chose to follow Michigan's well-established procedure of reviewing questions of law de novo and factual findings for clear error. *People v McRae*, 469 Mich 704, 710; 678 NW2d 425 (2004). We thus conclude that the first *Batson* step is a mixed question of fact and law that is subject to both a clear error (factual) and a de novo (legal) standard of review. A trial judge must first find the facts and then must decide whether those facts constitute a prima facie case of discrimination under *Batson* and its progeny.

We acknowledge that the United States Supreme Court has emphasized that the focus of *Batson* is not merely on the individual criminal defendant. See, e.g., *Powers v Ohio*, 499 US 400, 405-410; 111 S Ct 1364; 113 L Ed 2d 411 (1991). Rather, the focus is also on the integrity of the judicial system, as well as the rights of the prospective jurors. *Id.* at 410-414.[11] Unquestionably, ensuring the integrity of the judicial process and maintaining fair jury selection procedures are paramount concerns. However, these concerns do not persuade us that *Batson*'s first step should be treated any differently

[11] See also Herman, *Why the court loves Batson: Representation-Reinforcement, colorblindness, and the jury*, 67 Tul L R 1807, 1814-1815 (1993) ("A criminal defendant is permitted to raise Batson challenges not on the theory that his or her own rights have been violated, but rather on the theory that he or she is being afforded standing to raise the rights of a third party—the prospective juror.").

than other mixed questions of law and fact. Indeed, we believe that these paramount concerns can be effectuated under our established rules for appellate review. Thus, until the United States Supreme Court holds otherwise, under *Batson*'s first step, we will review the questions of law de novo and the factual findings for clear error.

3. STANDARD OF REVIEW FOR *BATSON*'S SECOND STEP

While there appears to be some disagreement about the standard of review for *Batson*'s second step, we believe that those jurisdictions that have concluded that the second step is subject to review de novo have the better view. See, e.g., *United States v Bishop*, 959 F2d 820, 821 n 1 (CA 9, 1992); *Hurd v Pittsburg State Univ*, 109 F3d 1540, 1546 (CA 10, 1997); *Valdez, supra* at 590. We believe that such an approach is consistent with controlling United States Supreme Court precedent. See, e.g., *Hernandez*, *supra* at 359 ("In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as *a matter of law*.") (emphasis added).

It is important to bear in mind that it is not until *Batson*'s third step that the persuasiveness of the proffered explanation for the peremptory challenge becomes relevant. *Purkett*, *supra* at 768.[12] Accordingly,

[12] See also *Johnson*, *supra*, ___ US ___; 125 S Ct 2417-2418; 162 L Ed 2d 140, quoting *Purkett*, *supra* at 768 ("The first two *Batson* steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim. 'It is not until the *third* step that the persuasiveness of the justification becomes relevant —the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.' ").

at *Batson*'s second step, a court is only concerned with whether the proffered reason violates the Equal Protection Clause as a matter of law. See, e.g., *United States v Uwaezhoke*, 995 F2d 388, 392 (CA 3, 1993) ("Thus, if the government's explanation does not, on its face, discriminate on the basis of race, then we must find that the explanation passes *Batson* muster as a matter of law, and we pass to the third step of *Batson* analysis to determine whether the race-neutral and facially valid reason was, as a matter of fact, a mere pretext for actual discriminatory intent."). It is also important to bear in mind that only in rare cases is the proffered explanation facially invalid because such direct evidence is equally rare. We thus conclude that the de novo standard governs appellate review of *Batson*'s second step.

4. STANDARD OF REVIEW FOR *BATSON*'S THIRD STEP

It is well-settled that a trial court's determination concerning whether the opponent of the peremptory challenge has satisfied the ultimate burden of proving purposeful discrimination is a question of fact that is reviewed for clear error. *Hernandez*, *supra* at 364-365; *United States v Hill*, 146 F3d 337, 341 (CA 6, 1998). Moreover, the trial court's ultimate factual finding is accorded great deference. *Miller-El I, supra* at 340. The United States Supreme Court has observed that "[d]eference to trial court findings on the issue of discriminatory intent makes particular sense in this context because . . . the finding 'largely will turn on evaluation of credibility.' " *Hernandez*, *supra* at 365, quoting *Batson*, *supra* at 98 n 21. Accordingly, the "clear error" standard comports with the concept that assessment of credibility lies within the trial court's province.[13] In accordance with well-settled law, we thus conclude that

[13] See, e.g., *Miller-El I*, *supra* at 339-340 (internal citations omitted):

the clear error standard governs appellate review of a trial court's resolution of *Batson*'s third step.

5. SUMMARY OF *BATSON* STANDARD OF REVIEW

In sum, we conclude that the proper standard of review depends on which *Batson* step is before us. If the first step is at issue (whether the opponent of the challenge has satisfied his burden of demonstrating a prima facie case of discrimination), we review the trial court's underlying factual findings for clear error, and we review questions of law de novo. If *Batson*'s second step is implicated (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law), we review the proffered explanation de novo. Finally, if the third step is at issue (the trial court's determinations whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination), we review the trial court's ruling for clear error.

> Credibility can be measured by, among other factors, . . . demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.
>
> * * *
>
> "Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding 'largely will turn on evaluation of credibility.' In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' "

C. REMEDIES FOR *BATSON* VIOLATIONS

In the present case, defense counsel did not object to the dismissal of veniremembers Bonner and Johnson. Although he referred to Bonner and Johnson during his *Batson* objection, he only objected to the dismissal of veniremember Jones. Therefore, in this case, the *Batson* objection only pertains to the dismissal of veniremember Jones. In order to ensure that a trial court remedies all purposeful discrimination, however, courts should apply the *Batson* objection to all strikes in an alleged pattern.

In order for a pattern of strikes to develop, several jurors might be struck without objection until a pattern begins to emerge. If a trial court allowed earlier strikes in a pattern to stand without taking remedial action, the court would potentially be allowing purposeful discrimination. Therefore, most jurisdictions do not consider a *Batson* objection waived if the prosecution fails to raise it immediately following the strike.

The case of *State v Ford*, 306 Mont 517, 523; 39 P3d 108 (2001), provided a thorough discussion of the rulings in different jurisdictions regarding *Batson* error preservation. Several jurisdictions held that a *Batson* challenge must be made before the jury is sworn, or else the issue is waived.[14] Additionally, numerous courts take the stance that a *Batson* challenge must also be raised before the court dismisses the venire.[15] One case

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[14] See *State v Wilson*, 117 NM 11; 868 P2d 656 (NM App, 1993); *United States v Cashwell,* 950 F2d 699, 704 (CA 11, 1992); *United States v Dobynes,* 905 F2d 1192, 1196 (CA 8, 1990). See *also People v Hudson*, 157 Ill 2d 401; 626 NE2d 161 (1993).

[15] See *United States v Biaggi*, 909 F2d 662, 679 (CA 2, 1990); *Government of Virgin Islands v Forte*, 806 F2d 73, 76 (CA 3, 1986); *Morning v Zapata Protein (USA), Inc*, 128 F3d 213, 216 (CA 4, 1997); *United States v Abou-Kassem*, 78 F3d 161, 167 (CA 5, 1996); *United States v Rodriguez*,

held that *Batson* objections were waived once the stricken veniremembers left the courthouse, but the court nonetheless underwent a *Batson* analysis for each of the discharged veniremembers in the pattern.[16]

There are several reasons why courts require a party to raise a *Batson* challenge before the venire is dismissed. First, the *Batson* objection warns the prosecutor, or the person peremptorily striking a juror, that he might be required to provide race-neutral explanations for the strike. *United States v Erwin*, 793 F2d 656 (CA 5, 1986). Furthermore, if a court finds a *Batson* violation after the venire is dismissed, then there must be a new jury-selection process and a new venire called. *State v Cummings,* 838 SW2d 4, 6 (Mo App, 1992). If a *Batson* challenge is made before the venire is discharged, however, the trial court can immediately correct the error and disallow the strike. See *State v Parker*, 836 SW2d 930 (Mo, 1992).

Therefore, in order to preserve the option of reseating improperly stricken jurors, the court in *Parker* suggested that "[t]rial courts should refrain from releasing venirepersons who have been peremptorily struck until the venire is excused." *Id.* at 936 n 3.

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917 F2d 1286, 1288 (CA 11, 1990); *State v Cummings*, 838 SW2d 4 (Mo App, 1992); *Sorensen v State*, 6 P3d 657, 662 (Wy, 2000); *State v Harris*, 157 Ariz 35, 36; 754 P2d 1139 (1988).

[16] In *State v Jacobs*, 803 So 2d 933 (La, 2001), the Louisiana Supreme Court held that the objections to the first three jurors were untimely, and thus waived, because "the jurors were no longer 'under any instructions' in the case." *Id.* at 939. The reason why *Jacobs* might not be easily applicable to other cases, however, is that the judge "effectively collapse[d] the first two stages of the *Batson* procedure . . . [and performed] the crucial third step of weighing the defendant's proof and the prosecutor's race-neutral reasons to determine discriminatory intent." *Id.* at 941. Therefore, although the judge claimed that the objection was untimely, he nonetheless undertook a *Batson* analysis and determined that there were race-neutral reasons for the jurors' dismissals.

Requiring courts to retain stricken jurors until the end of jury selection, however, could potentially burden trial courts and citizens called in for jury service if the selection process lasts several days. Because of the difficulties in retaining stricken jurors, this Court concludes that a *Batson* challenge is timely if it is made before the jury is sworn. It must be noted, however, that if stricken veniremembers are dismissed and later found to be part of a pattern of discriminatory strikes, the only remaining remedy for the *Batson* violation would be to discharge the entire venire and start the process anew. A court may not ignore or fail to remedy the prior improper strikes simply because the court already dismissed the veniremembers.

In the present case, the prosecutor provided race-neutral explanations for her exclusion of veniremembers Bonner and Johnson, even though defense counsel did not specifically object to their dismissals. The trial judge stated that she was not "satisfied with the prosecutor's response as to potential juror Jones and Johnson," but because they already left, she did not rule on whether the prosecutor engaged in purposeful discrimination. Instead, she instructed the attorneys to be careful "from this point on" with their selections. If the judge had found a *Batson* error, however, her only remedial option would have been to dismiss the entire venire and select the jury from a new panel because she had already dismissed the stricken veniremembers.

III. ANALYSIS

The record reflects that the trial judge never explicitly found that the prosecutor violated *Batson*. Nor can we infer such a finding on this record. Instead, the record is susceptible to the fair inference that the trial judge acted to preserve the presence of minority jurors

on the panel, knowing that the jury pool, as a matter of chance, was largely Caucasian. Protecting a defendant's right to a fair and impartial jury does not entail ensuring any particular racial composition of the jury.[17] The goal of *Batson* and its progeny is to promote racial neutrality in the selection of a jury and to avoid the systematic and intentional exclusion of any racial group. *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975); *Holland v Illinois*, 493 US 474, 476-480; 110 S Ct 803; 107 L Ed 2d 905 (1990).

As a threshold matter, we must note that our task in resolving these cases is difficult, in large part, because of the trial judge's failure to rigorously follow the *Batson* procedures and, more importantly, to clearly articulate her findings and conclusions on the record. Therefore, under these circumstances, we must fairly read the record to determine exactly what the trial judge found and concluded in light of defendants' *Batson* objections.

On the basis of our reading of the voir dire transcripts, we conclude that the trial court did not, in fact, find a *Batson* violation and, thus, there is no error to complain of in these cases. The trial judge's initial

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[17] See, for example, a recent proposal to amend MCR 6.412. This proposed court rule would expressly prohibit the use of peremptory challenges to achieve a racially proportionate jury. It states:

> (F) Discrimination in the Selection Process.
>
> (1) No person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex.
>
> (2) Discrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection. [See *Michigan Bar Journal*, June 2005, p 64.]

expression of dissatisfaction with the prosecutor's race-neutral reasons, when considered in context with her subsequent remarks that "we are getting close to a sensitive issue," related to her concern about the number of minority veniremembers left on the panel. The judge further articulated her actual motivation in the following excerpt: "I think all of us are being, trying to be conscientious about the selection of these jurors *because of the racial makeup of the jury panels, which we don't have any control over.*" The trial judge's remarks do not reflect a finding that the prosecutor engaged in purposeful discrimination. Rather, the comments demonstrate that her true motivation was to ensure some modicum of racial balance in the jury panel. Use of peremptory challenges, however, to ensure racial proportionality in the jury is prohibited by *Batson* and will be prohibited by proposed MCR 6.412(F) if adopted.[18]

The trial judge never expressly found that the prosecutor exercised peremptory challenges for a racially discriminatory reason. In fact, her comments at the end of jury selection suggest a contrary conclusion. The trial judge was more concerned with achieving a proportionate racial composition on the jury than with the exclusion of veniremember Jones. She ultimately concluded that no *Batson* violation existed because a satisfactory number of African-American females were still present on the jury.

We reject Justice CAVANAGH's conclusion that the trial judge ever found that defense counsel met his burden of

[18] Justice CAVANAGH states that we rely on the above proposed court rule to support the proposition that the use of peremptory challenges to ensure racial proportionality in the jury is prohibited. We do not rely on the proposal to support this proposition. Rather, we cite to it to show that this *Court* is considering steps to prevent such problems from occurring in the future.

proving purposeful discrimination. Rather, the trial judge's focus, as her comments reflect, was to ensure that the racial composition of the jury remained proportionate.

The purpose of *Batson* is to prevent discriminatory exclusions of veniremembers on the basis of race or gender. Here, the jury pool, by chance, contained a greater number of Caucasians than African-Americans. The trial judge was preoccupied with this fact. Her *Batson* analysis seemed to be infused with and confused by the erroneous belief that *Batson* is violated if the challenge resulted in too few minority jurors. The trial judge's statements did not imply that she would have kept Jones and Johnson on the jury because she thought they had been wrongfully excluded on the basis of race. Rather, her statements implied that she would have kept them on the jury to ensure that the number of African-American jurors remained proportionate to the number of Caucasian jurors.

The trial judge failed to recognize that a defendant is not entitled to a jury of a particular racial composition as long as no racial group is systematically and intentionally excluded. *Taylor*, *supra* at 538; *Holland, supra* at 476-480.[19] Defendants' jury was drawn from a fair cross section of the community. Nor was any racial group systematically excluded.

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[19] See also *United States v Ovalle*, 136 F3d 1092, 1107 (CA 6, 1998), in which the United States Court of Appeals for the Sixth Circuit struck down the Eastern District of Michigan's jury selection plan, which utilized the "subtraction" method of balancing the jury pool to ensure proportional representation of various racial groups within the community. It held, "The selection of the grand and petit juries from a qualified jury wheel that was derived through racially discriminatory means, and the fact that the Jury Selection Plan was not narrowly tailored to meet any compelling governmental interest, constitute grounds for reversal of the defendants' convictions."

IV. CONCLUSION

On the basis of our reading of the voir dire transcripts, we hold no *Batson* violation occurred in this case and the trial judge neither explicitly nor implicitly found such a violation. Giving the appropriate degree of deference to the trial judge's ultimate finding that the prosecutor did not engage in purposeful discrimination, we affirm defendants' convictions.

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

WEAVER, J. *(concurring)*. I concur in the majority's conclusion that, on a fair reading of the record, the trial court did not find that prospective jurors were excluded on the basis of race in violation of *Batson v Kentucky,* 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). During jury selection, the prosecutor exercised peremptory challenges to excuse prospective jurors Johnson and Bonner. Defense counsel did not object. A short time later, after the prosecution exercised a peremptory challenge to excuse prospective juror Jones, defense counsel asked to approach the bench. Defense counsel objected to excusing Jones, asserting that she was being excused because she was black. In response to defense counsel's assertion, the prosecutor then explained her reasons for excusing Jones, as well as Johnson and Bonner. Throughout the discussion, the trial court stated that "we are getting close to a serious issue here." And after noting that the trial court has to accept or reject the prosecutor's reasons, determining whether they are race-neutral or not, the trial court stated: "And I'm not, I'm saying that I think we're getting close to a sensitive issue here on Jones and Johnson. That's all I'm saying. I'm making my record too." When this

entire response is considered, it suggests that the trial court was not finding that a *Batson* violation had occurred, but was simply cautioning the parties that they may be getting "close" to a sensitive issue. Getting "close to a sensitive issue" is not the same thing as finding that a *Batson* violation has occurred and a prospective juror has been improperly excused on the basis of race.[1]

Because I conclude that the trial court did not find that a *Batson* violation occurred, I express no opinion concerning the standard of review for *Batson* violations under steps two and three of the test or the appropriate remedies for *Batson* violations.

CAVANAGH, J. (*concurring in part and dissenting in part*). I agree with the legal principles announced in parts II(A) and II(B) of the majority's opinion.[1] I write separately because I disagree with the majority's reading of the record. I believe that an evenhanded reading of the record demonstrates that the trial court found that prospective jurors were excluded on the basis of

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[1] Unlike the majority, I do not speculate with regard to the reasons for the trial court's statements. I simply conclude that after a fair reading of the record, the trial court did not find that a *Batson* violation had occurred.

[1] I do not join part II(C) of the majority opinion because I do not believe that these cases are the proper vehicle to explore when a *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), objection must be raised. In these cases, the *Batson* objections were made in a relatively timely manner. In this regard, these cases do not present a situation where a party is raising the *Batson* objection for the first time on appeal. Further, these are not cases where a party waited until the end of trial to make a *Batson* objection. While I applaud the majority's efforts to clarify our *Batson* jurisprudence and provide our lower courts guidance, I must nonetheless refrain from joining part II(C) of the majority opinion. Because the timeliness of the *Batson* objections in these cases is not at issue, I would prefer to decide the larger issue of when a *Batson* objection must be lodged in a more suitable case.

race in violation of *Batson v Kentucky,* 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), and its progeny. Further, I would hold that the trial court correctly made this determination under *Batson*'s three-step test.[2] Upon making this determination, however, the trial court reasoned that any *Batson* violation was cured by the eventual makeup of the jury because "the same number if not more" unchallenged African-American jurors remained on the panel that ultimately decided these cases. I would hold that the initial *Batson* violation was not cured by the eventual makeup of the jury and, thus, the trial court erred by continuing the proceedings in this manner. Accordingly, I would reverse the judgments of the Court of Appeals and remand these cases for new trials.

I. FACTUAL BACKGROUND

During jury selection, defendants raised objections to the prosecutor's use of her peremptory challenges. On the first and second days of jury selection, the prosecutor exercised a total of four peremptory challenges. On the third day, the prosecutor exercised three more peremptory challenges. Of the seven challenges the prosecutor had exercised at that point, three were against African-American veniremembers, one male and two females. After the prosecutor exercised her

[2] *Batson*'s three-step process is as follows: (1) the opponent of the peremptory challenge must make a prima facie showing of discrimination; (2) if the trial court determines that a prima facie showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike; and (3) if the proponent provides a race-neutral explanation, the trial court must then determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination. *Batson*, *supra* at 96-98.

third challenge on day three, and after the court recessed for lunch, defense counsel raised a *Batson* objection.

Defense counsel argued that the prosecutor was excluding African-American veniremembers on the basis of race, specifically African-American males. The prosecutor responded by arguing that a pattern of discrimination was not present, noting that she struck four Caucasians and only three African-Americans. Moreover, the prosecutor argued, only one of the excluded African-Americans was male. While continuing to assert that the first step of *Batson* was not satisfied, the prosecutor also explained her reasons for excluding the African-Americans. The trial court found that *Batson* had not been violated at that point, stating:

> But in this particular case and this particular matter, I do not see a pattern of the prosecution improperly excluding African American males, because they've only excluded one, or African American females where two have been excluded.
>
> I think the reasons are acceptable. So I don't see a problem there.

The trial court then recessed for lunch, and the veniremembers returned to the courtroom after the break.

When jury selection resumed, the prosecutor exercised peremptory challenges to exclude veniremembers Johnson, Bonner, and Jones. After the prosecutor sought to exclude veniremember Jones, defense counsel asked to approach the bench, and the trial court directed the veniremembers to leave the courtroom for a few minutes. Defense counsel objected to the exclusion of these three African-American females on *Batson* grounds. The trial court did not make any findings at this time; rather, the prosecutor argued that veniremember Bonner was excluded because she was closely

related to two people who have been convicted of first-degree murder, not because she was African-American. The prosecutor further asserted that veniremember Johnson was excluded because she had a close relative convicted of a drug charge and she was "hesitant in her demeanor." Finally, the prosecutor explained that she excluded veniremember Jones because Jones had a child close to the age of the victim and Jones was a professional working person. The trial court then noted that veniremember Berg, a Caucasian female who was also a professional working person, was not challenged and excluded from service. The following exchange then occurred:

> *The Court*: Just before we recessed for lunch, I thought that it was very clear that we didn't have a problem here. But now I think we are getting very close to a sensitive issue.
>
> I didn't see a problem with—
>
> [*Counsel for Defendant Knight*]: Miss Johnson, Your Honor.
>
> *The Court*: —Christine Johnson. She was, actually her demeanor was soft and she seemed very forthright and honest. And I understand with Miss Bonner, I didn't see any problems with that. But I was very surprised about Miss Johnson. I didn't say anything because the defense didn't object. So I didn't object.
>
> The same thing with Miss Jones. I do not see a reason other than—I mean, it seems to me for the prosecution to say, she has a daughter the same age as the victim, that would seem to work in the prosecution's favor, just in terms of thinking in the jury selection. *So I don't accept that*.
>
> *[The Prosecutor]*: Your Honor,—
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> *The Court*: I do see that we are getting close, and there are, I don't know two or three minority jurors left in this panel. So I think we are getting close to a serious issue here.

I wish that somebody had said something about keeping Miss Jones and Miss Johnson. And then we address this matter *because I probably would not have excused either one of them*.

* * *

[The Prosecutor]: Under *Batson* . . ., [a] prosecutor has to explain peremptory challenges with a neutral reason.

As long as I come up with a neutral reason for their dismissal, I believe that that's appropriate. And I given—

The Court: *But the Court has to accept or reject whether the reason is neutral or not*.

[The Prosecutor]: I understand.

The Court: *And I'm not*, I'm saying that I think we're getting close to a sensitive issue here on Jones and Johnson. That's all I'm saying. I'm making my record too.

* * *

The Court: We have to [be] realistic here. I really don't want any problems with this case, especially along these lines.

I'm not satisfied with the prosecutor's response as to potential juror Jones and Johnson. But I think they've already left.

* * *

I'm just saying, I let Jones and Johnson go without holding them, especially Jones. I guess I should have held her and I didn't do that. I'll take the fault for that. But from this point on let's try to be careful with this jury selection. We are close to getting this jury selected. [Emphasis added.]

Defense counsel inquired whether Johnson and Jones could be located; however, these veniremembers had already left the building. The panel was then called

back into the courtroom, and jury selection was completed. At the end of selection, the trial court observed:

> With the panel that we ended up with, I think that any *Batson* problems that may have been there have been cured.
>
> We have the same number if not more jurors, African American female jurors on the panel as if we had kept Miss Christina Johnson and Miss Ruby Jones.
>
> I don't think either side ended up selecting this panel for any reason other than I think that these are the ones who will be the fair and impartial persons to hear and try this case.

In the end, the jury convicted defendant Knight of first-degree murder and codefendant Rice of first-degree murder and possession of a firearm during the commission of a felony.

II. ANALYSIS

I agree with the majority that this Court's "task in resolving these cases is difficult, in large part, because of the trial judge's failure to rigorously follow the *Batson* procedures and, more importantly, to clearly articulate her findings and conclusions on the record." *Ante* at 349. On the basis of its reading of the voir dire transcripts, the majority concludes that the trial court did not, in fact, find a *Batson* violation and, thus, there is no error to complain of in these cases. With respect to veniremembers Johnson and Jones, I respectfully disagree and would conclude that the trial court believed that these veniremembers were excluded on the basis of race in violation of *Batson*. I am simply hard pressed to find anything in the record from which it can be fairly said that the trial court did not conclude that Johnson and Jones were excluded on the basis of race.

On the third day of jury selection, and after the lunch recess, defense counsel raised a *Batson* challenge to the exclusion of veniremembers Johnson, Bonner, and Jones.[3] The trial court did not decide whether defendants satisfied *Batson*'s first step by making a prima facie showing of racial discrimination. Instead, the prosecutor volunteered her reasons for the exclusions and attempted to proffer race-neutral explanations for the peremptory challenges. After considering the proffered explanations, the trial court rejected them, stating "I don't accept that," and "I'm not satisfied with the prosecutor's response as to potential juror Jones and Johnson." I find the following exchange particularly illustrative:

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[3] This *Batson* challenge should not be confused with a similar objection defense counsel raised earlier that day. While the earlier objection provides some context for the later objection, I am concerned with the trial court's treatment of the later *Batson* objection—i.e., the objection to the exclusion of veniremembers Johnson and Jones.

Moreover, the majority posits that defense counsel's initial objection, as well as counsel's other objections, demonstrates counsel's misunderstanding of *Batson*. I disagree. Defense counsel initially asserted that the prosecutor had engaged in a pattern of systematically excluding African-American veniremembers. To establish a prima facie case of discrimination based on race under *Batson*'s first step, the opponent must show that (1) he or she is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. *Batson*, *supra* at 96. A pattern of strikes against members of a certain racial group certainly constitutes a relevant circumstance. Indeed, as the *Batson* Court itself noted, "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." *Id*. at 97. *Batson* and its progeny do not *require* a pattern to be shown because the striking of even a single juror on the basis of race violates the Constitution. See, e.g., *J E B v Alabama ex rel TB,* 511 US 127, 142 n 13; 114 S Ct 1419; 128 L Ed 2d 89 (1994). However, a pattern of strikes against a particular racial group is still significant because it may give rise to an inference of discrimination. Thus, defense counsel's remarks do not demonstrate his misunderstanding of *Batson*.

> *[The Prosecutor]*: Under *Batson* . . . , [a] prosecutor has to explain peremptory challenges with a neutral reason.
>
> As long as I come up with a neutral reason for their dismissal, I believe that that's appropriate. And I given—
>
> *The Court*: *But the Court has to accept or reject whether the reason is neutral or not*.
>
> *The Prosecutor*: I understand.
>
> *The Court*: *And I'm not* . . . .

On the basis of my review of the record, the only conclusion that can be fairly drawn is that the trial court believed that veniremembers Johnson and Jones were improperly excluded from the jury pool on the basis of race. In my view, the trial court effectively saw itself deciding *Batson*'s third prong, and concluded that the prosecutor's explanations were a pretext and, thus, purposeful discrimination had been demonstrated. This conclusion also finds record support where the trial court expressed regret for dismissing Johnson and Jones and not being able to reseat these prospective jurors.

Nor am I persuaded by the prosecutor's argument that the trial court *preliminarily* concluded that *Batson* may have been violated, but *ultimately* concluded that no violation occurred.[4] While this argument may be plausible in some instances, this is not one of them. I believe that the trial court's comments noting that any

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[4] The prosecutor directs this Court's attention to the following comments by the trial court:

> With the panel that we ended up with, I think that any Batson problems that may have been there have been cured.
>
> We have the same number if not more jurors, African American female jurors on the panel as if we had kept Miss Christina Johnson and Miss Ruby Jones.

Batson violation had been cured, and that "this panel" was not selected on racial grounds, did not alter the trial court's conclusion that veniremembers Johnson and Jones were excluded on the basis of race. Stated differently, nothing in the record suggests that the trial court retracted its finding that Johnson and Jones were excluded in violation of *Batson*. While the record demonstrates that the trial court may have believed that "this panel" (the jury actually empaneled) was not subjected to discrimination and the trial court may have been concerned with the racial composition of the jury, the record clearly shows that the trial court also believed that excluded veniremembers Johnson and Jones were subjected to discrimination.

In sum, I would conclude that the record fairly reveals that the trial court found a *Batson* violation because it rejected the prosecutor's proffered explanations and would have recalled Johnson and Jones to sit on the jury if they could have been located. An even-handed reading of the record shows that the trial court never retreated from its finding that these veniremembers were excluded on the basis of race. I tend to agree with the majority and suspect that some of the trial court's statements arguably stemmed from its desire to ensure a racially mixed jury and that such a desire is prohibited by *Batson* and its progeny.[5] Motivations aside, however, that does not change the fact that the

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> I don't think either side ended up selecting this panel for any reason other than I think that these are the ones who will be the fair and impartial persons to hear and try this case.

Notably, the majority relies heavily on this same passage for the proposition that no *Batson* error occurred at all.

[5] I disagree, however, with the majority's reliance on a proposed court rule that may be adopted sometime in the future. See *ante* at 349 n 17 and 350. Instead, I prefer to simply examine this case under the constitu-

trial court concluded that Johnson and Jones were excluded on the basis of race. In other words, regardless of the trial court's main goal, or the goal ascribed to it by the majority, the record clearly demonstrates that the trial court along the way also found that purposeful discrimination occurred in violation of *Batson*.[6] Because I conclude that the trial court found that *Batson* had been violated, the question becomes whether this determination was proper.

The prosecution argues that even if the trial court found a *Batson* violation, the proffered explanations were race-neutral and the trial court erred when it concluded that the reasons were a pretext. Accordingly, the prosecution is questioning the trial court's resolution of *Batson*'s second and third steps.[7] Thus, I would, consistent with this Court's stated approach, review de novo whether the prosecutor articulated a race-neutral explanation for the strike as a matter of law. *United States v Uwaezhoke*, 995 F2d 388, 392 (CA 3, 1993). Further, I would review for clear error the trial court's determinations whether the race-neutral explanations

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tional concerns set forth in *Batson* and its progeny rather than rely on a *proposed* court rule that has not even taken effect.

[6] We should be mindful that our role is not to search for any plausible reason to avoid concluding that a trial court found that discrimination indeed occurred. See, e.g., *Miller-El v Dretke*, __ US __; 125 S Ct 2317, 2332; 162 L Ed 2d 196, 221 (2005) (*Miller-El II*) (If a prosecutor's proffered reason for a peremptory challenge "does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."). Like the majority, I could imagine many reasons to explain away the lower court proceedings. But this would not change the fact that the trial court concluded that discrimination occurred in violation of *Batson*. Again, while the record is not a model of clarity, I simply cannot ignore or explain away the trial court's conclusion.

[7] Appellate review of *Batson*'s first step is not implicated in these cases. See *Hernandez v New York*, 500 US 352, 359; 111 S Ct 1859; 114 L Ed 2d 395 (1991) (plurality opinion).

were a pretext and whether defendants proved purposeful discrimination, according the trial court's findings high deference. *Miller-El v Cockrell*, 537 US 322, 340; 123 S Ct 1029; 154 L Ed 2d 931 (2003) (*Miller-El I*).

I agree with the prosecution that the proffered explanations for the peremptory challenges were facially valid under the Equal Protection Clause as a matter of law. The proponent of the peremptory challenge cannot satisfy his or her burden under *Batson*'s second step "by merely denying that he had a discriminatory motive or by merely affirming his good faith." *Purkett v Elem*, 514 US 765, 769; 115 S Ct 1769; 131 L Ed 2d 834 (1995). Rather, the proponent of a strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," and the explanation must be "related to the particular case to be tried." *Batson*, *supra* at 98 & n 20, quoting *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 258; 101 S Ct 1089; 67 L Ed 2d 207 (1981). "What it means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Purkett*, *supra* at 769. In other words, the proffered reason does not always have to make perfect sense as long as the reason does not deny equal protection of the law. Here, the prosecutor's explanations for excluding veniremembers Johnson and Jones were based on something other than their race. See *Hernandez*, *supra* at 360. Further, discriminatory intent was not necessarily inherent in the prosecutor's explanations. *Id*. Thus, I believe that the prosecutor's explanations were race-neutral as a matter of law, and the trial court properly proceeded to the third step of the *Batson* inquiry.

According high deference to the trial court's findings, I cannot say under these circumstances that the trial court clearly erred under *Batson*'s third step when it

concluded that veniremembers Johnson and Jones had been excluded on the basis of race. Resolution of *Batson*'s third step largely hinges on the evaluation of credibility, and "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' " *Miller-El I*, *supra* at 339 (citation omitted). Here, the trial court rejected defendants' *Batson* challenge that was lodged earlier in the day. After the lunch recess, however, the record reveals that the trial court became suspicious of the prosecutor's method of exercising peremptory challenges. In light of defendants' objection to the exclusion of veniremembers Johnson and Jones, and after observing the prosecutor's demeanor and listening to the proffered reasons for the peremptory challenges, the trial court concluded that these veniremembers were excluded on the basis of race.

The trial court noted that one of the proffered reasons for excluding Jones (that she was a professional working person) applied with equal force to a Caucasian woman who the prosecutor did not attempt to peremptorily challenge. The prosecutor explained that she excluded veniremember Jones because Jones had a child close to the age of the victim and Jones was a professional working person. The trial court then noted that veniremember Berg, a Caucasian female who was also a professional working person, was not challenged and excluded from service. See, e.g., *Miller-El II*, *supra*, ___ US ___; 125 S Ct 2325; 162 L Ed 2d 214 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."). Further, all three challenges exercised by the prosecutor after the recess were made against African-Americans. Thus, out of the ten peremptory challenges exercised by the

prosecutor, six were against African-Americans. While these facts alone certainly may not always justify a conclusion of purposeful discrimination in every case, the prosecutor's rationales, coupled with her demeanor, could have affected the trial court's credibility determination.[8] In light of the high degree of deference accorded to a trial court's credibility assessment in the *Batson* arena, I cannot say the trial court clearly erred when it found that the prosecutor's reasons for excluding veniremembers Johnson and Jones were a pretext. Thus, I would conclude that the trial court properly found that the prosecutor violated *Batson* when she excluded Johnson and Jones on the basis of their race.

In light of this conclusion, it must be determined whether, upon learning that Johnson and Jones could not be located, the trial court erred in proceeding in the manner that it did; namely, deciding that any *Batson* violation had been "cured" because the "same number if not more" of African-American jurors sat on defendants' jury. I conclude that the trial court erred in proceeding in this fashion. Such an approach not only ignores the structural nature of a *Batson* violation, but directly conflicts with the propositions on which *Batson* and its progeny are based.

"Jury service is an exercise of responsible citizenship by all members of the community, including those who

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[8] For example, in *Miller-El I*, *supra* at 342-343, the United States Supreme Court noted that the prosecution's reasons for striking African-American members of the venire appeared race-neutral in that case. However, the fact that the prosecutor used ten of the fourteen challenges to exclude African-Americans, and three of the prosecution's race-neutral rationales for striking African-American veniremembers pertained just as well to some Caucasian veniremembers who were not challenged and who did serve on the jury, might suggest that the challenges were selective and based on racial considerations. See also *Miller-El II*, *supra*, ___ US ___; 125 S Ct 2325; 162 L Ed 2d 214.

otherwise might not have the opportunity to contribute to our civic life." *Powers v Ohio*, 499 US 400, 402; 111 S Ct 1364; 113 L Ed 2d 411 (1991). Allowing racial discrimination in the jury-selection process to go unremedied "offends the dignity of persons and the integrity of the courts." *Id*. Doing nothing is not an available remedy when a trial court is confronted with a recognizable *Batson* violation.[9]

Here, the trial court's "same number if not more" or, stated differently, "no harm, no foul" approach does not comport with the principles of *Batson* and its progeny.

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[9] The *Batson* Court made it clear that state courts are to be accorded wide latitude in fashioning a remedy in light of a violation. *Batson*, *supra* at 99 n 24. There are two well-accepted remedies available to a trial court in the event a *Batson* violation occurs. I believe that these remedies are worth mentioning. First, if a trial court determines that a party exercised a peremptory challenge on the basis of race in violation of *Batson*, the trial court can disallow the challenge and seat the challenged veniremember. *Batson*, *supra* at 99 n 24 (concluding that a trial court should "disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire"). See also *State v Grim*, 854 SW2d 403, 416 (Mo, 1993) ("[T]he proper remedy for discriminatory use of peremptory strikes is to quash the strikes and permit those members of the venire stricken for discriminatory reasons to sit on the jury if they otherwise would.").

Second, if a trial court determines that the discrimination in the selection process is more pervasive, the court may discharge the entire venire and start the process anew. *Batson, supra* at 99 n 24 (concluding that the trial court may "discharge the venire and select a new jury from a panel not previously associated with the case"). See also *State v McCollum*, 334 NC 208, 236; 433 SE2d 144 (1993) ("As *Batson* violations will always occur at an early stage in the trial before any evidence has been introduced, the simpler, and we think clearly fairer, approach is to begin the jury selection anew with a new panel of prospective jurors who cannot have been affected by any prior *Batson* violation.").

In sum, a trial court is under an affirmative duty to ensure that the constitutional mandates of *Batson* are respected. While there may be other options available to a trial court to remedy a *Batson* violation, permitting purposeful discrimination to stand without crafting a remedy is *not* an acceptable option.

Not only does such an approach suggest that jurors are racially fungible, but it ignores the fact that veniremembers Johnson and Jones were excluded from the judicial process on the basis of race. When faced with an argument similar to the one advanced by the trial court to support its approach, the Sixth Circuit Court of Appeals rejected this argument and reasoned that "[w]here purposeful discrimination has occurred, to conclude that the subsequent selection of an African-American juror can somehow purge the taint of a prosecutor's impermissible use of a peremptory strike to exclude a veniremember on the basis of race confounds the central teachings of *Batson*." *Lancaster v Adams*, 324 F3d 423, 434 (CA 6, 2003). See also *United States v Harris*, 192 F3d 580, 587 (CA 6, 1999) (rejecting the proposition that the failure to exclude one member of a protected class is sufficient to insulate the unlawful exclusion of others); *United States v Battle*, 836 F2d 1084, 1086 (CA 8, 1987) ("We emphasize that under *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors."); *United States v David*, 803 F2d 1567, 1571 (CA 11, 1986). While a defendant does not have a right to a jury composed in whole or in part of persons of the defendant's own race, the defendant "does have the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria." *Batson*, *supra* at 85-86. In light of these principles, as well as more recent United States Supreme Court precedent, I believe that the trial court's rationale was fundamentally defective. See, e.g., *Powers*, *supra* at 410-414.

Granted, the trial court was placed in a precarious situation because Johnson and Jones could not be located. Accordingly, the trial court could not have

disallowed the prosecutor's challenges and resumed selection with Johnson and Jones reinstated on the venire.[10] *Batson*, *supra* at 99 n 24. However, the trial court could have discharged the venire and selected a new jury from a panel not associated with the case. *Id.*; see also *ante* at 348. Although inaction is not an option, the trial court failed to take any remedial action after finding a *Batson* violation. It was only by chance that the "same number if not more" of African-Americans ultimately served on defendants' jury. But *Batson* is principally concerned with why certain veniremembers are excluded and requires remedial action if those veniremembers are excused on the basis of race. I reject the trial court's rationale that the discrimination against veniremembers Johnson and Jones was somehow "cured" by the eventual makeup of the jury. Therefore, I would hold that the trial court erred when it did not take any action to remedy the *Batson* violation.

Because the trial court concluded that Johnson and Jones were purposefully excluded from the jury pool on the basis of race and the trial court erred by failing to remedy these *Batson* violations, I would conclude that this error is subject to automatic reversal. This Court has yet to formally decide the issue whether a *Batson* violation is structural error that defies harmless error analysis. Structural errors "are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal." *People v Duncan*, 462 Mich

[10] In this regard, the trial court observed that the veniremembers could not be located because they left the building. The record is unclear exactly what steps the trial court took to find Johnson and Jones. The trial court possibly could have done more to locate these veniremembers. And if these veniremembers were located, the trial court would have then had the option to reinstate Johnson and Jones on the venire.

47, 51; 610 NW2d 551 (2000). In other words, structural errors affect the entire conduct of the trial from beginning to end, and these errors alter the framework within which the trial proceeds. *Arizona v Fulminante*, 499 US 279, 309-310; 111 S Ct 1246; 113 L Ed 2d 302 (1991).[11] In this regard, it must be observed that the United States Supreme Court has never suggested that the discriminatory exclusion of prospective jurors is subject to harmless error review. Indeed, my review of the Court's precedent, as well as the decisions from the federal Courts of Appeals, compels the conclusion that the purposeful exclusion of a prospective juror on the basis of race is considered structural error and, thus, it defies harmless error analysis.

The United States Supreme Court has stressed that unlawful exclusions in violation of *Batson* taint the entire conduct of the trial. Indeed, "the effects of racial discrimination during voir dire 'may persist through the whole course of the trial proceedings.' " *Tankleff v Senkowski*, 135 F3d 235, 248 (CA 2, 1998), quoting *Powers*, *supra* at 412. To this end, the United States Supreme Court has stated:

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[11] In *Fulminante*, *supra* at 310, the Court noted that some examples of structural defects involve the right to self-representation at trial, *McKaskle v Wiggins*, 465 US 168, 177 n 8; 104 S Ct 944; 79 L Ed 2d 122 (1984), and the right to a public trial, *Waller v Georgia*, 467 US 39, 49 n 9; 104 S Ct 2210; 81 L Ed 2d 31 (1984). Notably, the United States Supreme Court also observed that the unlawful exclusion of members of the defendant's race from a grand jury was a structural defect not subject to harmless error analysis. *Fulminante*, *supra* at 310, citing *Vasquez v Hillery*, 474 US 254; 106 S Ct 617; 88 L Ed 2d 598 (1986). More recently, in *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999), the Court again cited *Vasquez* for the proposition that racial discrimination in the selection of grand jurors is structural error subject to automatic reversal. While the precedential value of this proposition has been questioned because Justice White did not join this portion of the *Vasquez* opinion, the United States Supreme Court itself has cited *Vasquez* with approval on this proposition.

> A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. [*Powers*, *supra* at 412.]

On the basis of this language, the Eight Circuit Court of Appeals has concluded that *Powers* "is a strong indication that the Supreme Court would hold that a constitutional error involving race-based exclusion of jurors infects the entire trial process itself and is hence a structural error." *Ford v Norris*, 67 F3d 162, 171 (CA 8, 1995). Stated differently, unlawful exclusions on the basis of race are intrinsically harmful.

Further, the United States Supreme Court has also stressed the impact these exclusions have on the whole system. For example, the Court has observed that "[t]he exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." *J E B v Alabama*, 511 US 127, 142 n 13; 114 S Ct 1419; 128 L Ed 2d 89 (1994). Accordingly, the United States Supreme Court has consistently reversed convictions without first determining whether the unlawful exclusion of potential jurors affected the trial's outcome. See, e.g., *Powers*, *supra* at 416. The Court has also required automatic reversal where unlawful discrimination was shown in the selection of grand jurors. *Vasquez*, *supra* at 263-264; *Rose v Mitchell*, 443 US 545, 556; 99 S Ct 2993; 61 L Ed 2d 739 (1979). Because the Court emphasizes the impact these exclusions have on the judicial system and regularly subjects such error to automatic reversal, I believe that the Court would hold that a race-based exclusion of a prospective juror is structural error.

The majority of federal Courts of Appeals that have examined this issue generally have reached the same result and have concluded that race-based exclusions are structural error not subject to harmless error analysis. See, e.g., *Tankleff*, *supra* at 248; *Rosa v Peters*, 36 F3d 625, 635 n 17 (CA 7, 1994); *Davis v Secretary for Dep't of Corrections*, 341 F3d 1310, 1316-1317 (CA 11, 2003); *United States v Angel*, 355 F3d 462, 470-471 (CA 6, 2004); *Williams v Woodford*, 396 F3d 1059, 1069 (CA 9, 2005). I would join those jurisdictions and likewise conclude that the purposeful exclusion of a prospective juror on the basis of race is structural error. The United States Supreme Court has made it clear that the purposeful exclusion of a veniremember on the basis of race defies "harmless error" analysis and merits automatic reversal. *Johnson v United States*, 520 US 461, 468-469; 117 S Ct 1544; 137 L Ed 2d 718 (1997); *J E B*, *supra* at 142 n 13. Therefore, until the United States Supreme Court holds otherwise, if a reviewing court determines that a prospective juror was excluded from the jury pool on the basis of race, this is structural error subject to automatic reversal. Accordingly, because the trial court found that *Batson* had been violated but erred in not remedying the discrimination, defendant Knight and codefendant Rice are entitled to new trials.

III. CONCLUSION

A fair reading of the voir dire transcripts indicates the trial court found that veniremembers Johnson and Jones were excluded on the basis of race in violation of *Batson* and its progeny. I would hold that the trial court correctly determined that the principles of *Batson* had been violated. The prosecutor's proffered explanations for the exclusions were race-neutral as a matter of law, and the trial court did not clearly err when it rejected

these explanations and determined that defendants had proved purposeful discrimination. However, I would hold that the purposeful exclusion of veniremembers Johnson and Jones on the basis of race was not cured by the eventual makeup of the jury and, thus, the trial court erred by continuing the proceedings without remedying the *Batson* violations. Thus, I would reverse the judgments of the Court of Appeals and remand these cases for new trials.

TAYLOR, C.J., and KELLY, J., concurred with CAVANAGH, J.

McCLEMENTS v FORD MOTOR COMPANY

Docket No. 126276. Argued April 13, 2005 (Calendar No. 9). Decided July 26, 2005. Amended and rehearing denied 474 Mich 1201.

Milissa McClements brought an action in the Oakland Circuit Court against Ford Motor Company and Daniel P. Bennett, a supervisor employed by Ford, alleging violations of the Civil Rights Act (CRA), MCL 37.2101 *et seq*., specifically that she was exposed to a sexually hostile work environment as a result of actions by Bennett. The plaintiff, an employee of a company that operates cafeterias at a Ford plant, also alleged that Ford was negligent in retaining Bennett as an employee. The court, Wendy Potts, J., granted summary disposition in favor of the defendants. The plaintiff appealed, and the Court of Appeals, BORRELLO, P.J., and WHITE and SMOLENSKI, JJ., reversed the trial court's dismissal of the common-law negligent retention claim and affirmed with regard to the remaining claims. Unpublished opinion per curiam, issued April 22, 2004 (Docket No. 243764). The Supreme Court granted Ford's application for leave to appeal and the plaintiff's application for leave to file a cross-appeal. 471 Mich 937 (2004).

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

A common-law claim for negligent retention cannot be premised on workplace sexual harassment. Further, the plaintiff has failed to establish a genuine issue of material fact that Ford affected or controlled the terms, conditions, or privileges of her employment and, therefore, she cannot bring a claim against Ford under the CRA. The part of the Court of Appeals judgment that holds that the plaintiff has failed to establish a claim under the CRA against Ford must be affirmed, the part of the Court of Appeals judgment that holds that the plaintiff has an actionable claim for negligent retention must be reversed, and the circuit court's order of judgment in favor of Ford must be reinstated.

1. The CRA provides the right to be free from workplace sexual harassment and accords an aggrieved worker the remedy of a civil action for appropriate injunctive relief, damages, or both. The plaintiff's protections against workplace sexual harassment are

wholly creatures of statute and, therefore, the plaintiff's remedy is limited to those provided by the CRA. Accordingly, there is no common-law claim for negligent retention in the context of workplace sexual harassment.

2. A worker can only bring an action under the CRA for discriminatory acts, including sexual harassment, against a nonemployer defendant if the worker can establish that the nonemployer affected or controlled the terms, conditions, or privileges of the worker's employment. In this case, however, the plaintiff failed to establish that Ford affected or controlled the terms, conditions, or privileges of her employment by the company that operated the cafeterias at Ford's plant.

Justice WEAVER, concurring in part and dissenting in part, agreed that a worker may bring a claim against a nonemployer defendant under the Civil Rights Act if the worker can establish that the nonemployer defendant affected or controlled a term, condition, or privilege of the worker's employment. Justice WEAVER dissented from the majority's conclusion that the plaintiff failed to present a genuine issue of material fact regarding that question, however, believing that statements made to the plaintiff raise a question whether the defendant had the ability to affect or control a term, condition, or privilege of the plaintiff's employment. The parties should be allowed to present evidence on the issue, and the question should go to the jury. Justice WEAVER also dissented from the majority's conclusion that the plaintiff may not pursue a common-law claim for negligent retention. The plaintiff's claim is not premised solely on the statutorily based tort of sexual harassment, but implicates other torts such as assault and battery. The plaintiff should have the opportunity to establish her negligent retention claim.

Affirmed in part and reversed in part; circuit court order of judgment for Ford reinstated.

Justice CAVANAGH, joined by Justice KELLY, dissenting, stated there is ample evidence for a jury to decide whether the defendant had adequate notice of Bennett's sexual harassment and assault of women, including information and reports provided by other women who were the defendant's employees. The jury should be allowed to determine whether the defendant adequately investigated these claims and took appropriate remedial action. With regard to the plaintiff's claim under the Civil Rights Act for sex discrimination in the form of sexual harassment, Bennett allegedly affected a condition of the plaintiff's employment by creating a sexually hostile work environment at the plaintiff's workplace and the defendant was the only one that had the authority to control

Bennett, who was the defendant's employee. The plaintiff can also bring a claim for negligent retention. The Civil Rights Act did not abolish this claim. Bennett's behavior allegedly was assaultive in addition to being sexual harassment. The jury should be allowed to determine whether the defendant acted reasonably in retaining Bennett. The decision of the Court of Appeals should be reversed in part and affirmed in part, and the plaintiff should be allowed to proceed on her claim for negligent retention and her claim under the Civil Rights Act.

1. CIVIL RIGHTS — CIVIL RIGHTS ACT — SEXUAL HARASSMENT.

The Civil Rights Act provides the sole remedy for alleged acts of sexual harassment in the workplace; there is no common-law claim for an employer's negligent retention of an offending employee in the context of workplace harassment (MCL 37.2101 *et seq.*).

2. CIVIL RIGHTS — CIVIL RIGHTS ACT — ACTIONS — NONEMPLOYER DEFENDANTS.

An employer's liability for discrimination under the Civil Rights Act does not require an employment relationship with a plaintiff worker; a worker is entitled to bring an action against a nonemployer defendant if the worker can establish that the defendant affected or controlled a term, condition, or privilege of the worker's employment (MCL 37.2202).

Scheff & Washington, P.C. (by *George B. Washington* and *Miranda K.S. Massie*), for the plaintiff.

Kienbaum Opperwall Hardy & Pelton, P.L.C. (by *Elizabeth Hardy* and *Julia Turner Baumhart*) (*Patricia J. Boyle*, of counsel), for Ford Motor Company.

MARKMAN, J. We granted leave to appeal in this case to resolve two questions: (1) whether a common-law claim of negligent retention can be premised on sexual harassment in light of the remedies provided by the Civil Rights Act (CRA), MCL 37.2101 *et seq.*; and (2) whether an employer can be held liable under the CRA for sexual harassment against a nonemployee. The trial court granted summary disposition to defendant on both issues, ruling that there was insufficient notice to Ford

to support the negligent retention theory, and that plaintiff could not pursue a claim under the CRA without demonstrating at least a "quasi-employment" relationship. The Court of Appeals affirmed with respect to the CRA claim, but reversed with respect to plaintiff's negligent retention claim. We hold that: (1) a common-law claim for negligent retention cannot be premised upon workplace sexual harassment; and (2) because plaintiff has failed to establish a genuine issue of material fact that defendant affected or controlled a term, condition, or privilege of her employment, she cannot bring a claim against defendant under the CRA. Accordingly, we affirm in part and reverse in part the judgment of the Court of Appeals, and reinstate the trial court's order of summary disposition in favor of defendant.

I. FACTS AND PROCEDURAL HISTORY

Defendant Ford Motor Company hired AVI Food Systems to operate three cafeterias at its Wixom assembly plant. Plaintiff Milissa McClements was hired by AVI as a cashier at the Wixom plant in March 1998.[1] Plaintiff testified that Daniel Bennett, then a superintendent in the predelivery department of the plant, had in November 1998[2] invited her on "three or four" occasions to meet him at a local fast food restaurant. On each occasion, plaintiff rebuffed his invitation. Accord-

[1] Within a month, plaintiff filed a complaint with AVI alleging that she was sexually harassed by a non-AVI contractor. After an investigation, AVI had the offending nonemployee removed from its premises.

[2] The record is replete with confusion over when the alleged incidents took place. In her complaint, plaintiff alleged that the incidents with Bennett occurred in September 1998. However, in her deposition, plaintiff testified that the incident could have taken place in late November, early December 1998, because she "seem[ed] to remember it being Thanksgiving . . . ."

ing to plaintiff, Bennett "seemed very persistent, like he didn't understand that I wasn't interested." Plaintiff acknowledged that, at this point, Bennett was polite, and there was no testimony that he used sexual or foul language. Bennett denies making any such invitations.

Plaintiff described two additional encounters with Bennett that occurred during this same time period. During the first of these encounters, Bennett allegedly entered the cafeteria while it was closed, and approached plaintiff from behind. Plaintiff testified that "I was facing the opposite way. He came up and just grabbed me and turned me around and stuck his tongue in my mouth." After "a few days," plaintiff allegedly had a second encounter with Bennett in the closed cafeteria. According to plaintiff, Bennett again grabbed her from behind, attempted to stick his tongue in her mouth, and stated, "Come on, I know you want it. Isn't there somewhere we can go and have sex?" Plaintiff refused this advance, and Bennett left the cafeteria. Plaintiff allegedly reported the incidents to her union steward, but claims that she was advised that if she reported the incident to defendant, it would "turn around and stab you in the back and you [would] end up losing your job." Plaintiff did not report the incident to either defendant or AVI until the instant lawsuit was filed.

In 2000, plaintiff was approached by another Ford employee, Justine Maldonado,[3] who claimed that she had also been sexually harassed by Bennett. Specifically, Maldonado claimed that in January or February 1998, Bennett exposed himself to her and demanded

[3] In a separate action by Maldonado, we directed oral argument on whether to grant Maldonado's application for leave to appeal or take other peremptory action permitted by MCR 7.302(G)(1). *Maldonado v Ford Motor Co*, 471 Mich 940 (2004).

oral sex in the parking lot of the Wixom plant. Bennett also allegedly followed Maldonado in his car, got out after she had stopped at a floral shop, and reached into her car and tugged on her blouse. In late-October 1998, Maldonado told Joe Howard, her uncle and a production manager at Wixom, about the incidents.[4] During "the last couple days" in October, Maldonado told David Ferris, a former Ford superintendent who was on temporary assignment to her union, about the incidents. Maldonado testified that she spoke with Ferris just before undergoing knee surgery on November 2, 1998. Ferris testified that "two or three days" later, he confronted Bennett about Maldonado's accusations. The next day, Ferris informed Jerome Rush, Wixom's director of labor relations, about the alleged incidents of sexual harassment. Ferris testified that the conversation lasted a minute "at the most." Rush allegedly told Ferris that he "need not be involved in these types of issues" and took no further action.

Even after learning of the Maldonado incidents, plaintiff did not come forward with her allegations. However, plaintiff's attitude changed after Maldonado informed her in August 2001 that Bennett had exposed himself to three teenage girls. In 1995, Bennett was convicted of misdemeanor indecent exposure, for exposing himself to three teenage girls on I-275 while he was driving a company car. Defendant was aware of the incident, because the police determined Bennett's identity by tracing the car through Ford.[5]

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[4] Howard testified that his conversation with Maldonado about the alleged harassment did not take place until October 1999.

[5] Bennett's conviction was expunged by the district court in November 2001. Before granting summary disposition to defendant, the trial court granted defendant's motion to strike all references to the conviction from the complaint.

After learning about the indecent exposure arrest and conviction, plaintiff filed the instant lawsuit in September 2001. Plaintiff claimed that defendant: (1) negligently retained Bennett, whom it knew had a propensity to sexually harass women; and (2) breached its obligation under the CRA to prevent Bennett from sexually harassing her.

The trial court granted defendant's motion for summary disposition. First, the trial court found that there was no evidence that defendant knew of Bennett's propensity to sexually harass women in the workplace. Maldonado's complaints to her uncle and friend were not sufficient to give defendant notice of Bennett's sexually harassing behavior and the 1995 conviction alone is insufficient to establish that propensity. Thus, defendant could not be held liable under the negligent retention theory. Second, the trial court found that plaintiff as a nonemployee could not hold defendant liable under the CRA. However, even if defendant were potentially liable under the CRA, it could not be held liable under these circumstances, because its higher management was never made aware of the allegedly sexually harassing behavior. In an unpublished opinion, the Court of Appeals affirmed in part and reversed in part the judgment of the trial court. Unpublished opinion per curiam of the Court of Appeals, issued April 22, 2004 (Docket No. 243764). The Court of Appeals held that defendant's knowledge of the indecent exposure arrest and Maldonado's allegations created a genuine issue of material fact whether defendant "knew or should have known of Bennett's sexually derogatory behavior toward female employees." However, the Court of Appeals also applied the "economic reality test," *Ashker v Ford Motor Co*, 245 Mich App 9, 14; 627 NW2d 1 (2001), and held that defendant was not plaintiff's employer. As a result, the Court of Appeals

concluded that plaintiff could not maintain a CRA complaint against an entity that is not her employer. This Court granted defendant's application for leave to appeal, as well as plaintiff's application for leave to file a cross-appeal. 471 Mich 937 (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). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is only permitted if the evidence, while viewed in a light most favorable to the plaintiff, fails to establish a claim as a matter of law. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). We review de novo the questions whether the CRA displaces a common-law claim for negligent retention based upon sexual harassment in the workplace and whether an employer can be held liable under the CRA for sexual harassment against a nonemployee because they are questions of law. *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003).

III. ANALYSIS

The issue in this case is not whether Bennett has engaged in reprehensible conduct either inside or outside the workplace. Rather, the issues are: (1) whether defendant negligently retained Bennett as a supervisor as of the time Bennett allegedly sexually harassed plaintiff, despite the fact that it knew or should have known of his propensity to sexually harass women; and (2) whether defendant is responsible under the CRA for

failing to prevent sexual harassment of plaintiff even though plaintiff was not a direct employee of defendant.

A. NEGLIGENT RETENTION CLAIM

Plaintiff's first theory is that defendant negligently retained Bennett as a supervisor after learning of his propensity to sexually harass women. In general, an employer is not responsible for an intentional tort in the workplace committed by its employee acting outside the scope of employment. *Martin v Jones*, 302 Mich 355, 358; 4 NW2d 686 (1942). However, this Court has previously recognized an exception to this general rule of liability when the employer " 'knew or should have known of his employee's propensities and criminal record before commission of an intentional tort by [that] employee . . . .' " *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412; 189 NW2d 286 (1971) (citation omitted). Plaintiff argues that defendant knew of Bennett's "propensity" to engage in sexually harassing behavior because of: (1) Bennett's 1995 indecent exposure conviction; and (2) Maldonado's complaints to defendant's supervisor (Howard) and labor relations representative (Rush) concerning Bennett's harassment. Plaintiff concludes that defendant breached its duty of reasonable care by retaining Bennett despite its knowledge of his previous actions. The Court of Appeals held that whether defendant "knew or should have known" of Bennett's propensities was a question of fact for the jury.[6]

[6] Defendant argues that the Court of Appeals improperly allowed the jury to resolve the issue of whether defendant had a duty towards plaintiff. We agree that whether a duty exists to a particular plaintiff is a question for the court. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500-501; 418 NW2d 381 (1988). An employer's duty is to exercise reasonable care in selecting and retaining its employees. However, it is the province of the jury to determine whether an employer has

However, in those cases in which we have held that an employer can be held liable on the basis of its knowledge of an employee's propensities, the underlying conduct comprised the common-law tort of assault. See *Hersh, supra* at 412; *Bradley v Stevens*, 329 Mich 556, 563; 46 NW2d 382 (1951). In the instant case, however, the entire premise for plaintiff's negligent retention claim is the *statutorily based* tort of sexual harassment. Before passage of the CRA, Michigan did not provide a common-law remedy for workplace discrimination. *Pompey v Gen Motors Corp*, 385 Mich 537, 552; 189 NW2d 243 (1971). Plaintiff's protections against being sexually harassed in the workplace are wholly creatures of statute. " 'Where a statute gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only.' " *Monroe Beverage Co, Inc v Stroh Brewery Co*, 454 Mich 41, 45; 559 NW2d 297 (1997), quoting *Lafayette Transfer & Storage Co v Pub Utilities Comm*, 287 Mich 488, 491; 283 NW 659 (1939). Here, the CRA provides the right to be free from sexual harassment, MCL 37.2103(i), and accords an aggrieved worker the remedy of "a civil action for appropriate injunctive relief or damages, or both." MCL 37.2801(1). Plaintiff's remedy, then, for any act of sexual harassment is limited to those provided by the CRA. Accord-

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breached that duty by retaining the employee in question. In order for the jury to determine whether an employer has breached this duty, it must first determine whether the employer "knew or should have known" that its employee had a propensity to engage in the conduct that caused the injury to the plaintiff. The propensity at issue in the instant case is an alleged propensity to sexually harass women. Because plaintiff's exclusive remedy for a claim based on sexual harassment is the CRA, there is no question of fact for the jury and, therefore, summary disposition was appropriate.

ingly, there is no common-law claim for negligent retention in the context of workplace sexual harassment.[7]

Plaintiff invokes MCL 37.2803, which states that the CRA "shall not be construed to diminish the right of a person to direct or immediate legal or equitable remedies in the courts of this state." However, contrary to the dissent's theory, *post* at 397, this statutory language does not allow a worker to bring a CRA claim under the guise of a negligent retention claim. Rather, this provision simply allows a worker to bring suit under any legal theory that existed before the passage of the CRA. Thus, a worker would not be barred by the CRA from bringing a common-law negligent retention claim, as long as the premise for that claim is a tort that existed before passage of civil rights legislation.[8]

Therefore, because the CRA provides the exclusive remedy for a claim based on sexual harassment, plaintiff has failed to establish a claim of negligent retention,[9] and no inquiry into whether defendant possessed sufficient notice that Bennett was engaged in sexual harassment is necessary.

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[7] We note defendant's assertion that the *Hersh* rule is contrary to public policy concerning the rehabilitation of first-time offenders. According to defendant, *Hersh* encourages employers to refuse to hire anyone who was ever convicted of even a misdemeanor, for fear that they might later be held liable for any conduct by the employee that somehow could be linked, after the fact, to the circumstances of that crime. Because we hold that plaintiff's negligent retention claim cannot be maintained, there is no need at this time to reach defendant's public policy argument.

[8] For example, if an employee had a history of committing simple assault, and the employer knew or should have known of that history, then a third party who was assaulted by the employee might be able to hold the employer liable under a negligent retention theory premised on simple assault.

[9] Both the dissent and the concurrence/dissent argue that plaintiff's negligent retention claim "implicates other torts such as assault and battery." *Post* at 392. While that may be, plaintiff premised her claim on sexual harassment, not assault or battery.

B. CIVIL RIGHTS ACT CLAIM

Plaintiff's second theory is that defendant failed to prevent sexual harassment in the workplace. MCL 37.2202(1) states in pertinent part:

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

Discrimination based on sex includes sexual harassment. MCL 37.2103(i). The statute defines sexual harassment as follows:

> Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> (*i*) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
>
> (*ii*) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education, or housing.

> (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment. [MCL 37.2103(i).]

Plaintiff claims that CRA forbids *any* entity classified as an employer from discriminating against *any* individual, including nonemployees. Therefore, because the actions of defendant's employee allegedly created a sexually hostile work environment, defendant can be held liable under the CRA. Defendant, on the other hand, argues that an employer can only be held liable for discrimination against a nonemployee if some form of employment relationship exists between the parties. Both the trial court and the Court of Appeals held that plaintiff was required to prove at least a "quasi-employment relationship" before a claim under the CRA could be maintained. We conclude that, unless an individual can establish a genuine issue of material fact that an employer affected or controlled a term, condition, or privilege of his or her employment, a nonemployee may not bring a claim under the CRA.

Fundamental canons of statutory interpretation require us to discern and give effect to the Legislature's intent as expressed by the language of its statutes. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). If the language is unambiguous, as is generally the case, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459; 663 NW2d 447 (2003), "we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto, supra* at 402.

MCL 37.2201(a) defines an "employer" for purposes of the CRA as "a person who has 1 or more employees, and includes an agent of that person." As recognized by plaintiff, the language of the statute does not otherwise narrow the scope of who may be considered an employer. Thus, MCL 37.2202 forbids *any* employer from engaging in acts of discrimination that are prohibited by the CRA. MCL 37.2202 does not state that an employer is only forbidden from engaging in such acts against its own employees. Indeed, the CRA appears to clearly envision claims by nonemployees for the failure or refusal to hire or recruit, MCL 37.2202(1)(a); the improper classification of applicants by a status prohibited under the CRA, MCL 37.2202(1)(b); and the discrimination against former employees by operation of a benefit plan or system, MCL 37.2202(1)(c). Accordingly, to limit the availability of relief under the CRA to those suits brought by an employee against his or her employer is not consistent with the statute.

However, the language of the statute is also clear in requiring some form of nexus or connection between the employer and the status of the nonemployee. MCL 37.2202 forbids an employer from using a classification protected by the CRA: to "discriminate against an individual with respect to . . . a term, condition, or privilege of employment," MCL 37.2202(1)(a); to "deprive the . . . applicant of an employment opportunity," MCL 37.2202(1)(b); or to "discriminate against a person . . . with respect to a term, condition, or privilege of employment," MCL 37.2202(1)(c). In other words, an employer is liable under the CRA when it utilizes a prohibited characteristic in order to adversely affect or control an individual's employment or potential employment. Thus, the key to liability under the CRA is not simply the status of an individual as an "employee"; rather, liability is contingent upon the employer's af-

fecting or controlling that individual's work status. Accordingly, an employer can be held liable under the CRA for discriminatory acts against a nonemployee if the nonemployee can demonstrate that the employer affected or controlled a term, condition, or privilege of the nonemployee's employment.[10]

In *Chiles v Machine Shop, Inc*, 238 Mich App 462; 606 NW2d 398 (1999), the Court of Appeals came to the same conclusion while interpreting similar language in the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1202.[11] In *Chiles*, an employee injured his back on the job and filed for worker's compensation

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[10] For example, a secretary who works for a temporary employment agency might not be an "employee" at the office where she is sent to fill in. However, there is little question that the employer at that office would dictate a term, condition, or privilege of her employment with the temporary employment agency, at least during the pendency of her temporary employment.

[11] This provision of the PWDCRA is identical in all relevant respects to the CRA. MCL 37.1202(1) states in relevant part:

> Except as otherwise required by federal law, an employer shall not:
>
> (a) Fail or refuse to hire, recruit, or promote an individual because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position.
>
> (b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position.
>
> (c) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position.

benefits. After he was laid off, the employee brought suit under the PWDCRA. The "employer," who laid off the plaintiff, argued that it was not liable under the PWDCRA because the employee was technically employed by a separate, though affiliated, company. The Court in *Chiles* noted that the PWDCRA

> addresses the conduct of an "employer" who *takes adverse employment action against* an "individual" because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job. MCL 37.1202(1)(a); MSA 3.550(202)(1)(a). The act does not limit the definition of "employer" to the plaintiff's employer but, instead, simply defines it as a "person who has 1 or more employees." MCL 37.1201(b); MSA 3.550(201)(b). [*Chiles, supra* at 468 (emphasis supplied).][12]

Thus, liability under the PWDCRA "does not require that an employment relationship exist," but it does require that the employer defendant "have the authority to affect a plaintiff's employment or potential employment." *Id.* at 468-469. However, the authority to affect a worker's employment *alone* is not sufficient to impose liability upon an employer defendant.[13] Rather, in order to be liable under the PWDCRA, the employer defendant must also "take[] adverse employment action" against the worker plaintiff. Accordingly, under *Chiles*, the employer defendant must (1) have "the ability to affect adversely the terms and conditions of an individual's employment or potential employment," *id.* at 468; and (2) "take[] adverse employment action

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[12] The definition of an employer is essentially the same under the CRA. MCL 37.2201(1)(a).

[13] Thus, contrary to the concurrence\dissent's position, the fact that plaintiff produced *some* evidence that defendant had the ability to "affect or control a term, condition, or privilege of plaintiff's employment," *post* at 391, is not sufficient to present a genuine issue of material fact for the jury.

against an 'individual' because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job . . . . e.g., discriminatorily refusing to hire an applicant on account of a disability," *id.* at 468, quoting MCL 37.1202(1)(a). In other words, the more precise articulation of the *Chiles* rule is that the employer defendant must, in fact, *use* such authority by "tak[ing] adverse employment action against an individual" in violation of the PWDCRA. Thus, to be liable under the PWDCRA, the employer defendant must actually affect or control a term, condition, or privilege of an individual's employment. The Court of Appeals in *Chiles* determined that the employer defendant directly supervised the employee, controlled what tasks he worked at, and had the ability to fire or discipline the employee. Further, the employer defendant actually affected the plaintiff's employment by laying him off. As a result, the Court of Appeals determined that the parties' relationship fell within the scope of the PWDCRA and, therefore, the plaintiff could maintain an action under the PWDCRA.

We hold that a worker is entitled to bring an action against a nonemployer defendant if the worker can establish that the defendant affected or controlled a term, condition, or privilege of the worker's employment. In the instant case, plaintiff has failed to establish that defendant affected or controlled a term, condition, or privilege of her employment.[14] Plaintiff was

[14] The dissent argues that, because defendant had the authority to control Bennett and Bennett affected a condition of plaintiff's employment, it follows that defendant itself "affect[ed] a condition of plaintiff's employment." *Post* at 396. Based on this reasoning, an employer would apparently *always* be liable for its agent's creation of a sexually hostile work environment. However, we have held that such imposition of vicarious liability is proper only in sexual discrimination cases in which the employer's agent has used his or her authority to affect an individu-

hired, paid, and subject to discipline by AVI. AVI placed plaintiff in the Wixom plant and had the sole authority to move her to different cafeterias or even to another plant. Plaintiff has failed to demonstrate that defendant affected or controlled whether she was hired, her benefits of employment, or where she was assigned to work. Further, although the cafeterias were located in the Wixom plant, they were operated solely by AVI, and were off-limits to defendant's employees except during break-times.

We conclude that plaintiff failed to raise a genuine issue of material fact that defendant affected or controlled a term, condition, or privilege of her employment. Accordingly, plaintiff may not maintain a cause of action under the CRA against this defendant, and, again, no inquiry into whether defendant possessed sufficient notice that Bennett was engaged in sexual harassment is necessary.

IV. CONCLUSION

We conclude that plaintiff has failed to establish a genuine issue of material fact that defendant affected or controlled a term, condition, or privilege of her employment and, therefore, she cannot bring a claim against defendant under the CRA. Further, we conclude

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al's employment. *Chambers v Trettco, Inc,* 463 Mich 297, 310; 614 NW2d 910 (2000), citing *Champion v Nation Wide Security, Inc,* 450 Mich 702, 708-709; 545 NW2d 596 (1996). We have declined to treat sexually hostile work environment cases in the same manner, noting that "strict imposition of vicarious liability on an employer 'is illogical in a pure hostile environment setting' because, generally, in such a case, 'the supervisor acts outside 'the scope of actual or apparent authority to hire, fire, discipline, or promote.' " *Chambers, supra* at 311, quoting *Radtke v Everett*, 442 Mich 368, 396 n 46; 501 NW2d 155 (1993). We again decline to strictly impose vicarious liability in sexually hostile work environment cases, absent an awareness by the employer of the offensive conduct.

that a common-law claim for negligent retention cannot be premised upon workplace sexual harassment. Accordingly, we affirm the judgment of the Court of Appeals that plaintiff has failed to establish that she may bring a claim under the CRA against this defendant, we reverse the judgment of the Court of Appeals that plaintiff has an actionable claim for negligent retention, and reinstate the trial court's order of judgment in favor of defendant.

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

WEAVER, J. (*concurring in part and dissenting in part*). I concur in the majority's holding that a worker may bring a claim against a nonemployer defendant under the Civil Rights Act[1] if the worker can establish that the nonemployer defendant affected or controlled a term, condition, or privilege of the worker's employment. *Ante* at 389. But I dissent from the majority's conclusion that plaintiff failed to present a genuine issue of material fact that defendant affected or controlled a term, condition, or privilege of plaintiff's employment. As noted by the majority, when plaintiff reported the incidents to her union steward, she stated that she was advised that if she reported the incidents to defendant, defendant would " 'turn around and stab you in the back and you [would] end up losing your job.' " *Ante* at 377. While this statement standing alone would probably not be sufficient to establish that defendant did, in fact, affect or control a term, condition, or privilege of plaintiff's employment, it does raise a question whether defendant had that ability. Therefore, I would allow the parties to present evidence on this issue and let the question go to the jury.

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[1] MCL 37.2101 *et seq.*

I also dissent from the majority's conclusion that plaintiff may not pursue a common-law claim for negligent retention. As noted by the majority, MCL 37.2803 provides that "[t]his act shall not be construed to diminish the right of a person to direct or immediate legal or equitable remedies in the courts of this state." As explained in *Hersh v Kentfield Builders, Inc,* 385 Mich 410, 412; 189 NW2d 286 (1971), under the common-law claim of negligent retention, an employer may be held liable for an intentional tort committed by one of its employees if the employer " 'knew or should have known of his employee's propensities and criminal record before commission of an intentional tort . . . .' " (Citation omitted.)

The majority asserts that plaintiff may not pursue a common-law negligent retention claim because the claim is premised entirely on "the statutorily based tort of sexual harassment." *Ante* at 382 (emphasis deleted). I disagree. Plaintiff's negligent retention claim is not premised solely on "the statutorily based tort of sexual harassment," but also implicates other torts such as assault and battery. Therefore, I would allow plaintiff the opportunity to establish her negligent retention claim and let the jury determine whether she has successfully done so.

CAVANAGH, J. (*dissenting*). I believe there is ample evidence for a jury to decide the issue of whether defendant had adequate notice that one of its supervisors, Daniel Bennett, had the propensity to sexually harass and assault women and was indeed doing so. Accordingly, because plaintiff presented sufficient evidence of notice, a jury should be allowed to determine plaintiff's claims against defendant for sexual harassment under the Civil Rights Act (CRA), MCL 37.2101 *et*

seq., and negligent retention. Therefore, I respectfully dissent from the majority's decision dismissing all of plaintiff's claims.

I. THERE IS SUFFICIENT EVIDENCE THAT DEFENDANT HAD NOTICE OF BENNETT'S PROPENSITY FOR SEXUAL HARASSMENT AND ASSAULT AND ALLEGATIONS THAT HE WAS INDEED SEXUALLY HARASSING AND ASSAULTING WOMEN IN THE WORKPLACE

Plaintiff presented sufficient evidence that defendant had adequate notice of Bennett's propensity to sexually harass and assault women and the pervasiveness of the existing sexual harassment perpetrated by Bennett. Bennett was one of defendant's supervisors. In 1995, defendant learned that Bennett had exposed himself to three teenage girls while driving one of defendant's vehicles. Bennett was convicted of indecent exposure.[1] While the facts related to this conviction alone may not be enough to put defendant on notice, defendant received other information that Bennett was sexually harassing women.

In late October 1998, Justine Maldonado, another of defendant's employees, reported to a production manager that Bennett was sexually harassing her.[2] Maldonado also told another of defendant's employees, David Ferris, about the sexual harassment. Ferris told Jerome Rush, defendant's director of labor relations at defendant's Wixom plant.

Maldonado's complaint was not the first complaint of this nature against Bennett. As detailed in *Elezovic v Ford Motor Co*, 472 Mich 408, 433, 442-444; 697 NW2d 851 (2005) (CAVANAGH, J., concurring in part and dissenting in part; WEAVER, J., concurring in part and

[1] This conviction was later expunged.

[2] The production manager was also Maldonado's uncle.

dissenting in part), defendant also had notice in October 1998 that Lula Elezovic had stated that Bennett sexually harassed her. This information was shared with the director of labor relations–*the same director of labor relations* who learned of Maldonado's complaints. Further, other coworkers had also discussed sexual harassment involving Bennett with the director of labor relations.[3]

An employer can only avoid liability if it *adequately investigates a claim of sexual harassment* and takes prompt and appropriate remedial action. *Radtke v Everett*, 442 Mich 368, 396; 501 NW2d 155 (1993). Managers and the director of labor relations knew of claims that Bennett was sexually harassing women. These claims, along with knowledge that Bennett had exposed himself to three teenage girls, are sufficient evidence to allow a jury to determine whether, under the totality of the circumstances, defendant adequately investigated these claims and took appropriate remedial action. See *Chambers v Trettco, Inc*, 463 Mich 297, 312, 318-319; 614 NW2d 910 (2000).

II. PLAINTIFF CAN BRING A CLAIM AGAINST DEFENDANT UNDER THE CRA

The CRA, in MCL 37.2201(a), defines "[e]mployer" as "a person who has 1 or more employees, and includes an agent of that person." An employer is prohibited from discriminating against an individual by doing any of the following:

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[3] Interestingly, in yet another case involving Bennett, *Perez v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, issued March 10, 2005 (Docket No. 249737), slip op at 3, the Court of Appeals notes, "Defendant admits that the proper procedure for reporting a sexual harassment claim was to report to the *labor relations department* or a UAW committeeperson." (Emphasis added.)

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

"Discrimination because of sex includes sexual harassment." MCL 37.2103(i).

> Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> * * *
>
> (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment. [MCL 37.2103(i)(*iii*).]

The majority acknowledges that the CRA allows for claims by nonemployees, but the majority states that "unless an individual can establish a genuine issue of material fact that an employer affected or controlled the terms, conditions, or privileges of his or her employment, a nonemployee may not bring a claim under the

CRA." *Ante* at 385. According to the majority, plaintiff cannot bring a claim against defendant because "[p]laintiff was hired, paid, and subject to discipline by AVI [Food Systems]. AVI placed plaintiff in the Wixom plant and had the sole authority to move her to different cafeterias or even to another plant." *Ante* at 389-390. The majority's application of the statute in this case ignores the specific language of the statute.

MCL 37.2202(1)(a) states that an employer cannot "otherwise discriminate against an individual with respect to . . . a term, condition, or privilege of employment . . . ." Discrimination includes sexual harassment. MCL 37.2103(i). Sexual harassment includes creating a sexually hostile or offensive work environment, MCL 37.2103(i)(*iii*), and this is exactly what defendant, through its supervisor Bennett, allegedly did to plaintiff.

Defendant's supervisor, Bennett, did not merely have the ability or authority to affect a condition of plaintiff's employment, he allegedly did so because plaintiff alleged Bennett's conduct created a sexually hostile work environment at plaintiff's workplace. Notably, defendant was the only one who had the authority to control *Bennett* and, therefore, affect a condition of plaintiff's employment. The CRA prohibits sexual harassment by an employer or an employer's agent. Bennett was defendant's agent when he allegedly sexually harassed plaintiff. Therefore, plaintiff can bring a claim against defendant for sexual harassment under the CRA.[4]

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[4] Contrary to the majority's presentation of the dissent's position, see *ante* at 389 n 14, defendant would be liable only if it had notice and did not adequately investigate the claim and take prompt and appropriate remedial measures, just as in all other hostile work environment sexual harassment cases.

III. PLAINTIFF CAN BRING A CLAIM AGAINST DEFENDANT FOR NEGLIGENT RETENTION

MCL 37.2803 states that the CRA "shall not be construed to diminish the right of a person to direct or immediate legal or equitable remedies in the courts of this state." When a statute provides a remedy for enforcement of a common-law right, it is cumulative and not exclusive. *Pompey v Gen Motors Corp*, 385 Mich 537, 552-553; 189 NW2d 243 (1971). The passage of the CRA did not abolish plaintiff's right to bring a negligent retention claim against defendant.

As stated by plaintiff's counsel during oral argument, Bennett's conduct, while indeed sexual harassment, was also "classic assault and battery, [a] common law tort." Plaintiff's complaint also alleged that Bennett posed a "known danger to women" and "sexually assaulted" plaintiff. Plaintiff's claim that Bennett grabbed her and tried to put his tongue in her mouth, as well as Maldonado's claims that Bennett assaulted her and exposed himself to her and Elezovic's claims that Bennett assaulted her, certainly qualify as assaultive behavior. See, e.g., *Radtke*, *supra* at 395 (sexual assault can be sexual harassment that creates a hostile work environment).

Plaintiff has presented sufficient evidence that defendant was aware of Bennett's propensity to sexually harass and assault women and that defendant negligently retained Bennett in light of this information. See *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412, 415; 189 NW2d 286 (1971). Accordingly, I believe that plaintiff can present a claim for common-law negligent retention to a jury, and the jury should decide whether defendant acted reasonably.

IV. CONCLUSION

I believe that plaintiff presented sufficient evidence

that defendant had adequate notice of Bennett's propensity to sexually harass and assault women and that Bennett was indeed doing so in the workplace. It is then a question for the jury whether defendant's subsequent conduct was reasonable under the circumstances. Accordingly, I would reverse the decision of the Court of Appeals in part and allow plaintiff to proceed on her claim under the CRA. I would also affirm the decision of the Court of Appeals in part and allow plaintiff to proceed on her claim for negligent retention.

KELLY, J., concurred with CAVANAGH, J.

PEOPLE v HOUSTON

Docket No. 126025. Argued April 12, 2005 (Calendar No. 3). Decided July 26, 2005.

Duane Houston was convicted by a jury in the Genesee Circuit Court of second-degree murder and possession of a firearm during the commission of a felony. In applying the sentencing guidelines, the trial court, Robert M. Ransom, J., assessed twenty-five points for offense variable (OV) 3, which addresses physical injury to the victim, and sentenced the defendant to life imprisonment for the second-degree murder conviction as a second-offense habitual offender. The defendant argued on appeal that, because the victim died and his sentencing offense was a homicide, zero points should have been assessed for OV 3. The Court of Appeals, JANSEN, P.J., and MARKEY and GAGE, JJ., affirmed the defendant's convictions and sentences without addressing the scoring of OV 3, concluding that a life sentence would still be appropriate under the sentencing guidelines without the disputed points assessed for OV 3. 261 Mich App 463 (2004). The Supreme Court granted the defendant's application for leave to appeal. 471 Mich 913 (2004).

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

The trial court properly assessed twenty-five points under OV 3 for the death of the victim. The sentencing guidelines require the sentencing judge to assess the highest number of points applicable to OV 3. When a victim dies and homicide is an element of the sentencing offense, the sentencing court is precluded from assessing one hundred points. The sentencing court may assess zero points only if no physical injury occurred to the victim or if "[b]odily injury not requiring medical treatment occurred to a victim" and "bodily injury is an element of the sentencing offense." Neither is applicable where a victim dies as a result of a gunshot wound to the head. Therefore, the proper score for OV 3 in that situation under the plain language of MCL 777.33 is twenty-five points on the basis of the life-threatening bodily injury the victim sustained in the course of the homicide. The defen-

dant's sentence fell within the recommended range of the guidelines, and the trial court did not err.

Affirmed.

Justice CAVANAGH, joined by Justices WEAVER and KELLY, dissenting, stated that the trial court improperly assessed twenty-five points under OV 3 for the death of the victim. When a victim dies and homicide is an element of the sentencing offense, the proper score for OV 3 under the plain language of MCL 777.33 is zero points because the victim has suffered a life-ending injury, rather than a life-threatening injury for which twenty-five points would be appropriate. If the erroneously assessed points were removed from the defendant's score, he would fall within a sentencing grid cell that does not provide for a life sentence as an option, even when the defendant's upper minimum is increased pursuant to MCL 777.21 because of his habitual-offender status. Absent separate sentencing grids for habitual offenders, whether a life sentence is available when a defendant's upper minimum is increased pursuant to the habitual-offender sentencing guidelines statute depends on whether it is denoted in the legislative sentencing grids. The Court of Appeals decision should be reversed and the case remanded to the trial court for resentencing.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES — PHYSICAL INJURY TO VICTIM.

When a victim dies and homicide is an element of the sentencing offense, the sentencing court must assess twenty-five points based on the life-threatening injury inflicted by the defendant (MCL 777.33).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Donald A. Kuebler*, Chief of Research, Training, and Appeals, for the people.

State Appellate Defender (by *Gail Rodwan*) for the defendant.

Amicus Curiae:

Stuart J. Dunnings, III, David G. Gorcyca, Joyce F. Todd, and *Danielle Walton*, for the Prosecuting Attorneys Association of Michigan.

YOUNG, J. This appeal concerns the proper method of scoring offense variable 3 (OV 3), which addresses "physical injury to a victim." MCL 777.33. The defendant in this case was convicted of second-degree murder on the basis of the shooting death of John Strong. Offense variable 3 requires the sentencing judge to select one from among the several listed scoring elements and assign points that range from a high of one hundred for a death to zero when no injury occurred. The sentencing guidelines require that the sentencing judge assess the *highest* number of points applicable. Generally speaking, the higher the number of points assessed, the longer the resulting sentence.

In determining defendant's sentence under the legislative guidelines, the trial court assessed twenty-five points for OV 3 because the victim suffered an injury–a gunshot wound. Defendant was sentenced to life imprisonment, in part on the basis of this scoring determination.

On appeal, defendant argues that he should not have been assessed *any* points for OV 3. This variable provides that the sentencing court must score one hundred points when a victim dies *unless* homicide is the sentencing offense. Defendant would have been appropriately assessed one hundred points but for the fact that second-degree murder, a form of homicide, was the sentencing offense. Defendant argues that none of the other variable elements requiring the assessment of points was applicable and, therefore, the trial court's only option was to assess *zero* points.

We disagree. The defendant not only killed the victim, but in the process also caused a physical injury—a gunshot wound to the head.[1] Consequently, although the court did not have the option of assessing one hundred points for OV 3, it properly assessed twenty-five points on the basis of the next applicable variable element: "Life threatening or permanent incapacitating injury." This conclusion is mandated by the fact that the statute governing OV 3 requires that trial courts assess the highest number of points possible.

Accordingly, we affirm the judgment of the Court of Appeals.

FACTS AND PROCEDURAL HISTORY

In December 2001, John Strong was the victim of an attempted robbery in Flint, Michigan. During the course of the robbery, Mr. Strong's assailant shot him in the head, killing him. Defendant Duane Houston was charged with Mr. Strong's death. Although he maintained his innocence throughout his trial, defendant was convicted by a jury of second-degree murder[2] and possession of a firearm during the commission of a felony,[3] and was acquitted of assault with intent to rob while armed.[4] The court sentenced defendant as a second felony offender to a term of life, plus a term of two years.

Defendant appealed by right to the Court of Appeals, arguing that the trial court had misscored OV 3 and

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[1] The dissent detects an "inconsistency" between our recognition that the victim suffered an injury and our conclusion that the victim suffered a life-threatening injury. *Post* at 411. But a life-threatening injury *is* an injury. We fail to see an "inconsistency" here.

[2] MCL 750.317.

[3] MCL 750.227b.

[4] MCL 750.89.

offense variable 14 (OV 14)[5] and had erred by sentencing him to life imprisonment as an habitual offender.[6] In affirming defendant's convictions, the panel assumed arguendo that the offense variables were scored erroneously, but held that any error was harmless because defendant was properly sentenced to life imprisonment as a repeat offender.[7]

In November 2004, we granted defendant's application for leave to appeal, limiting the parties to the following issues: "(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."[8]

STANDARD OF REVIEW

Statutory construction is a question of law subject to review de novo.[9] Our paramount task is to discern and give effect to the Legislature's intent as manifest in the plain, unambiguous language of its statutes.[10]

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[5] Our order granting leave to appeal in this case was limited to considering the scoring of OV 3. 471 Mich 913 (2004). Indeed, the Court of Appeals opinion notes that any error in scoring OV 14 would not have affected defendant's sentence. 261 Mich App 463, 471; 683 NW2d 192 (2004). We do not address OV 14 in this appeal.

[6] Defendant also argued before the Court of Appeals that the trial court abused its discretion in admitting evidence regarding defendant's possession of a weapon similar to that used in the murder. 261 Mich App 465-470. The Court of Appeals panel rejected that argument and we excluded that issue from our limited order granting leave to appeal. 417 Mich 913.

[7] 261 Mich App 472-473.

[8] 471 Mich 913.

[9] *People v Perkins,* 468 Mich 448, 452; 662 NW2d 727 (2003).

[10] *Lansing Mayor v Pub Service Comm,* 470 Mich 154, 157; 680 NW2d 840 (2004).

ANALYSIS

I

We must begin, as always, with the language of the governing statutes. At the time defendant was sentenced,[11] MCL 777.33 (OV 3) provided:

> (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.....35 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.
>
> (b) *Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense.*
>
> (c) Score 35 points if death results from the commission of a crime and the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive under the influence or while impaired causing death.

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[11] MCL 777.33 was later amended in a manner not germane to the legal question at issue here.

(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.]

Defendant argues that, because the statute governing OV 3 prohibits the trial court from scoring one hundred points on the basis of the death of the victim when homicide is the sentencing offense, the court in this case was required to assess *zero* points. Implicit in this argument is the assumption that only the "ultimate result" of a defendant's criminal act—here, the death rather than the injury that preceded the death—may be considered in scoring OV 3. The prosecution argues, on the other hand, that the court correctly assessed twenty-five points for OV 3. Because the court was precluded from considering the victim's death under MCL 777.33(2)(b), it could, in the prosecution's view, consider and score the next applicable factor on the basis of the physical injury that preceded the victim's death.

Faithful application of the plain language of MCL 777.33 demonstrates that the prosecution is correct and that defendant was properly assessed twenty-five points for OV 3 in this case.

The Legislature expressly prohibited the assessment of one hundred points when, as here, the underlying offense is homicide.[12] Consequently, one hundred points under MCL 777.33(1)(a) must be excluded as a possible assessment for OV 3.[13]

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[12] MCL 777.33(2)(b).

[13] MCL 777.33(2)(c) states that thirty-five points are to be scored only when the underlying offense "involve[s] the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive . . . ." Because the underlying offense in this case did not involve the operation of any of the listed

It is equally clear, according to the plain language of MCL 777.33(1)(f), that zero points must be excluded as an option because zero points may be assessed under that subsection only when "[n]o physical injury occurred to a victim."[14] The gunshot wound to the victim's head in this case unquestionably constitutes a physical injury. Therefore, the trial court did not have the option of scoring zero points for OV 3.[15]

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conveyances, thirty-five points under MCL 777.33(1)(b) must be excluded as a possible assessment for OV 3 as well. Five points under MCL 777.33(1)(e) must also be excluded; the victim did not suffer a "bodily injury *not* requiring medical treatment" because a gunshot wound to the head is, quite obviously, a bodily injury that does require medical treatment.

[14] It may also be appropriate in some cases to score zero points where "[b]odily injury not requiring medical treatment occurred to a victim" and "bodily injury is an element of the sentencing offense"—although, as discussed earlier, "[b]odily injury *not* requiring medical treatment" does not apply to the victim in this case. MCL 777.33(1)(e) and (2)(d). Justice CAVANAGH believes this supports his position. We disagree.

MCL 777.33 requires that the trial court assign the greatest number of points possible when scoring OV 3. When (a) a victim incurs a bodily injury not requiring medical treatment and (b) bodily injury is an element of the sentencing offense, the highest number of points possible under OV 3 is *zero points*. But when a victim dies after receiving a life-threatening injury, the highest number of points possible is *twenty-five* points. Justice CAVANAGH's argument is therefore premised on failure to follow a clear statutory requirement: that of assessing the highest number of points possible.

[15] Justice CAVANAGH posits that "[i]f homicide is an element of the sentencing offense, a defendant should not be assessed *any points* for OV 3 . . . ." *Post* at 415 (emphasis added). However, MCL 777.33(2)(b) states that if homicide is an element of the sentencing offense, a defendant should not be assessed *one hundred points* for OV 3. In other words, MCL 777.33(2)(b) specifically precludes the scoring of *one hundred points* where the sentencing offense is a homicide. If the Legislature, as the dissent contends, had intended to preclude the scoring of *any points* where the sentencing offense is a homicide, why did it only specifically preclude the scoring of *one hundred points*? Indeed, that the Legislature precluded the scoring of *one hundred points* where the sentencing offense

The only options left for the trial court, therefore, were to assess either twenty-five points under MCL 777.33(1)(c) or ten points under MCL 777.33(1)(d) on the basis of the life-threatening bodily injury requiring medical treatment sustained by the victim—viz., the gunshot wound to the victim's head. Because the statute directs the trial court to award the highest number of points possible under OV 3, the trial court was required to assess twenty-five points under MCL 777.33(1)(c).[16]

Therefore, the trial court correctly assessed twenty-five points for OV 3. When defendant's offense variables are properly scored, his recommended sentence under the legislative guidelines is 180 to 300 months or life.

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is a homicide suggests that the Legislature intended *some points* to be scored where the sentencing offense is a homicide.

[16] The dissent asserts that MCL 777.33(1)(c) is simply inapplicable where a victim actually dies after receiving a life-threatening injury, maintaining that there is a critical distinction between a "life-threatening" or "potentially fatal injury" and a "life-ending" or "fatal injury." *Post* at 411 . We see no support in the statute for the position that an injury that *actually* causes death cannot be said to have once been a "life-threatening" or "potentially fatal injury."

Nor does the dissent's distinction have much logical appeal. Suppose that Mr. Jones was the victim of a life-threatening injury—say, severe head trauma—on Day 1 and is hospitalized. On Day 50, despite heroic medical efforts to save him, Mr. Jones dies. The defendant is charged with homicide for the resulting death of the victim. Under the dissent's rationale, Mr. Jones's severe head trauma was never a "life-threatening injury" because, in the end, he actually died.

Thus, the dissent's "interesting conundrum" is purely the product of its own "contorted analysis." *Post* at 413, 414. Contrary to the dissent, we think it *can* be said that a victim who "dies instantly" has suffered a "life-threatening injury." *Post* at 413. In this case, the victim suffered a gunshot wound to the head. Although the shot may have killed him immediately, the fact remains that the *injury itself* was truly life-threatening. Indeed, to paraphrase Justice MARKMAN's dissenting statement in *People v Hauser*, 468 Mich 861, 862 (2003), the victim sustained an injury so life-threatening that it was followed by his death.

Accordingly, the trial court did not err in sentencing defendant to life for second-degree murder, and its sentence must be affirmed.

II

Our conclusion in part I follows from the plain language of the statute and the undisputed facts in this case.

Defendant offers three arguments to counter this reading of the statute governing OV 3. First, he asserts that only the ultimate outcome of the criminal act—the victim's death, in this case—may be considered in scoring OV 3. The statute obviously contains no "ultimate outcome" requirement.[17] Rather, it instructs courts to "[s]core 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."[18] This language indicates that the Legislature believed that multiple scoring factors may apply to a single offense. The statute simply indicates that the one scoring factor ultimately selected should (a) be applicable and (b) yield the highest number of points possible. Where more than one factor might apply (e.g., when a life-threatening injury requires medical treatment), the one generating the highest points is the correct one. The defendant's assumption that only the ultimate outcome of the defendant's act may be considered in scoring OV 3 is therefore undermined by the statutory language.

Defendant's second argument is a variation on the first. Defendant argues that OV 3 presents a "graduated scale," meting out the greatest number of points to those who inflict the greatest harm. In light of this

[17] See part I of this opinion (quoting the relevant statutory language).

[18] MCL 777.33(1) (emphasis added).

purported "scale," it would be incongruous, in defendant's view, to assess twenty-five points for a mere physical injury when the defendant caused the victim's *death*.

This argument, however ironic,[19] is unpersuasive for the reasons already noted. The Legislature intended for multiple factors to apply and directed courts to select one in order to assess the highest number of points possible. The Legislature has explicitly eliminated the option of assessing one hundred points in homicide cases, but not the requirement of assessing the "highest number of points" possible. The graduated nature of OV 3 therefore does not lead to the conclusion that defendant may receive zero points for this offense variable.

Finally, defendant argues that zero points must be scored for OV 3 because the Michigan offense variables "*generally* [indicate] a legislative policy of not assessing points for factors that are inherent in the elements of the offense for which the defendant is being sentenced."[20] Thus, defendant argues: "With the exception of the anomalous and later-added MCL 777.33(1)(b), involving alcohol-related deaths, this OV assesses points for aggravating circumstances, not for factors inherent in the sentencing offense itself."

This is an odd and unpersuasive argument. We consistently look to and enforce the plain language of statutes rather than some imagined "legislative purpose" supposedly lurking behind that language.[21] The

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[19] To the extent that more egregious crimes should receive higher points as the statute directs, it is surely more consistent with defendant's purported "scale" to assess him twenty-five rather than zero points.

[20] Defendant's brief at 5 (emphasis in original).

[21] See, e.g., *Sotelo v Grant Twp,* 470 Mich 95, 100; 680 NW2d 381 (2004).

text of MCL 777.33 is quite clear and, as shown in part I, requires the assessment of twenty-five points in this case. Defendant offers no reason to abandon our usual rule of statutory construction.

Moreover, the Legislature has in this very statute demonstrated its ability to preclude the scoring of points for circumstances that are a necessary element of the sentencing offense. For instance, MCL 777.33(2)(b) precludes the scoring of one hundred points where death is an element of the sentencing offense. In addition, MCL 777.33(2)(d) precludes the scoring of five points where bodily injury is an element of the sentencing offense. Therefore, if the Legislature had intended to preclude the scoring of twenty-five points where death is an element of the sentencing offense, it clearly knew how to do so. Thus, none of defendant's arguments offers a persuasive reason to depart from the Legislature's intent as manifest in the plain language of the statute governing OV 3.

CONCLUSION

On the basis of the foregoing, we conclude that the trial court did not err in assessing twenty-five points for OV 3 and sentencing defendant to life imprisonment. We therefore affirm the judgment of the Court of Appeals.[22]

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

CAVANAGH, J. (*dissenting*). I respectfully dissent from the majority's misguided interpretation of MCL 777.33.

[22] However, for the reasons stated in Justice CAVANAGH's dissent, we do not agree with the Court of Appeals analysis of MCL 777.21.

The internal inconsistency in the majority's reasoning is best illustrated by comparing its statement that when a person dies, the person has suffered an injury, see *ante* at 402, with its conclusion that when a person dies, the defendant who caused the death is subject to points for causing a "[l]ife threatening or permanent incapacitating injury . . . ." MCL 777.33(1)(c). While I agree that when a person dies, the person has presumably suffered an injury, I do not agree that when a person dies, the person has suffered a life-threatening or permanently incapacitating injury. Rather, I believe that the person has suffered an injury that ended the person's life, i.e., a life-*ending* injury, and that as such, twenty-five points cannot be scored. Surprisingly, the majority's error is far removed from its assertion that its interpretation is true to the statutory language.

I do not disagree that for offense variable (OV) 3, the trial court must determine which characteristics of the defendant's crime apply and assess the highest number of applicable points. I disagree, though, that § 33(1)(c) *applies* to a situation in which a victim dies. In a departure from the plain language of the statute, the majority's reading requires substituting "life-ending" for "life-threatening."

In fact, the prosecutor's citations of dictionary definitions support my view. The prosecutor states that one dictionary defines "life threatening" as "potentially fatal." Another defines it as "very dangerous or serious with the possibility of death as an outcome." The prosecutor advocates that an injury that is "potentially fatal" is equivalent to an injury that is fatal. But an ordinary reading of the statute's phrase "[l]ife threatening . . . injury" indicates a situation in which a person receives an injury that threatens, but does not take, the person's life. Contrary to the majority, I would decline

to accept the prosecutor's invitation to read "life-threatening injury" as "life-ending injury."

Had the Legislature intended that a potentially fatal injury include an injury actually causing death, it would have said so. On the basis of the myriad examples in our statutes in which the Legislature specifies that death is included, such as in the phrase "injury or death,"[1] I would find precluded an argument that where the Legislature says "[l]ife threatening or permanent incapacitating injury" it also means "life-ending injury." So it is not that defendant assumes that only the "ultimate result" of his criminal act can be considered in scoring OV 3, an argument the majority attributes to him. See *ante* at 405. Rather, defendant correctly argues that the injury he inflicted was not the type for which points can be assessed under § 33(1)(c). Although a victim of a homicide presumably suffers an injury, the type of injury the victim suffers is a life-ending one, not a life-threatening or permanently incapacitating one.

Moreover, I find unpersuasive the argument that had the Legislature intended to exclude a situation in which a victim dies from the "[l]ife threatening or permanent incapacitating injury" condition specified by MCL 777.33(1)(c), it would have said so. I find more persuasive the view that the Legislature likely did not foresee an attempt to equate a potentially fatal injury with a fatal one. Thus, it most likely found no need to do

[1] A cursory search through our statutes shows that the Legislature is fully capable of using the term "injury or death" when it so means. Such a search reveals 156 instances in which the Legislature used some variation of the phrase "injury or death." Even more compelling is the Legislature's use of some variation of the phrase "injury or injury resulting in death" in several statutes. See, e.g., MCL 38.67a(3), 38.1390(1), 418.141, and 418.375(3). From this it is clear that when the Legislature intends to encompass *either* an injury *or* a death, or a death resulting from an injury, it is perfectly capable of stating what it means.

anything other than preclude the scoring of one hundred points for death when death is an element of the sentencing offense.[2] Quite simply, an injury that causes a death is not a life-threatening or permanently incapacitating injury. The latter, by its plain definition, presumes that the person has survived the physical attack.

The majority's reasoning results in an interesting conundrum and illuminates that its position is not true to the plain language of the statute or the Legislature's intent. Suppose a victim dies instantly.[3] Can it truly be said that the victim suffered a permanently incapacitating or life-threatening injury? At what point between the death-causing act and the death was the injury suffered?

If a permanently incapacitating or life-threatening injury cannot be ascertained in the above example, which I do not believe that it can, the majority would then consider if perhaps § 33(1)(d) ("[b]odily injury requiring medical treatment occurred to a victim") or § 33(1)(e) ("[b]odily injury not requiring medical treatment occurred to a victim") would apply. The majority asserts that "a gunshot wound to the head is, quite obviously, a bodily injury that does require medical treatment." *Ante* at 406 n 13. As such, it concludes that scoring five points under § 33(1)(e) ("[b]odily injury not requiring medical treatment occurred to a victim") must be *excluded*. But in an instantaneous death, no medical treatment *is* required. Would the majority then believe that five points were possible for an injury

[2] Similarly, under MCL 777.33(1)(e), five points are scored when "[b]odily injury not requiring medical treatment occurred to a victim." But MCL 777.33(2)(d) instructs, "Do not score 5 points if bodily injury is an element of the sentencing offense."

[3] It appears in this case that the victim did die instantly.

requiring no medical treatment? Under this contorted analysis, a defendant's OV 3 score becomes a function of how quickly and painlessly the defendant inflicted death on the victim. The more "efficient" the defendant is, the lower number of points the defendant will receive.

Certainly such an anomaly was not what the Legislature intended. I find incredible that the Legislature intended the courts to delve into these physiological, and even philosophical, questions to reach a proper OV 3 score. Rather, I find quite clear on the face of the statute that the Legislature intended a certain number of points to apply when a victim dies, and fewer points to apply when a victim suffers various degrees of injury. Otherwise, there would be no reason to differentiate so drastically between the number of assessable points for death, one hundred, and the number of points for life-threatening or permanently incapacitating injury, twenty-five.[4]

Thus, it is clear to me that the plain language employed by the Legislature in the statute concerning OV 3 compels a conclusion that points for a "[l]ife

[4] The majority states that where a victim does not die instantly, I would hold that the victim still did not suffer a "life threatening or permanent incapacitating injury." That is not entirely accurate. I would hold that, *for the purposes of scoring OV 3*, which assesses points for the *severity* of injury suffered, the victim suffered the most severe injury possible: death. I believe that it is obvious that the graduated scale of points corresponds to a graduated scale of types of injury. I do not believe that the Legislature designed OV 3 so that a prosecutor could make an end-run around the exemption the Legislature included that prevents scoring one hundred points when a victim dies and death is an element of the sentencing crime. In the context of the clear language and purpose of the statute, I conclude that the Legislature did not see the need to state the obvious, which is that when a victim dies, points are not scored for the types of nonfatal injuries enumerated in the statute. See *ante* at 407 n 16, 409-410.

threatening or permanent incapacitating injury" are to be assessed only when the injury fits that definition. If homicide is an element of the sentencing offense, a defendant should not be assessed any points for OV 3, even if the victim could be considered to have suffered an "injury" before dying. "Injury" is not synonymous with "life-threatening or permanent incapacitating injury." Thus, I conclude that the trial court erroneously assessed twenty-five points where defendant's victim died and homicide was an element of the sentencing offense. I would reverse the trial court in that respect.

THE AVAILABILITY OF A LIFE SENTENCE

If the twenty-five points that were erroneously assessed under OV 3 were subtracted from defendant's score, defendant would fall within the II-B cell of the sentencing grid contained in MCL 777.61, which specifies a minimum sentence range of 162 to 270 months. After increasing the higher number by twenty-five percent in accordance with the second-offense habitual-offender statute, defendant's range becomes 162 to 337 months. Although the Legislature has provided sentencing grids that delineate the appropriate sentencing ranges for various combinations of OV and prior record variable (PRV) scores in MCL 777.61 through 777.69, it has not provided separate grids for sentences that are increased when a defendant is an habitual offender.

In this case, the Court of Appeals determined that because defendant's upper minimum increased to 337 months by virtue of the habitual-offender statute, a life sentence was available. The Court of Appeals reasoned that other cells having an upper minimum of more than three hundred months offer the option of a life sentence, so the Legislature must have intended that any

time an upper minimum is more than three hundred months, a life sentence is available.

Because the Legislature chose not to provide sentencing grids governing habitual-offender sentences, the plain language of the habitual-offender sentencing guidelines statute governs. The relevant statute, MCL 777.21, states:

> (3) If the offender is being sentenced under section 10, 11, or 12 of chapter IX, determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range, increase the upper limit of the recommended minimum sentence range determined under part 6 for the underlying offense as follows:
>
> (a) If the offender is being sentenced for a second felony, 25%.

Before applying the increase, defendant's upper minimum was 270 months. Two hundred seventy increased by twenty-five percent is approximately 337. Three hundred thirty-seven months is not life. I would conclude that if the Legislature had intended that a life sentence be an option, it would have so specified, either in the habitual-offender sentencing guidelines statutes or in a separate sentencing grid.

As such, I would decline to write the word "life" into the sentencing grid cell at issue. The Court of Appeals arbitrarily used three hundred months as a harbinger that a life sentence was available. But it is not at all clear that three hundred months is the dispositive guiding factor because cell III-A, in which 270 months is the upper minimum, allows for a life sentence. A more rational explanation is that the Legislature included a life option where it believed that the combined OV and PRV scores merited it. For instance, when a defendant

amasses one hundred or more points in OVs, a life sentence is an option, even where the upper minimum is less than three hundred months. In that cell, III-A, the range is 162 to 270 months or life. And in cell I-C, where the OV total is relatively low, zero to forty-nine points, and the PRV level is zero to twenty-four points, the sentence range is the same as that in the III-A cell, except that life is *not* an option. Thus, it appears that the availability of a life sentence is tied to the OV and PRV score totals, rather than the number of months represented by the upper minimum.

Here, neither defendant's OV nor PRV score changed by virtue of increasing his upper limit pursuant to the habitual-offender sentencing guidelines statute. Therefore, because a life sentence is not an option for defendants having the OV and PRV scores reflected by cell II-B, absent an articulated upward departure, a life sentence is not available even if the upper minimum is increased to reflect a defendant's habitual-offender status.

Thus, I would hold that in instances where a victim dies and homicide is an element of the sentencing offense, the proper score for OV 3 is zero points. Further, I would hold that if a defendant's upper minimum is increased pursuant to the habitual-offender sentencing guidelines statute, whether a life sentence is available depends on whether it is denoted in the legislative sentencing grids and not on the number of months in a defendant's upper minimum sentence. As such, I would reverse the decision of the Court of Appeals and remand this case to the trial court for the appropriate resentencing.

WEAVER and KELLY, JJ., concurred with CAVANAGH, J.

PEOPLE v SCHAEFER
PEOPLE v LARGE

Docket Nos. 126067, 127142. Argued May 10, 2005 (Calendar Nos. 1 and 2). Decided July 27, 2005.

David W. Schaefer was convicted by a jury in the Wayne Circuit Court of operating a motor vehicle while under the influence of liquor and causing death (OUIL causing death) and negligent homicide. The circuit court, Leonard Townsend, J., instructed the jury on OUIL causing death by reading the statute rather than the standard jury instruction. The Court of Appeals, BORRELLO, P.J. and WHITE, J. (SMOLENSKI, J., dissenting), affirmed the negligent homicide conviction in an unpublished opinion per curiam issued March 25, 2004 (Docket No. 245175), but reversed Schaefer's conviction of OUIL causing death on the basis that the circuit court erred in instructing the jury by not informing the jury that Schaefer's intoxicated driving must be a substantial cause of the victim's death, as required by *People v Lardie*, 452 Mich 231 (1996).

James R. Large was charged in the 12th District Court with manslaughter with a motor vehicle, OUIL causing death, and two misdemeanors. A prosecution witness testified at the preliminary examination that the accident was unavoidable and would have occurred had Large been sober and driving the speed limit. The district court, Lysle G. Hall, J., did not bind Large over on the charge of OUIL causing death. The Jackson Circuit Court, Chad C. Schmucker, J., refused to reinstate the charge. The Court of Appeals, MURRAY, P.J., and MARKEY and O'CONNELL, JJ., affirmed the decision of the circuit court in an unpublished opinion per curiam issued August 10, 2004 (Docket No. 253261), determining that the prosecution had failed to present sufficient evidence that Large's intoxicated driving was a substantial cause of the victim's death, as required by *Lardie*.

The prosecution applied for leave to appeal to the Supreme Court in each case. Leave was granted and the cases were ordered to be argued and submitted together. 471 Mich 923 (2004).

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

The statute governing OUIL causing death, MCL 257.625(4), requires no causal link between a defendant's intoxication and the victim's death. In proving the causation element of OUIL causing death, the prosecution need only prove that the defendant's operation of the motor vehicle factually and proximately caused the victim's death.

1. The plain text of MCL 257.625(4) does not require that the defendant's intoxicated driving be a substantial cause of the victim's death. A defendant's status as intoxicated is a separate element of the offense that specifies the class of persons subject to liability under the statute. The manner in which a defendant's intoxication affects the operation of the vehicle is irrelevant to the causation element of the crime. *Lardie* is overruled to the extent that it held that a defendant's intoxicated driving must be a substantial cause of the victim's death.

2. In proving OUIL causing death, the prosecution must establish beyond a reasonable doubt that (1) the defendant was operating a motor vehicle in violation of MCL 257.625(1), (3), or (8); (2) the defendant voluntarily decided to drive knowing that he or she had consumed an intoxicating agent and might be intoxicated; and (3) the defendant's operation of the motor vehicle caused the victim's death.

3. The causation element requires both factual causation and proximate causation. Factual causation exists if the result would not have occurred but for the defendant's conduct. For the defendant's conduct to be regarded as a proximate cause, the victim's death must be the direct and natural result of the defendant's actions. If a reasonably foreseeable intervening cause superseded the defendant's act as the legally significant causal factor, the defendant's conduct will not be considered a proximate cause of the victim's death. Gross negligence or intentional misconduct by the victim or a third party will generally be considered a superseding cause, but ordinary negligence will not, because it is reasonably foreseeable.

4. In *Schaefer*, the trial court erred in instructing the jury on causation by reading only the text of § 625(4) when the jury specifically requested additional clarification on the causation element. The word "cause" in § 625(4) is a legal term of art normally not within the common understanding of jurors, so simply reading the statute to the jury was insufficient. The error was of the preserved, nonconstitutional type that can be presumed harmless in the absence of affirmative evidence presented by the defendant that the error was outcome determinative in that the reliability of the verdict was undermined.

No such evidence was demonstrated by Schaefer. Thus, the instructional error was harmless. However, *Schaefer* must be remanded to the Court of Appeals so that the Court of Appeals can address the remaining question whether the trial court committed error requiring reversal when instructing the jury by making repeated references to Schaefer's stipulation as to his 0.16 blood-alcohol level.

5. In *Large*, the issue of proximate cause is uncertain, and the proper course is to remand the case to the district court for reconsideration of whether to bind Large over in light of the principles discussed in this opinion.

Justice WEAVER concurred in the majority's holding, analysis, and application, but wrote separately to note that, upon reexamination of the statutory language and reconsideration of a point raised in her concurrence in *Lardie*, she agreed that the statute requires a showing of proximate cause in addition to cause in fact.

Justice CORRIGAN concurred in every aspect of the majority opinion, but wrote separately to suggest an analytic approach for the Court of Appeals to consider on remand when resolving the remaining issue in *Schaefer* involving the trial court's reference to the defendant's stipulation about his blood-alcohol level. The Court of Appeals should consider the alternative bases provided by MCL 257.625(1)(a) and (b) and the trial court's instruction that the jury was entitled to disregard the stipulation.

Justice CAVANAGH, concurring in part and dissenting in part, agreed with the majority's interpretation of the causation requirement of the statute, but disagreed with the decision to remand the cases for further proceedings under the rule set forth in the majority opinion. *Lardie* was settled law at the time of the defendants' conduct, giving the citizenry fair warning of what conduct would lead to criminal liability. The new interpretation is an unforeseeable judicial expansion of a criminal statute that lessens the prosecution's burden and increases the chance of culpability. Retroactive application of the new interpretation is unexpected and indefensible. It violates due process and subjects the defendants to ex post facto punishment. The district court's dismissal of the charge against Large should be affirmed, and Schaefer's case should be remanded for a new trial, with the trial court instructed to give the jury instruction to which Schaefer was entitled at his original trial.

Justice KELLY, concurring in part and dissenting in part, concurred with the majority's interpretation of MCL 257.625(4) that the prosecutor must prove that the defendant was intoxicated and that the defendant's driving was the factual and proximate

cause of the victim's death. She dissents from the decision to remand *People v Large* for further proceedings under the new rule set forth in the majority opinion. She concludes that doing so violates fundamental notions of fairness protected by the Due Process Clause of the federal and state constitutions.

Schaefer vacated and case remanded to the Court of Appeals.

Large reversed and case remanded to the district court.

CRIMINAL LAW — AUTOMOBILES — DRIVING WHILE INTOXICATED — DEATH.

The statute prohibiting the operation of a motor vehicle while intoxicated and causing death by that operation requires no causal link between the defendant's intoxication and the victim's death; in proving the causation element, the prosecution need only prove that the defendant's operation of the motor vehicle factually and proximately caused the victim's death (MCL 257.625[4]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the people in *Schaefer*.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Henry C. Zavislak*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people in *Large*.

Richard Glanda for David William Schaefer.

John P. Kobrin (*Robert K. Gaecke, Jr.*, of counsel) for James Richard Large.

YOUNG, J. We granted leave to appeal in these cases and ordered that they be argued and submitted together to clarify the elements of operating a motor vehicle while under the influence of liquor and causing death ("OUIL causing death"), MCL 257.625(4). In addressing this issue, we revisit our decision in *People v*

Lardie,[1] which held, *inter alia*, that to convict a defendant of OUIL causing death, the prosecution must prove "that the defendant's *intoxicated* driving was a *substantial cause* of the victim's death."[2]

We conclude that the *Lardie* Court erred in holding that the defendant's "*intoxicated* driving"[3] must be a substantial cause of the victim's death. The plain text of § 625(4) does not require that the prosecution prove the defendant's intoxicated state affected his or her operation of the motor vehicle. Indeed, § 625(4) requires no causal link at all between the defendant's intoxication and the victim's death. The statute requires that the defendant's *operation* of the motor vehicle, not the defendant's intoxicated manner of driving, must cause the victim's death. The defendant's status as "intoxicated" is a separate element of the offense of OUIL causing death. It specifies the class of persons subject to liability under § 625(4): intoxicated drivers.

Quite simply, by enacting § 625(4), the Legislature intended to punish "operating while intoxicated," not "operating in an intoxicated manner." Therefore, to the extent that *Lardie* held that the defendant's *intoxicated* driving must be a substantial cause of the victim's death, it is overruled.[4]

Accordingly, in *People v Schaefer*, we vacate the judgment of the Court of Appeals and remand the case

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[1] 452 Mich 231; 551 NW2d 656 (1996).

[2] *Id*. at 259-260 (emphasis added).

[3] *Id*. at 234 (emphasis in original).

[4] We do not disturb our other holdings in *Lardie*, including that the prosecution need not prove negligence or gross negligence by the defendant, that the defendant must have "voluntarily" decided to drive "knowing that he had consumed an intoxicating liquor," and that § 625(4) comports with constitutional due process principles. *Id*. at 249-251, 265-267.

to the Court of Appeals to address defendant's remaining argument that the trial court erred so as to require reversal in making repeated references to defendant's stipulation as to his 0.16 blood-alcohol level during the jury instructions. In *People v Large*, we reverse the judgment of the Court of Appeals and remand the case to the district court for reconsideration of whether to bind defendant over on the charge of OUIL causing death in light of the principles set forth in this opinion.

I. FACTS AND PROCEDURAL HISTORY

A. *PEOPLE v SCHAEFER*

In January 2002, defendant was driving on Interstate-75 in the city of Lincoln Park with his friend as a passenger in the vehicle. Defendant admitted that he consumed three beers before getting behind the wheel.[5] According to several eyewitnesses, defendant was tailgating various cars and driving erratically.

While on the freeway, defendant's passenger abruptly told him that they had reached their freeway exit. Defendant swerved to exit the freeway, hit the curb, and lost control of the car. The car rolled over, killing the passenger. Defendant stipulated at trial that he had a 0.16 blood-alcohol level almost three hours after the accident.[6]

Defendant was charged with OUIL causing death[7]

[5] Defendant denied drinking the beer contained in the empty bottles found in his vehicle. He claimed that the bottles were left over from a party.

[6] At the time defendant was charged, § 625(1) set the statutory intoxication threshold at a blood-alcohol content of 0.10 grams per one hundred milliliters. Pursuant to 2003 PA 61, however, the statutory intoxication threshold has been reduced from 0.10 to 0.08.

[7] MCL 257.625(4).

and manslaughter with a motor vehicle.[8] At trial, a defense expert witness testified that the exit ramp was safe for speeds up to thirty miles per hour, but dangerous at any greater speed. He stated that he would have expected numerous accidents, including rollovers, during the thirty-six years that the ramp was in existence and that he was surprised to learn that there had been no other rollover accidents in over twenty years.

In instructing the jury, instead of reading the standard instruction for OUIL causing death, CJI2d 15.11,[9] the trial court read the text of the OUIL causing death statute. When the jury asked for additional instructions during deliberations, the trial court said all it could do was tell them what the statute said. Thus, the court again read the statute to the jury. The jury convicted defendant of OUIL causing death and negligent homi-

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[8] MCL 750.321.

[9] CJI2d 15.11 provided at the time:

> (1) The defendant is charged with the crime of operating a motor vehicle under the influence of intoxicating liquor . . . or with an unlawful bodily alcohol level, or while impaired, and in so doing, causing the death of another person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
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> * * *
>
> (4) Third, that the defendant was under the influence of intoxicating liquor . . ., *or* had an unlawful bodily alcohol level, *or* was impaired while [he / she] was operating the vehicle.
>
> (5) Fourth, that the defendant voluntarily decided to drive knowing that [he / she] had consumed alcohol . . . and might be intoxicated.
>
> (6) Fifth, that the defendant's intoxicated [or impaired] driving was a substantial cause of the victim's death.

cide.[10] Defendant was sentenced to concurrent prison terms of fifty months to fifteen years for OUIL causing death and one to two years for negligent homicide.

On appeal, the Court of Appeals affirmed defendant's negligent homicide conviction, but reversed his conviction of OUIL causing death.[11] In a two-to-one decision, the Court of Appeals held that the trial court erred in instructing the jury because it did not inform the jury that defendant's *intoxicated* driving must be a "substantial cause" of the victim's death, as required by *Lardie*.[12] The dissent concluded that the trial court properly instructed the jury on the causation element of OUIL causing death by reading the statute to the jury. We granted the prosecutor's application for leave to appeal and ordered that this case be argued and submitted with *People v Large*.[13]

B. *PEOPLE v LARGE*

In July 2003, while driving on a road in Jackson County, defendant struck and killed an eleven-year-old girl who was riding her bicycle in the late afternoon. The girl emerged onto the road after descending from an elevated driveway, the street view of which was partially obstructed by vegetation. The bicycle that she was riding did not have any brakes. Defendant was driving approximately five miles an hour over the posted speed limit of fifty-five miles per hour. Despite swerving in an attempt to avoid hitting the girl, the

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[10] Negligent homicide, MCL 750.324, is a lesser-included offense of manslaughter with a motor vehicle. MCL 750.325; *People v Weeder*, 469 Mich 493, 497-498; 674 NW2d 372 (2004).

[11] Unpublished opinion per curiam, issued March 25, 2004 (Docket No. 245175).

[12] *Id*., slip op at 5.

[13] 471 Mich 923 (2004).

two collided. At the time of the accident, defendant had a 0.10 blood-alcohol level.

Defendant was charged with manslaughter with a motor vehicle,[14] OUIL causing death,[15] OUIL (second offense),[16] and violation of license restrictions.[17] At defendant's preliminary examination, the prosecution called a sheriff's deputy who testified as an expert witness in accident reconstruction. The deputy testified that the accident was unavoidable, opining that the collision still would have occurred had defendant been sober and driving the speed limit. According to the deputy, a sober driver would have required at least 1½ seconds to notice the girl and attempt to avoid hitting her. On the basis of his investigation, the deputy concluded that the girl emerged onto the road, and the impact occurred, all within less than one second.

The district court bound defendant over on all counts except OUIL causing death. On appeal to the circuit court, the court refused to reinstate the charge of OUIL causing death.[18] The prosecution then appealed to the Court of Appeals, which affirmed the circuit court.[19] Relying on *Lardie*, the Court of Appeals held that "[t]he prosecution failed to present sufficient evidence to justify a finding that defendant's intoxicated driving was a substantial cause of the victim's death . . . ."[20] In

[14] MCL 750.321.

[15] MCL 257.625(4).

[16] MCL 257.625(1).

[17] MCL 257.312.

[18] The circuit court also dismissed the manslaughter charge and remanded the case to the district court on the two remaining misdemeanor counts.

[19] Unpublished opinion per curiam, issued August 10, 2004 (Docket No. 253261).

[20] *Id.*, slip op at 4.

refusing to entertain the prosecutor's argument that *Lardie* was wrongly decided, the Court of Appeals stated that " '[a] decision of the Supreme Court is binding upon this Court until the Supreme Court overrules itself.' Therefore, we may not revisit the holding of *Lardie*."[21] We granted the prosecutor's application for leave to appeal and ordered that this case be argued and submitted with *People v Schaefer*.[22]

II. STANDARD OF REVIEW

Statutory interpretation is a question of law that is reviewed by this Court de novo.[23] Similarly, jury instructions that involve questions of law are also reviewed de novo.[24] In reviewing a district court's decision to bind over a defendant, the lower court's determination regarding the sufficiency of the evidence is reviewed for an abuse of discretion, but the lower court's rulings based on questions of law are reviewed de novo.[25]

III. ANALYSIS

A. MCL 257.625(4)

Our Legislature first enacted the "OUIL causing death" statute as part of 1991 PA 98 in an attempt to increase the criminal penalties associated with driving while intoxicated.[26] The Legislature evidently believed

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[21] *Id*. (citation omitted).

[22] 471 Mich 923 (2004).

[23] *People v Moore*, 470 Mich 56, 61; 679 NW2d 41 (2004); *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003).

[24] *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003); *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003).

[25] *People v Yost*, 468 Mich 122, 126-127; 659 NW2d 604 (2003); *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991).

[26] *Lardie*, *supra* at 253 & n 33.

that sentences resulting from involuntary manslaughter and negligent homicide convictions inadequately deterred intoxicated drivers from getting behind the wheel.[27] Thus, to address this concern, the Legislature enacted the OUIL causing death statute, which provides more severe penalties, with the apparent expectation that these heightened penalties would deter intoxicated individuals from driving.

Our OUIL causing death statute, MCL 257.625(4), provides:

> A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1) [under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance, or having an unlawful body alcohol content], (3) [visibly impaired by the consumption of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance], or (8) [any body content of a schedule 1 controlled substance] *and by the operation of that motor vehicle causes the death of another person* is guilty of a crime as follows:
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> (a) . . . [A] felony punishable by imprisonment for not more than 15 years or a fine of not less than $2,500.00 or more than $10,000.00, or both. [28]

B. *PEOPLE v LARDIE*

In *People v Lardie*, this Court was presented with a due process challenge to the OUIL causing death statute.[29] The defendants in the two consolidated cases in

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[27] *Id*. at 246-247, 253.

[28] MCL 257.625(4) (emphasis added). The reference to subsection 8—intoxication by a schedule 1 controlled substance—in § 625(4) was added as part of 2003 PA 61. At the time that defendants Schaefer and Large were charged, § 625(4) referenced only subsections 1 and 3.

[29] Although § 625(4) has been amended since our decision in *Lardie*, none of the amendments limits the holding of *Lardie* or is otherwise material to the resolution of the present cases.

Lardie alleged that § 625(4) imposed criminal liability without requiring a culpable mental state. In rejecting the defendants' due process arguments, this Court held that OUIL causing death is a general intent crime and that "the culpable act that the Legislature wishes to prevent is the one in which a person becomes intoxicated and then decides to drive."[30] We further held that "there is no requirement [under § 625(4)] that the people prove gross negligence or negligence" because "the Legislature essentially has presumed that driving while intoxicated is gross negligence as a matter of law."[31]

This Court then proceeded to examine the causation element of the OUIL causing death offense, stating:

> The Legislature passed [§ 625(4)] in order to reduce the number of alcohol-related traffic fatalities. The Legislature sought to deter drivers who are "willing to risk current penalties" from drinking and driving. In seeking to reduce fatalities by deterring drunken driving, the statute must have been designed to punish drivers when their *drunken* driving caused another's death. Otherwise, the statute would impose a penalty on a driver even when his wrongful decision to drive while intoxicated had no bearing on the death that resulted. Such an interpretation of the statute would produce an absurd result by divorcing the defendant's fault from the resulting injury. We seek to avoid such an interpretation.[32]

Thus, relying on policy justifications and its belief that a contrary construction would lead to an "absurd re-

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[30] *Lardie*, *supra* at 245. We stated, "[t]he Legislature must reasonably have intended that the people prove a mens rea by demonstrating that the defendant purposefully drove while intoxicated or, in other words, that he had the general intent to perform the wrongful act." *Id*. at 256.

[31] *Id*. at 249, 251.

[32] *Id*. at 256-257 (emphasis in original).

sult," the *Lardie* Court held that "in proving causation, the people must establish that the particular defendant's decision to drive while intoxicated produced a *change in that driver's operation of the vehicle* that caused the death of the victim."[33] According to the *Lardie* Court, "[i]t is the *change* that such intoxication produces, and whether it caused the death, which is the focus of [the causation] element of the crime."[34]

The *Lardie* Court summarized the three distinct elements the prosecution must prove in securing a conviction for OUIL causing death:

> (1) [That] the defendant was operating his motor vehicle while he was intoxicated, (2) that he voluntarily decided to drive knowing that he had consumed alcohol and might be intoxicated, and *(3) that the defendant's intoxicated driving was a substantial cause of the victim's death*.[35]

C. PRINCIPLES OF STATUTORY INTERPRETATION

When interpreting a statute, it is the court's duty to give effect to the intent of the Legislature as expressed in the actual language used in the statute.[36] It is the role of the judiciary to interpret, not write, the law.[37] If the statutory language is clear and unambiguous, the statute is enforced as written.[38] Judicial construction is neither necessary nor permitted because it is presumed

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[33] *Id*. at 258 (emphasis added).

[34] *Id*. at 258 n 47 (emphasis in original).

[35] *Id*. at 259-260 (emphasis added).

[36] *Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 129 (2004); *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

[37] *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002); *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

[38] *People v Laney*, 470 Mich 267, 271; 680 NW2d 888 (2004); *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003).

that the Legislature intended the clear meaning it expressed.[39]

D. THE CAUSATION ELEMENT OF § 625(4)

The plain text of § 625(4) requires no causal link between the defendant's intoxication and the victim's death.[40] Section 625(4) provides, "A person, whether licensed or not, who operates a motor vehicle [while intoxicated] and *by the operation* of that motor vehicle *causes* the death of another person is guilty of a crime . . . ."[41] Accordingly, it is the defendant's *operation* of the motor vehicle that must cause the victim's death, not the defendant's "intoxication." While a defendant's status as "intoxicated" is certainly an element of the offense of OUIL causing death, it is not a component of the *causation* element of the offense. Justice WEAVER succinctly stated this point in her concurrence in *Lardie*:

> The plain language of the statute clearly indicates that the Legislature intended causation to turn on the fact that the defendant *operated* the vehicle while intoxicated, rather than the *changed manner in which, or how, the defendant operated* the vehicle while intoxicated.[42]

The *Lardie* Court's reliance on policy considerations in construing § 625(4) was misplaced. It is true that the

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[39] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002); *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001).

[40] Defendant Schaefer admits this point, stating that "[a] bare reading of the statute does not require that the defendant's *intoxicated* driving be a substantial cause of the victim's death." Schaefer brief at 12-13 (emphasis in original). He further states, "[t]he statute does not require a nexus between the drunken driving, and the cause of the accident." *Id*. at 15.

[41] MCL 257.625(4) (emphasis added).

[42] *Lardie*, *supra* at 273 (emphasis in original).

cardinal rule of statutory interpretation is to give effect to the intent of the Legislature.[43] However, the Legislature's intent must be ascertained from the actual text of the statute, not from extra-textual judicial divinations of "what the Legislature really meant."[44] As we stated in *Lansing Mayor*, *supra*, "rather than engaging in legislative mind-reading to discern [legislative intent], we believe that the best measure of the Legislature's intent is simply the words that it has chosen to enact into law."[45]

The *Lardie* Court also erred in assuming that judicial adherence to and application of the actual text of § 625(4) "would produce an absurd result." The result that the Court in *Lardie* viewed as "absurd"–imposing criminal liability under § 625(4) when a victim's death is caused by a defendant's *operation* of the vehicle rather than the defendant's *intoxicated* operation–reflects a policy choice adopted by a majority of the Legislature. A court is not free to cast aside a specific policy choice adopted on behalf of the people of the state by their elected representatives in the Legislature simply because the court would prefer a different policy choice. To do so would be to empower the least politically accountable branch of government with unbridled policymaking power. Such a model of government was not envisioned by the people of Michigan in ratifying our Constitution, and modifying our structure of government by judicial fiat will not be endorsed by this Court.

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[43] *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004); *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 772; 664 NW2d 185 (2003).

[44] See *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 164; 680 NW2d 840 (2004); *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 762; 641 NW2d 567 (2002).

[45] *Lansing Mayor*, *supra* at 164.

Instead, we must construe the causation element of § 625(4) according to the actual text of the statute. Section 625(4) plainly requires that the victim's death be caused by the defendant's *operation* of the vehicle, not the defendant's *intoxicated* operation. Thus, the manner in which the defendant's intoxication affected his or her operation of the vehicle is unrelated to the causation element of the crime. The defendant's status as "intoxicated" is a separate element of the offense used to identify the class of persons subject to liability under § 625(4).[46]

Accordingly, we overrule *Lardie* only to the extent it held that the prosecution must prove "that the defendant's *intoxicated* driving was a *substantial cause* of the

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[46] The flaw in the *Lardie* Court's analysis is readily apparent when one considers the closely analogous crime of operating a vehicle with a suspended or revoked license and causing death. MCL 257.904(4). The text of § 904(4) parallels the language in § 625(4). Section 904(4) provides:

> A person who operates a motor vehicle [under a suspended or revoked license] and who, *by operation of that motor vehicle, causes the death of another person* is guilty of a felony . . . . [Emphasis added.]

Under the *Lardie* Court's rationale, § 904(4) would require that the defendant's suspension or revocation somehow affect (i.e., be a "substantial cause" of) the manner by which the defendant operates the vehicle before criminal liability may be imposed. There is obviously no textual basis for such a conclusion, just as there was no such basis in *Lardie*. As Justice WEAVER pointed out in her concurrence in *Lardie*, the *Lardie* majority fundamentally misunderstood the nature of a "status crime." *Lardie*, *supra* at 271 n 8. The *Lardie* majority mistakenly took the status element of the crime—that the defendant was intoxicated—and fused it with the causation element of the offense. Therefore, to the extent that the *Lardie* Court was simply attempting to articulate a proximate cause requirement by creating its "substantial cause" test, the *Lardie* Court erred in conflating the "status" and "causation" elements of the crime.

victim's death."[47] We hold that the prosecution, in proving OUIL causing death, must establish beyond a reasonable doubt that (1) the defendant was operating his or her motor vehicle in violation of MCL 257.625(1), (3), or (8); (2) the defendant voluntarily decided to drive, knowing that he or she had consumed an intoxicating agent and might be intoxicated; and (3) the defendant's operation of the motor vehicle caused the victim's death.[48]

It is ironic that the *Lardie* Court recognized that the Legislature's intent in passing § 625(4) was "to deter th[e] gravely dangerous conduct"[49] of driving while intoxicated, yet interpreted § 625(4) in such a way so as to limit substantially the applicability of § 625(4) beyond that which the Legislature envisioned. As Justice WEAVER noted in her *Lardie* concurrence, the *Lardie* majority's "demanding burden of proof"–requiring the prosecution to show that the defendant's intoxication *changed* his or her manner of operation–"was not intended by the Legislature and is not found in the language of the statute."[50] Unlike the *Lardie* Court, we believe that the best way to "deter this gravely dangerous conduct" is to enforce the statute *as written* and thereby give the statute the teeth that the Legislature intended.[51]

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[47] *Lardie*, *supra* at 259-260 (emphasis added). As mentioned in note 4 of this opinion, we do not disturb the other holdings in *Lardie*.

[48] MCL 257.625(4); cf. *Lardie*, *supra* at 259.

[49] *Lardie*, *supra* at 253.

[50] *Id*. at 272.

[51] As we noted in *Robinson v Detroit*, 462 Mich 439, 463-468; 613 NW2d 307 (2000), we do not lightly overrule precedent. However, we do not believe that any of the considerations discussed in *Robinson* counsel against overruling *Lardie* in the present cases. Notably, we find it difficult to conceive any possible situation in which a "reliance interest"

Having determined that § 625(4) requires the victim's death to be caused by the defendant's *operation* of the vehicle, rather than the defendant's *intoxicated manner of operation*, we turn to the issue of defining the term "cause." In the criminal law context, the word "cause" has acquired a unique, technical meaning.[52] Accordingly, pursuant to MCL 8.3a, we must construe the term "according to [its] peculiar and appropriate meaning" in the law.[53]

In criminal jurisprudence, the causation element of an offense is generally comprised of two components: factual cause and proximate cause.[54] The concept of factual causation is relatively straightforward. In determining whether a defendant's conduct is a factual cause of the result, one must ask, "but for" the defendant's

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would ever exist in the context of a criminal statute. Additionally, as noted by Justice WEAVER in *Lardie*, the majority opinion in *Lardie* defies "practical workability" because the "change" in operating ability due to intoxication that the prosecution must demonstrate creates a nearly impossible burden of proof.

[52] Indeed, for more than a century, this Court has recognized that "cause" is a term of art in criminal law. See *People v Cook*, 39 Mich 236 (1878); *People v Rockwell*, 39 Mich 503 (1878); *People v Townsend*, 214 Mich 267, 277-280; 183 NW 177 (1921).

[53] MCL 8.3a provides:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; *but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning*. [Emphasis added.]

See also *Babcock*, *supra* at 257-258; *People v Jones*, 467 Mich 301, 304-305; 651 NW2d 906 (2002).

[54] *People v Tims*, 449 Mich 83, 95; 534 NW2d 675 (1995); see also 1 Torcia, Wharton's Criminal Law (15th ed), § 26; LaFave & Scott, Handbook on Criminal Law, § 35, p 246.

conduct, would the result have occurred?[55] If the result would not have occurred absent the defendant's conduct, then factual causation exists.[56]

The existence of factual causation alone, however, will not support the imposition of criminal liability.[57] Proximate causation must also be established. As we noted in *Tims*, proximate causation is a "legal colloquialism."[58] It is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural.[59] Thus, a proximate cause is simply a factual cause "of which the law will take cognizance."[60]

For a defendant's conduct to be regarded as a proximate cause, the victim's injury must be a "direct and natural result" of the defendant's actions.[61] In making this determination, it is necessary to examine whether there was an intervening cause that superseded the defendant's conduct such that the causal link between

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[55] *Tims*, *supra* at 95; *People v Barnes*, 182 Mich 179, 194; 148 NW 400 (1914); see also 1 Torcia, Wharton's Criminal Law (15th ed), § 26; Perkins, Criminal Law (2d ed), pp 687-688; LaFave & Scott, Handbook on Criminal Law, § 35, p 249 (1972) ("In order that conduct be the [factual] cause of a particular result it is almost always sufficient that the result would not have happened in the absence of the conduct; or, putting it another way, that "but for" the antecedent conduct the result would not have occurred.").

[56] *Tims*, *supra* at 95.

[57] *Tims*, *supra* at 95.

[58] *Id*. at 96.

[59] See, e.g., Beale, *The proximate consequences of an act*, 33 Harv L R 633, 640 (1920).

[60] 1 Torcia, Wharton's Criminal Law (15th ed), § 26, pp 147-148; See also Perkins, Criminal Law (2d ed), p 690.

[61] *Barnes*, *supra* at 198; see also 1 Torcia, Wharton's Criminal Law (15th ed), § 26; Perkins, Criminal Law (2d ed), pp 690-695; LaFave & Scott, Handbook on Criminal Law, § 35, pp 251-252 (1972); McLaughlin, *Proximate cause*, 39 Harv L R 149, 183 (1925).

the defendant's conduct and the victim's injury was broken. If an intervening cause did indeed *supersede* the defendant's act as a legally significant causal factor, then the defendant's conduct will not be deemed a proximate cause of the victim's injury.[62]

The standard by which to gauge whether an intervening cause supersedes, and thus severs the causal link, is generally one of reasonable foreseeability. For example, suppose that a defendant stabs a victim and the victim is then taken to a nearby hospital for treatment. If the physician is negligent in providing medical care to the victim and the victim later dies, the defendant is still considered to have proximately caused the victim's death because it is reasonably foreseeable that negligent medical care might be provided.[63] At the same time, *gross* negligence or intentional misconduct by a treating physician is not reasonably foreseeable, and would thus break the causal chain between the defendant and the victim.[64]

The linchpin in the superseding cause analysis, therefore, is whether the intervening cause was foreseeable based on an objective standard of reasonableness. If it was reasonably foreseeable, then the defendant's conduct will be considered a proximate cause. If, however, the intervening act by the victim or a third party was not reasonably foreseeable—e.g., *gross* negli-

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[62] *Cook*, *supra* at 239-240; *Townsend*, *supra* at 277-279; *People v Vanderford*, 77 Mich App 370, 372-373; 258 NW2d 502 (1977).

[63] *Cook*, *supra* at 240. See also Perkins, Criminal Law (2d ed), p 716 ("And negligence, unfortunately, is entirely too frequent in human conduct to be considered 'abnormal.' "); LaFave & Scott, Handbook on Criminal Law, § 35, p 259 ("In short, mere negligence in medical treatment is not so abnormal that the defendant should be freed of liability.").

[64] *Cook*, *supra* at 240. See also Perkins, Criminal Law (2d ed), p 719; LaFave & Scott, Handbook on Criminal Law, § 35, p 259.

gence or intentional misconduct—then generally the causal link is severed and the defendant's conduct is not regarded as a proximate cause of the victim's injury or death.

In criminal law, "gross negligence" is not merely an elevated or enhanced form of ordinary negligence. As we held in *Barnes*, *supra*, in criminal jurisprudence, gross negligence "means wantonness and disregard of the consequences which may ensue, and indifference to the rights of others that is equivalent to a criminal intent."[65]

Accordingly, in examining the causation element of OUIL causing death, it must first be determined whether the defendant's operation of the vehicle was a factual cause of the victim's death. If factual causation is established, it must then be determined whether the defendant's operation of the vehicle was a proximate cause. In doing so, one must inquire whether the victim's death was a direct and natural result of the defendant's operation of the vehicle and whether an intervening cause may have superseded and thus severed the causal link.[66] While an act of God or the *gross* negligence or intentional misconduct by the victim or a third party will generally be considered a superseding

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[65] *Barnes*, *supra* at 198.

[66] Justice CAVANAGH suggests in his partial dissent that both the *Lardie* Court and the majority in the present cases require a "more demanding standard" of proximate cause in the criminal context than that found in tort law. *Post* at 451. Justice CAVANAGH mischaracterizes both *Lardie* and the present cases. First, we do not read *Lardie* to impose the heightened form of proximate cause in criminal law that Justice CAVANAGH advocates. In fact, in *Tims*, which was decided just one year before *Lardie*, we explicitly rejected that same argument. Second, contrary to Justice CAVANAGH's assertion, we do not adopt a heightened form of proximate cause in the present cases. Instead, we are simply applying the standard of proximate cause that this Court articulated in *Tims* and that has existed in our criminal jurisprudence for well over a century.

cause, *ordinary* negligence by the victim or a third party will not be regarded as a superseding cause because ordinary negligence is reasonably foreseeable.[67]

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[67] Had the Legislature intended to require only factual causation and not proximate causation as well, the Legislature would have instead used the words "*results* in death" rather than "*causes* the death."

Indeed, MCL 257.617, which requires motorists involved in accidents to remain at the scene of the accident, specifically uses the phrase "results in . . . death." Section 617(2) provides:

> [I]f the individual [flees the scene of an accident] and the accident *results in serious impairment of a body function or death*, the individual is guilty of a felony punishable by imprisonment for not more than 5 years or by a fine of not more than $5,000.00, or both. [Emphasis added.]

Accordingly, the Legislature is well aware of how to draft a statute that requires only factual causation and not proximate causation.

The United States Court of Appeals reached the same conclusion in construing an analogous federal criminal statute: distribution of a controlled substance resulting in death, 21 USC 841. Specifically § 841(a)(1) makes it illegal to "knowingly or intentionally . . . distribute . . . a controlled substance" and § 841(b)(1)(C) provides an enhanced sentence "if death or serious bodily injury *results* from the use of such substance . . . ." (Emphasis added.) In recently addressing the proximate cause issue, the United States Court of Appeals for the Ninth Circuit held:

> [P]roximate cause is not a required element for conviction and sentencing under § 841(b)(1)(C). All that is necessary under the statutory language is that "death . . . results" from the offense described in § 841(a)(1). . . . Cause-in-fact is required by the "results" language, but proximate cause . . . is not a required element. [*United States v Houston*, 406 F3d 1121, 1124-1125 (CA 9, 2005).]

In so holding, the Ninth Circuit joined numerous other circuits that reached the same conclusion. See *United States v Soler*, 275 F3d 146, 152 (CA 1, 2002); *United States v McIntosh*, 236 F3d 968, 972-973 (CA 8, 2001); *United States v Robinson*, 167 F3d 824, 830-832 (CA 3, 1999); *United States v Patterson*, 38 F3d 139, 145-146 (CA 4, 1994).

Therefore, if the Legislature had intended to eliminate proximate causation as an element of OUIL causing death, it would have used the

E. APPLICATION

i. *PEOPLE v SCHAEFER*

Defendant argues that the trial court erred in instructing the jury on OUIL causing death in two respects. First, defendant contends that the trial court's instruction on the causation element of the crime was flawed. Second, defendant argues that the trial court erred when it reminded the jury three times during instructions about defendant's stipulation as to his 0.16 blood-alcohol level.

In initially instructing the jury on the causation element of OUIL causing death, the trial court read the text of § 625(4) to the jury. Defendant objected to the instruction, arguing that the standard jury instruction for OUIL causing death, CJI2d 15.11, which incorporated this Court's *Lardie* holding, should have been read instead. Less than an hour into deliberations, the jury specifically requested clarification from the trial court on the causation element of OUIL causing death:

> *The Court*: Okay. You're asking to explain under the influence, as is stated in Count I [OUIL causing death]. [I]s that what you want to know?
>
> *Juror No. 11*: *Also causing death*.
>
> *The Court*: I'm sorry; also what?
>
> *Juror No. 11*: Under the influence *causing death*.
>
> *The Court*: Yeah, okay. All I can do is tell you what the statute says. If that was the case, you have to decide that. [Emphasis added.]

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phrase "and by the operation of that motor vehicle the death of another person *results*." The Legislature, however, deliberately chose to use the word "cause" in § 625(4) and thereby incorporated the technical, legal meaning of the term.

Defendant again objected to the instruction, arguing that the trial court did not adequately explain the causation element of OUIL causing death.

We agree that the trial court erred in instructing the jury on causation, but not for the reasons offered by defendant. Defendant argues that the causation instruction was flawed because the trial court did not instruct the jury that defendant's intoxicated driving must be a "substantial cause" of the victim's death, as required by *Lardie*. As discussed above, the *Lardie* Court erred in requiring that the defendant's *intoxication*, rather than the defendant's *operation* of the motor vehicle, constitute the substantial cause. Accordingly, the trial court's causation instruction was not flawed in the manner asserted by defendant. Instead, we conclude that the trial court erred because the word "cause" in § 625(4) is a legal term of art normally not within the common understanding of jurors, and thus, simply reading the statute to the jury was insufficient. The jury could not be expected to understand that the statute required the prosecutor to prove *both* factual causation and proximate causation.[68]

Having determined that the causation instruction was flawed, we turn to whether the error was harmless. Mere error alone in instructing the jury is insufficient to set aside a criminal conviction. Instead, a defendant

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[68] While the trial court was not required to read the jury the standard criminal jury instruction because they are not binding authority, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), the court was nevertheless obligated to "instruct the jury as to the law applicable to the case." MCL 768.29. While reading the applicable statute to the jury may well be instructing the jury as to the law applicable to the case in most circumstances, it was not here because the statute contained a term of art jurors are not presumed to understand, i.e., a jury would not understand from a reading of the statute that the existence of factual causation alone would be insufficient to support a guilty verdict.

must establish that the erroneous instruction resulted in "a miscarriage of justice."[69] Specifically, by enacting MCL 769.26, our Legislature has provided:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, *on the ground of misdirection of the jury*, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in *a miscarriage of justice*.[70]

As we noted in *People v Cornell*,[71] in giving effect to the "miscarriage of justice" standard of MCL 769.26, a reviewing court is required to classify the type of alleged instructional error as either constitutional or nonconstitutional, and as either preserved or unpreserved.[72] In *Cornell*, we held that instructional error based on the misapplication of a statute is generally considered nonconstitutional error.[73] As such, any error that the trial court committed in the present case in failing to explain the causation element of § 625(4) was nonconstitutional. Moreover, because defendant promptly objected to the instruction and adequately articulated the basis for the objection, the alleged error was properly preserved.

Accordingly, the alleged instructional error in this case is appropriately classified as preserved, nonconsti-

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[69] MCL 769.26; *People v Young*, 472 Mich 130, 141-142; 693 NW2d 801 (2005).

[70] MCL 769.26 (emphasis added).

[71] 466 Mich 335; 646 NW2d 127 (2002).

[72] *Id*. at 362-363, citing *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). Constitutional errors must further be classified as either structural or nonstructural. *Cornell*, *supra* at 363.

[73] *Id*. at 364-365; see also *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000).

tutional error, as noted by the Court of Appeals. In *People v Lukity*,[74] we held that MCL 769.26 creates a presumption that preserved nonconstitutional error is harmless unless the defendant demonstrates that the error was outcome determinative.[75] Specifically, in *Lukity* we stated that MCL 769.26 "presumes that a preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative."[76] An error is not "outcome determinative" unless it " 'undermined the reliability of the verdict.' "[77]

Applying the *Lukity* standard to the alleged instructional error in the present case, we conclude that any error on the part of the trial court in merely reading the statute and failing to explain the causation element of OUIL causing death was harmless. There is no evidence that the trial court's failure to explain fully both the factual cause and proximate cause components of the causation element of the offense was "outcome determinative" or that the "reliability of the verdict was undermined."

Assuming, arguendo, that the jury gave full credit to the testimony of defendant's expert witness on highway design, the most that the witness's testimony established was that the freeway exit was negligently designed. The witness presented no evidence that there was any *gross* negligence in the design of the freeway

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[74] 460 Mich 484; 596 NW2d 607 (1999).

[75] *Id*. at 495-496.

[76] *Id*. (citation omitted).

[77] *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001), quoting *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). Recent cases where we found that instructional error required reversal include *People v Mass,* 464 Mich 615; 628 NW2d 540 (2001), *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000), and *People v Rodriguez*, *supra.*

exit. As such, the design of the freeway exit could not be considered a superseding cause that would prevent defendant from being legally regarded as a proximate cause of the victim's death. We conclude, therefore, that defendant has failed to rebut the presumption that the alleged instructional error was harmless because he has not demonstrated that the alleged error was outcome determinative in that it undermined the reliability of the verdict, as required by MCL 769.26 and *Lukity*.[78]

Defendant also argues that the trial court committed error requiring reversal when it reminded the jury three times during instructions about defendant's stipulation as to his 0.16 blood-alcohol level.[79] However, the Court of Appeals declined to address this argument in light of its resolution of this case. Accordingly, we remand this case to the Court of Appeals limited solely to the issue of whether the trial court committed error requiring reversal in making repeated references to the stipulation regarding defendant's blood-alcohol level.[80]

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[78] As noted earlier, defendant's expert witness admitted at trial that his defective design theory was inconsistent with the actual history of accidents associated with the exit ramp.

[79] Schaefer brief at 26 ("the judge reminded the jurors that the parties stipulated that the Defendant's blood alcohol level was 0.16. The reminder of the stipulation is used three times in this instruction . . . .").

[80] Justice CAVANAGH's ex post facto and due process concerns are misplaced. As the United States Supreme Court has held, "The *Ex Post Facto* Clause, by its own terms, does not apply to courts. Extending the Clause to courts through the rubric of due process thus would circumvent the clear constitutional text." *Rogers v Tennessee*, 532 US 451, 460; 121 S Ct 1693; 149 L Ed 2d 697 (2001). Although it is true, as Justice CAVANAGH indicates, that prior precedent from the United States Supreme Court and this Court has held that there are due process limitations on the retroactive application of judicial interpretations of criminal statutes that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," *post* at 453-454, we believe that it is not "indefensible or unexpected" that a court would, as we do today, overrule a case that failed to abide by the express terms of a statute.

We do not retain jurisdiction.[81]

ii. *PEOPLE v LARGE*

The first two elements of OUIL causing death are not in dispute. Defendant's blood-alcohol level was 0.10 grams and he voluntarily chose to drive knowing that he had consumed alcohol. The uncertainty lies in the causation element of the offense.

Defendant's operation of the vehicle was undeniably a factual cause of the young girl's death. Absent defendant's operation of the vehicle, the collision would not have occurred. The issue of proximate causation, however, is less certain. There is evidence that the victim's death was the direct and natural result of defendant's operation of the vehicle. At the same time, the victim rode a bicycle without brakes down a partially obstructed hill onto a busy road and, thus, according to the prosecution's own expert witness, made the collision unavoidable. Given the fact that during the preliminary examination the parties did not directly address the proximate cause issue, including whether the victim's own behavior was a superseding cause, the proper course is to remand this case to the district court for reconsideration of whether to bind over defendant in light of the principles discussed in this opinion. We do not retain jurisdiction.

IV. CONCLUSION

The *Lardie* Court erred in holding that the defendant's "intoxicated driving" must be a substantial cause

[81] Because we conclude that the trial court's other instructional errors were harmless, the Court of Appeals is to consider on remand only whether the trial court's multiple references to the stipulation constituted error requiring reversal—i.e., that a "miscarriage of justice" occurred, as required by MCL 769.26 and *Lukity*. If the Court of Appeals determines that no "miscarriage of justice" occurred, defendant's conviction of OUIL causing death is to be affirmed.

of the victim's death. There is no textual basis for the *Lardie* Court's holding. Indeed, the plain text of the OUIL causing death statute requires no causal link at all between the defendant's intoxication and the victim's death. The defendant's status as "intoxicated" is a separate element of the offense and entirely irrelevant to the causation element of the crime. It is the defendant's *operation* of the motor vehicle that must cause the victim's death under § 625(4), not the manner by which the defendant's intoxication may or may not have affected the defendant's operating ability. Therefore, to the extent that *Lardie* held that § 625(4) requires the defendant's intoxicated driving to be a substantial cause of the victim's death, it is overruled. In proving the causation element of OUIL causing death, the people need only prove that the defendant's *operation* of the motor vehicle caused, both factually and proximately, the victim's death.

Accordingly, in *People v Schaefer*, the judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals to address defendant's remaining argument that the trial court erred so as to require reversal in making repeated references to defendant's stipulation as to his 0.16 blood-alcohol level during the jury instructions. In *People v Large*, the judgment of the Court of Appeals is reversed and the case is remanded to the district court for reconsideration of whether to bind defendant over on the charge of OUIL causing death in light of the principles set forth in this opinion. We do not retain jurisdiction in either case.

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

WEAVER, J. *(concurring).* I join in the majority's holding, analysis, and application in these cases. As the

majority concludes—and as I urged in my separate concurrence in *People v Lardie,* 452 Mich 231, 267; 551 NW2d 656 (1996)—a proper reading of the statute prohibiting OUIL causing death is that it criminalizes a death caused by a person operating a car while intoxicated, regardless of the manner of operation.

I write separately to note that the same careful consideration of the OUIL statutory text that results in the above conclusion demands I reconsider another point I made in my *Lardie* concurrence.

Specifically, I suggested in *Lardie* that showing proximate cause was not necessary to prove OUIL causing death. *Lardie, supra* at 268 n 5, 273 n 11. However, now that the issue is squarely before the Court, and I have reexamined the language of the statute in the two cases before us, I now agree that the Legislature's use of the term "causes the death" indicates that the common-law meaning of "cause" must be used, and both cause in fact and proximate cause need to be shown.

The dangers of driving under the influence are no doubt of concern to the Legislature; however, as the majority indicates, had the Legislature wanted to remove a showing of proximate cause from the statute prohibiting OUIL causing death, it could have used the term "resulting in the death" instead.

CORRIGAN, J. (*concurring*). I concur in and join every aspect of the majority opinion. I write separately to suggest an analytic approach to the sole remaining issue to be resolved on remand in *People v Schaefer*, i.e., whether the trial court committed error requiring reversal when it reminded the jury three times during instructions about defendant's stipulation regarding his blood-alcohol level of 0.16 grams.

As the majority correctly observes, *ante* at 445 n 81, in determining whether the multiple references to the stipulation constitute an error requiring reversal, the Court of Appeals should consider whether defendant has established that a "miscarriage of justice" occurred, as required by MCL 769.26 and *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999).

In assessing whether a miscarriage of justice occurred, I believe it is noteworthy that defendant is mistaken in assuming that his blood-alcohol level at the time of the accident is the sole factor that the jury was entitled to consider in finding that he was intoxicated. MCL 257.625(1) clearly provides two independent bases on which the jury could have concluded that defendant was intoxicated. Specifically, at the time defendant was charged, § 625(1) provided that a defendant is considered intoxicated for the purpose of OUIL causing death if *either* of the following applies:

> (a) The person is under the influence of intoxicating liquor, a controlled substance, or a combination of intoxicating liquor and a controlled substance.
>
> (b) The person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

Thus, pursuant to § 625(1), the jury could have found that defendant was intoxicated *either* on the basis of evidence of defendant's blood-alcohol level, *or* on the basis of evidence presented at trial demonstrating that defendant was "under the influence of intoxicating liquor."

In instructing the jury, the trial court repeatedly informed the jury of these two alternative bases:

> *The Court*: So, the elements are *either* operating under the influence, that's one. *Or,* operating a motor vehicle while the blood alcohol content is 0.10.

* * *

> It's *either* driving under the influence, *or* driving with a blood alcohol content of 0.10. And as a result of so operating a motor vehicle, causes the death of another person.
>
> Those are the elements of Count 1 [OUIL causing death]. . . .
>
> * * *
>
> So, if you find in Count 1 [OUIL causing death] that the defendant operated a motor vehicle under the influence of intoxicants, *or* that he at the time had a blood alcohol level in excess of .10. And that as a result of that, a person was killed. That is what you call homicide caused by driving under the influence. [Emphasis added.]

Moreover, the trial court explicitly instructed the jury that it was free to reject defendant's stipulation about his blood-alcohol level. Specifically, the trial court told the jury, "You have a right to accept [the stipulation], or you have a right to reject it. It's entirely up to you." It is thus quite possible that the jury chose to ignore completely defendant's stipulation about his blood-alcohol level when it found defendant guilty of OUIL causing death.[1]

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[1] The prosecution presented various evidence at trial to demonstrate that defendant was "under the influence of intoxicating liquor," pursuant to § 625(1)(a). First, defendant himself admitted that he consumed at least three beers before getting behind the wheel. Defendant also admitted that his blood-alcohol level was 0.16 grams less than three hours after the accident and that he did not consume any alcoholic beverages between the time of the accident and when his blood was later drawn at the hospital. The accident occurred about 10:08 p.m., and defendant's blood was drawn at the hospital about 12:56 a.m. The victim, defendant's passenger, had a blood-alcohol level of 0.35 grams approximately forty minutes after the accident occurred. Three hours after the accident, the victim's blood-alcohol level had *declined* to 0.24 grams.

Accordingly, in addressing on remand whether the trial court committed error requiring reversal in making repeated references to the stipulation, the Court of Appeals should consider the alternative bases provided by § 625(1)(a) and (b) and the trial court's instruction that the jury was entitled to disregard the stipulation.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur in the result reached by the majority that, to convict a defendant of OUIL causing death under MCL 257.625(4), the prosecution must prove that the defendant was intoxicated and that his or her driving was both the factual and the proximate cause of the victim's death. Like Justice WEAVER, I have carefully reexamined the language of the statute and this Court's interpretation of that language in *People v Lardie*, 452 Mich 231; 551 NW2d 656 (1996). In doing so, I have come to the conclusion that the *Lardie* Court's interpretation of the statute did not effectuate the intent of the Legislature. As Justice WEAVER noted in her *Lardie*

Second, several eyewitnesses told the police that defendant was tailgating various cars on the freeway, driving erratically, and swerved suddenly to get off the highway. Evidence was presented at trial that defendant followed a car on the freeway for one mile with less than one-half of a car length between the vehicles and while traveling at a speed of sixty-five miles an hour. Defendant acknowledged that the other two lanes of the freeway were clear for the entire mile that he was tailgating. Defendant then proceeded to tailgate a tractor-trailer in a similar manner.

Third, when the police investigated the crime scene, officers found numerous empty bottles of alcohol in defendant's vehicle. In addition to the empty bottles of beer, the police also found an empty vodka bottle in defendant's vehicle. Defendant denied drinking any vodka on the night of the accident.

Fourth, the nature of the accident itself was described in great detail at trial. Defendant suddenly swerved to get off the freeway and his vehicle rolled over. In the prior twenty years, there had been no rollover accidents on that same freeway exit.

concurrence, the *Lardie* majority's conclusion that the focus must be on the defendant's "intoxicated driving" imposed an unworkable burden on the prosecution. *Lardie*, *supra* at 272 (WEAVER, J., concurring). After due consideration, I now believe that the correct interpretation of the statute is that set forth by the current majority.

I would also suggest that the *Lardie* majority's conclusion that the defendant's driving must be a "substantial" cause of the victim's death, while inartfully worded, was likely an attempt to accentuate that the concept of proximate cause in a criminal context is a more demanding standard than that found in tort law. *People v Barnes*, 182 Mich 179, 196-199; 148 NW 400 (1914); LaFave & Scott, Criminal Law (2d ed), § 3.12, pp 279, 282. This is true "because the potential deprivation of personal rights is obviously much more extreme in criminal, as opposed to tort, actions." *People v Harding*, 443 Mich 693, 738; 506 NW2d 482 (1993) (CAVANAGH, J., concurring in part and dissenting in part). Thus, in a criminal context, "[t]he proximate cause standard requires a sufficient causal connection between the defendant's conduct and the result of that conduct. '[I]t [must] appear[] that the death resulted as the natural, direct, and necessary result of the unlawful act . . . .' " *Id.* at 737, quoting *Barnes*, *supra* at 196.

As our criminal jury instructions suggest, "the criminal standard for proximate cause requires a more direct causal connection than the tort concept of proximate cause." *Harding, supra* at 738. Thus, in establishing causation under MCL 257.625(4), it is critical to note the following caveats:

> [C]riminal liability requires a more direct causal connection than merely finding that the defendant's actions were "a" cause. Where there are multiple independent

> causes contributing to the victim's injury or death, so that the defendant's conduct alone would not have caused the death, we would not impose liability for criminal negligence unless the defendant's conduct sufficiently dominated the other contributing factors, to be fairly deemed a criminal proximate cause, and the injury was reasonably foreseeable from the defendant's negligence. More specifically, even though a victim's contributory negligence is not an affirmative defense, it is a factor to be considered by the trier of fact in determining whether the prima facie element of proximate cause has been proven beyond a reasonable doubt. [*People v Tims*, 449 Mich 83, 111; 534 NW2d 675 (1995) (CAVANAGH, J., dissenting).]

Thus, the *Lardie* Court's underlying premise, that proximate cause should be examined differently in a criminal case, was correct, but the current majority's approach more accurately conveys the concept.

I dissent, however, from the majority's decision to remand these cases for further proceedings under the rule set forth in today's opinion because I believe that applying the new rule, which overturns our prior interpretation of MCL 257.625(4), violates due process and infringes on the protections inherent in the Ex Post Facto Clauses of the United States and Michigan constitutions. US Const, art I, § 10; Const 1963, art 1, § 10.[1]

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[1] Although the Ex Post Facto Clauses do not directly apply to the judiciary, *People v Doyle*, 451 Mich 93, 99; 545 NW2d 627 (1996), citing *Marks v United States*, 430 US 188; 97 S Ct 990; 51 L Ed 2d 260 (1977), the "principles are applicable to the judiciary by analogy through the Due Process Clauses of the Fifth and Fourteenth Amendments." *Doyle, supra* at 100, citing *Bouie v City of Columbia*, 378 US 347; 84 S Ct 1697; 12 L Ed 2d 894 (1964); see also *People v Stevenson*, 416 Mich 383, 395; 331 NW2d 143 (1982); *People v Dempster*, 396 Mich 700, 714-718; 242 NW2d 381 (1976). For the purposes of my analysis, I consider the concepts inextricably intertwined. When a defendant is deprived of due process, and, thus, is subjected to a punishment not available at the time of his or her conduct, this treatment is precisely what is contemplated, and prohibited, under ex post facto principles.

In *People v Dempster*, 396 Mich 700; 242 NW2d 381 (1976), this Court recognized the longstanding rule that to avoid a deprivation of due process, "[a] criminal statute must be 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties'." *Id.* at 715, quoting *Connally v Gen Constr Co*, 269 US 385, 391; 46 S Ct 126; 70 L Ed 322 (1926). In *Lardie*, this Court examined MCL 257.625(4) in great detail in an attempt to clarify its meaning. We engaged in extensive endeavors of statutory construction to determine things that were not evident on the statute's face. In particular, we examined whether the statute was meant to impose strict liability; if it was not, whether it created a general or specific intent crime; whether the Legislature intended that the prosecution prove some type of fault; and what the parameters of the statute's causation requirement were.

The resulting judicial interpretation of the statute had, of course, the force of law, and sufficiently explained to the citizenry what type of conduct on their part would lead to criminal culpability. Through that decision, the people of this state were given "fair warning" of a prohibited type of conduct. As the United States Supreme Court has explained, "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie*, *supra* at 352.

Our decision in *Lardie*, which had the support of six justices, was the settled state of the law at the relevant time of these defendants' conduct. Due process precludes "retroactive application of a 'judicial construction of a criminal statute [that] is "unexpected and

indefensible by reference to the law which had been expressed prior to the conduct in issue . . . .' " *Doyle*, *supra* at 101, quoting *Bouie*, *supra* at 354, quoting Hall, *General Principles of Criminal Law* (2d ed), p 61. There was nothing in *Lardie* that suggested that the law was in some state of flux or that this Court's construction of the statute was less than clear or complete. No fair reading of *Lardie* would alert a person that *Lardie* would later be revisited or revised. Thus, at the time of these defendants' conduct, any construction different than that set forth in *Lardie* was both unexpected and indefensible.

The majority's assertion that "it is not 'indefensible or unexpected' that a court would, as we do today, overrule a case that failed to abide by the express terms of a statute," completely eliminates the protections against ex post facto punishments and due process violations. See *ante* at 444 n 80. Under the majority's reasoning, no new court opinion would ever be "indefensible or unexpected," because the new opinion would always be "correct." But this ignores the fact that *every* court believes an opinion it issues is correct, just as the *Lardie* Court believed in 1996, or it would not issue the opinion.

Further, the majority's reasoning imposes on our citizenry the untenable burden of guessing and predicting when one court might overturn a prior court's settled interpretation of a statute. I find such a result in grave conflict with the notions of due process and, thus, fatally flawed.

As such, I disagree that these defendants must again undergo the criminal process under our new interpretation of what was, at the relevant time, settled law. Such a ruling violates the fundamental principles of due process and subjects defendants to ex post facto pun-

ishment. While the prosecution had a more difficult burden under *Lardie*, today's decision lessens that burden, making our new interpretation an unforeseeable judicial expansion of a criminal statute. Subjecting defendants to a new rule that increases the chance of culpability, when their conduct was committed when the old rule was settled law, is a clear violation of defendants' constitutional rights.

Accordingly, I would affirm the district court's dismissal of defendant Large's case because the district court found that, under *Lardie*, probable cause that defendant committed a crime was nonexistent. The district court did not abuse its discretion in finding so. I would, though, remand defendant Schaefer's case for a new trial. On remand, I would instruct the trial court to give the jury instruction to which defendant Schaefer was entitled at his original trial.

KELLY, J. (*concurring in part and dissenting in part*). I concur with the majority's interpretation of MCL 257.625(4). I write separately to note that I too have reexamined the language of MCL 257.625(4) and past readings of it. I continue to believe that the opinion of this Court in *People v Lardie*[1] and that of the Court of Appeals on which I sat[2] were both correct in ruling that the statute is constitutional.

The defendant in *Lardie* had contended and the trial court had found that the statute creates an unconstitutional strict liability, public welfare offense. Both appellate courts disagreed that the statute is unconstitutional. I now believe that the statute does not impose strict liability on the intoxicated driver, as the Court of

[1] 452 Mich 231; 551 NW2d 656 (1996).

[2] 207 Mich App 615; 525 NW2d 504 (1994).

Appeals ruled. Nor does it require the prosecutor to prove that the intoxication caused the injury, as this Court ruled.

Lardie presented a different issue than the issue in these cases; it concerned intent. Causation was not the focus in *Lardie*, but it is here. The question here is what causal link between defendant's actions and the death does the statute require that the prosecutor show. After thorough consideration, I conclude that the correct interpretation of MCL 257.625(4) is that the prosecutor must prove (1) the defendant was intoxicated and (2) the defendant's driving was the factual and proximate cause of the victim's death.

I agree with Justice CAVANAGH that the majority errs in remanding *People v Large* for further proceedings under the new rule set forth in its decision. Doing so violates fundamental notions of fairness that are embedded in the Due Process Clause of the federal and state constitutions. US Const, Am V; Am XIV, § 1; Const 1963, art 1, § 17.

RORY v CONTINENTAL INSURANCE COMPANY

Docket No. 126747. Argued March 8, 2005 (Calendar No. 5). Decided July 28, 2005.

Shirley Rory and Ethel Woods brought an action in the Wayne Circuit Court against Continental Insurance Company. The plaintiffs alleged that the defendant unreasonably refused their claim for uninsured motorist benefits, submitted sixteen months after the accident causing their injuries, by invoking a policy provision requiring such a claim or suit be filed within one year from the date of the accident. The court, Robert L. Ziolkowski, J., denied the defendant summary disposition, concluding that the contractual one-year limit was not reasonable and was an unenforceable adhesion clause. The Court of Appeals, BORRELLO, P.J., and WHITE and SMOLENSKI, JJ., affirmed, agreeing that the one-year limitations period was unreasonable. 262 Mich App 679 (2004). The defendant appealed. The Supreme Court granted the defendant's application for leave to appeal. 471 Mich 904 (2004).

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

Insurance policies are subject to the same contract construction principles that apply to any other species of contract. Unless a contract provision violates law or a traditional defense to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written.

1. Unambiguous contracts are not open to judicial construction, and must be enforced according to their unambiguous terms unless doing so would violate law or public policy. Enforcing contracts according to their unambiguous terms respects the parties' freedom to contract. A judicial assessment of reasonableness is an invalid basis on which to refuse to enforce contractual provisions. Only recognized traditional contract defenses may be used to avoid the enforcement of contract provisions.

2. The contractually shortened period of limitations at issue is not prohibited by statute or public policy. The Legislature has provided a mechanism to ensure the reasonableness of insurance policies in this state. MCL 500.2236 requires that basic insurance policies be filed with and approved by the Commissioner of the

Office of Financial and Insurance Services. The commissioner has approved the policy at issue, and the plaintiffs have not challenged that decision in the appropriate forum.

3. Applying the label "adhesion contract" to a contract has no legal relevance and does not subject that contract to a greater level of judicial scrutiny or require the application of other than traditional contract principles to an unambiguous contract, which is to be enforced according to its plain terms, just as any other contract, subject to traditional contract defenses such as duress, waiver, estoppel, fraud, or unconscionability. The plaintiffs have not argued that any traditional contract defense applied.

Reversed and remanded to the circuit court for entry of order of summary disposition in favor of the defendant.

Justice KELLY, dissenting, concluded that it is a legitimate exercise for courts to review the reasonableness of contractual clauses that limit the period during which legal actions can be brought. The reasonableness doctrine has a long history in law and is well recognized by most other courts. It provides a necessary step to accurately implement the intent of the contracting parties and to ensure that an aggrieved party is not divested of rights and recourse. The doctrine should not be overturned. To do so constitutes a serious regression in Michigan law.

In many instances, circumstances beyond an insured's control create a bar to the insured's receipt of uninsured motorist benefits. The circumstances may not be ascertainable until more than one year has passed from the time of an accident. Applying the reasonableness doctrine to the facts of this case, the one-year contractual limitations period was so short that it acted as a practical abrogation of the plaintiffs' right to bring a lawsuit. The plaintiffs paid for insurance coverage from which they could never benefit. Thus, the limitations clause should be adjudged unreasonable.

The clause also prohibits a beneficiary from commencing and maintaining a suit in violation of MCL 500.2254. And contrary to the majority's assertion, the discretionary authority of the Commissioner of the Office of Financial and Insurance Services to review the reasonableness of insurance policies under MCL 500.2236(5) does not deprive the courts of review of the same matter.

Finally, it is unnecessary for the majority to reach the issue of adhesion contracts. Contrary to the majority's holding, the scrutiny and protections offered by traditional adhesion contract law are a necessary protection for the people of this state given the

reality that adhesion contracts are not fairly made or bargained for by individuals. These protections are accepted by the majority of courts and should not be abandoned. The Court of Appeals decision should be affirmed.

Justice CAVANAGH, dissenting, concurred in the result of Justice KELLY's dissent and stated that, while the parties may contract for shorter periods of limitations, those provisions, particularly when they are not bargained-for terms, should only be enforced when reasonable. To do otherwise ignores the manner in which the insurance industry operates, using adhesion contracts as a necessary ingredient in the trade. The shortened limitations period in this insurance policy is unreasonable and, thus, unenforceable. The Court of Appeals decision should be affirmed.

Justice WEAVER, dissenting, concurred in the result of Justice KELLY's dissent and stated that the specialized rules for interpreting insurance contracts are based on the recognition that an insured is not able to bargain over the terms of an insurance policy, but will rely on the agent's representations and would doubtless not understand or be able to apply many of the obscure provisions. These longstanding specialized rules of interpretation protect the consumer, especially with regard to no-fault insurance required by law, and should not be eliminated.

1. INSURANCE — CONTRACTS — CONTRACTUAL PERIODS OF LIMITATIONS — ADHESION CONTRACTS.

A court must construe and apply unambiguous insurance contractual provisions as written unless the provisions violate law or public policy; a court may not modify or refuse to enforce the provisions based on a judicial determination of reasonableness; to do so undermines the parties' freedom of contract; in the specific context of insurance policies, MCL 500.2236(5) assigns the task of evaluating the "reasonableness" of an insurance contract to the Commissioner of the Office of Financial and Insurance Services; the "public policy" of Michigan, as determined by the Legislature, is that the reasonableness of insurance policies is a matter consigned to the executive rather than judicial branch of government.

2. INSURANCE — CONTRACTS — ADHESION CONTRACTS.

An adhesion contract, however defined, is simply a species of contract; insurance policies, whether deemed "adhesive" or not, are subject to the same contract construction principles that apply to any other type of contract; an insurance contract is fully

enforceable according to its plain terms unless violative of the law or unless a traditional contract defense applies.

Hakim & Turfe (by *David D. Turfe* and *Maroun J. Hakim*) for the plaintiffs.

Garan Lucow Miller, P.C. (by *Robert D. Goldstein* and *Jami E. Leach*), for the defendant.

Amici Curiae:

Willingham & Coté, P.C. (by *John A. Yeager, Matthew K. Payok*, and *Curtis R. Hadley*), for Farm Bureau General Insurance Company of Michigan.

Law Offices of Robert June, P.C. (by *Robert B. June*), for the Michigan Trial Lawyers Association.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *David W. Silver*, Assistant Attorney General, for Linda A. Walters, Commissioner of the Office of Financial and Insurance Services, Department of Labor & Economic Growth.

YOUNG, J. In this case, the trial court refused to enforce the one-year contractual limitations period contained in the insurance policy issued to plaintiffs. The trial court did so because it concluded that the one-year limitations provision was "unfair," unreasonable, and an unenforceable adhesion clause. The Court of Appeals affirmed, and defendant Continental Insurance Company (Continental) appeals.

This case raises two fundamental questions of contract law: (1) are insurance contracts subject to a standard of enforcement different from that applicable to other contracts, and (2) under what conditions may a court disregard and refuse to enforce unambiguous contract terms?

We hold, first, that insurance policies *are* subject to the same contract construction principles that apply to any other species of contract. Second, unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written. We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of "reasonableness" as a basis upon which courts may refuse to enforce unambiguous contractual provisions.

Finally, in addition to these traditional contract principles, in this case involving an insurance contract, the Legislature has enacted a statute that permits insurance contract provisions to be evaluated and rejected on the basis of "reasonableness." The Legislature has explicitly assigned this task to the Commissioner of the Office of Financial and Insurance Services (Commissioner) rather than the judiciary. The Commissioner has allowed the Continental insurance policy form to be issued and used in Michigan. No party here has challenged the Commissioner's action to allow the Continental policy to be issued or used in this state.

Accordingly, we reverse the Court of Appeals decision and remand the case to the circuit court for entry of an order of summary disposition in favor of defendant.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs maintained an automobile insurance policy with defendant, which included optional coverage for uninsured motorist benefits. On May 15, 1998, plaintiffs were injured in an automobile accident. The police

report filed at the time of the collision did not indicate whether either party was insured. More than a year later, in September 1999, plaintiffs filed a first-party no-fault suit against defendant and a third-party suit for noneconomic damages against Charlene Haynes, the driver of the other vehicle. Only after the suit was commenced was it discovered that Haynes was uninsured. On March 14, 2000, plaintiffs submitted a claim for uninsured motorist benefits to Continental. Defendant denied the claim because it was not filed within one year after the accident, as required by the insurance policy.

In August 2000, plaintiffs filed the present action, contesting Continental's denial of uninsured motorist benefits. Defendant filed a motion for summary disposition, relying on a limitations provision in the insurance contract that required that a claim or suit for uninsured motorist coverage "must be brought within 1 year from the date of the accident."

The trial court denied defendant's motion, holding that the one-year limitations period contained in the contract was unreasonable. After the Court of Appeals issued an opinion in an unrelated case,[1] defendant renewed its motion for summary disposition.

The trial court again denied defendant's motion for summary disposition, holding that the one-year limitation was an unenforceable adhesion clause. Because the limitation was not highlighted in the contract, was not bargained for by the purchaser, and constituted a "significant reduction" in the time plaintiffs would other-

[1] *Williams v Continental Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued April 23, 2002 (Docket No. 229183). In *Williams*, the panel considered identical policy language and concluded that the one-year limitation was "not so unreasonable as to be unenforceable" because the policy required that a claim be filed within a year, rather than a lawsuit.

wise have to file suit against defendant, the trial court held that it would be "totally and patently unfair" to enforce the limitation contained in the policy.

On appeal, the Court of Appeals affirmed the trial court's decision to deny defendant's motion for summary disposition.[2] The Court of Appeals agreed with the trial court that a one-year period of limitations was unreasonable. The panel instead imposed a three-year period of limitations, holding:

> An insured may not have sufficient time to ascertain whether an impairment will affect his ability to lead a normal life within one year of an accident. Indeed, three of the factors to be considered in determining whether a serious impairment exists are the duration of the disability, the extent of residual impairment, and the prognosis for eventual recovery. Further, unless the police report indicates otherwise, the insured will not know that the other driver is uninsured until suit is filed, and the other driver fails to tender the defense to an insurance company. The insured, thus, must file suit well before the one-year period in order to assure that the information is known in time to make a claim or file suit against the insurance company within one year of the accident. Applying the standard set forth in *Camelot*, . . . we conclude that the limitation here is not reasonable because, in most instances, the insured (1) does not have "sufficient opportunity to investigate and file an action," where the insured may not have sufficient information about his own physical condition to warrant filing a claim, and will likely not know if the other driver is insured until legal process is commenced, (2) under these circumstances, the time will often be "so short as to work a practical abrogation of the right of action," and (3) the action may be barred before the loss can be ascertained.
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> * * *

[2] 262 Mich App 679; 687 NW2d 304 (2004).

> Here, the Legislature has provided a three-year limitations period for personal injury claims. The insured must sue the other driver within three years of the injury, whether or not the insured has sufficient information to know if a serious impairment has been sustained, and whether or not the other driver is insured. Application of the three-year period would not deprive the insured of a sufficient opportunity to investigate and file a claim and does not work a practical abrogation of the right. [*Id.* at 686-687 (internal citations omitted).][3]

Subsequently, we granted defendant's application for leave to appeal.[4]

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's decision to grant or deny summary disposition.[5] In reviewing the motion, the pleadings, affidavits, depositions, admissions, and any other admissible evidence are viewed in the light most favorable to the nonmoving party.[6] Moreover, questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo.[7] In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument.[8]

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[3] Relying on *Herweyer v Clark Hwy Services, Inc,* 455 Mich 14; 564 NW2d 857 (1997), the Court of Appeals agreed with the trial court that the insurance policy was adhesive and "should receive close judicial scrutiny." 262 Mich App at 687.

[4] 471 Mich 904 (2004).

[5] *Van v Zahorik*, 460 Mich 320; 597 NW2d 15 (1999).

[6] *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

[7] *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002); *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001).

[8] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

III. ANALYSIS

A. THE "REASONABLENESS DOCTRINE" IN MICHIGAN

Under the language of the insurance policy at issue, an insured is required to file a claim or lawsuit for uninsured motorist benefits "within 1 year from the date of the accident." Plaintiff asks this Court to refuse to enforce that provision of the insurance contract because the limitations period is not "reasonable." This action, being a claim arising under the insurance policy, is a first-party claim against the insurer. Therefore, contrary to the Court of Appeals conclusion that a three-year period of limitations applies to this lawsuit, plaintiff's suit against Continental—in the absence of the limitations provision contained in the policy—would be governed by the general six-year period of limitations applicable to contract actions.[9]

Uninsured motorist insurance permits an injured motorist to obtain coverage from his or her own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver.[10] Uninsured motorist coverage is optional—it is not compulsory coverage mandated by the no-fault act.[11] Accord-

[9] MCL 600.5807(8). If plaintiffs brought suit against the at-fault driver instead of their own insurance carrier, such a third-party claim would be limited to being brought within three years pursuant to former MCL 600.5805(9), now MCL 600.5805(10), which governs claims for injury to person or property.

[10] The owner or operator of a vehicle is subject to tort liability for noneconomic loss only if the injured motorist has suffered death, serious impairment of a body function, or permanent serious disfigurement. MCL 500.3135(1); *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004); *Auto Club Ins Ass'n v Hill*, 431 Mich 449; 430 NW2d 636 (1988).

[11] *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 533; 676 NW2d 616 (2004).

ingly, the rights and limitations of such coverage are purely contractual and are construed without reference to the no-fault act.[12]

In support of their claim that a contractual limitations provision may be disregarded on the basis of an assessment of "reasonableness," plaintiffs rely on *Tom Thomas Org, Inc v Reliance Ins Co*.[13] In *Tom Thomas,* the plaintiff filed suit fifteen months after the loss to recover for property damage under an insurance policy. The policy contained a one-year limitation on filing suit.

Even a cursory reading of *Tom Thomas* reveals that the holding of the case was premised on "judicial tolling" rather than reasonableness. In fact, the majority in *Tom Thomas* specifically declined to address the reasonableness of the one-year limitation; instead, it predicated its holding on "reconciliation of the provisions of the policy" by the imposition of judicial tolling.[14] In dicta, the Court noted the "general rule" that a shortened contractual period of limitations was "valid *if reasonable* even though the period is less than that prescribed by otherwise applicable statutes of limitation."[15]

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[12] *Id*.

[13] 396 Mich 588; 242 NW2d 396 (1976).

[14] The *Tom Thomas* Court held that the contractual period of limitations was judicially tolled "from the time the insured gives notice until the insurer formally denied liability." *Id*. at 597.

[15] *Id.* at 592 (emphasis added). In support of the "general rule," the *Tom Thomas* Court cited a secondary source rather than Michigan authority. However, the opinion subsequently noted that prior Michigan case law had enforced shortened contractual limitations periods without resort to a "reasonableness" analysis. *Id*. at 592 n 4.

In fact, prior case law had consistently upheld the validity of contractually shortened limitations periods; such provisions could be avoided only where the insured could establish waiver on the part of the insurer or estoppel. See *McIntyre v Michigan State Ins Co*, 52 Mich 188; 17 NW

In *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co*,[16] this Court expanded upon the "reasonableness" dicta articulated in *Tom Thomas*. In *Camelot*, the plaintiff sought payment on a labor and material bond from the defendant. The defendant moved for summary disposition on the basis of the one-year limitations period contained in the bond contract. Citing *Tom Thomas* for the proposition that a shortened period of limitations is acceptable "where the limitation is reasonable,"[17] *Camelot* relied on case law from foreign jurisdictions in articulating a three-part test for evaluating the reasonableness of a contractually shortened limitations period.[18] Ultimately, the Court held that the

781 (1883); *Law v New England Mut Accident Ass'n*, 94 Mich 266; 53 NW 1104 (1892); *Turner v Fidelity & Cas Co*, 112 Mich 425; 70 NW 898 (1897) (insurance company waived one-year limitation by conduct); *Harris v Phoenix Accident & Sick Benefit Ass'n*, 149 Mich 285; 112 NW 935 (1907)(failure of the insured to sue within six months was not waived); *Friedberg v Ins Co of North America*, 257 Mich 291; 241 NW 183 (1932) (where settlement negotiations are broken off by the insurer near the end of the contractual limitations period, the provision was deemed waived); *Hall v Metro Life Ins Co*, 274 Mich 196; 264 NW 340 (1936); *Barza v Metro Life Ins Co,* 281 Mich 532; 275 NW 238 (1937) (the plaintiff was bound by two-year limitations clause where there was no evidence of waiver or estoppel); *Bashans v Metro Mut Ins Co,* 369 Mich 141; 119 NW2d 622 (1963) (insurer did not waive two-year "binding" limitations clause); *Better Valu Homes, Inc v Preferred Mut Ins Co*, 60 Mich App 315; 230 NW2d 412 (1975).

[16] 410 Mich 118; 301 NW2d 275 (1981).

[17] *Camelot* also cited *Barza v Metro Life* and *Turner v Fidelity*, n 15 *supra*, in support of the "rule" that a contractual limitations provision may be upheld if reasonable. *Camelot, supra* at 126. However, neither *Barza* nor *Turner* may be properly read as requiring reasonableness before a contractual provision may be deemed valid. In both cases, the analysis focused on whether the insurer waived the otherwise binding limitations provision.

[18] *Camelot* held that a contractually shortened limitations period is reasonable if (1) the claimant has sufficient opportunity to investigate and file an action, (2) the time is not so short as to work a practical

one-year period of limitations was reasonable, and that no public policy considerations precluded enforcement of the contractual provision.

In the end, *Camelot* enforced the contractually shortened limitations period at issue. However, rather than simply enforcing the contract as written, the decision in *Camelot* was premised upon the adoption of a "reasonableness" test found in the dicta of *Tom Thomas*. In failing to employ the plain language of the contract, the *Camelot* Court erred.

A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*.[19] Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that " '[t]he general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.' "[20]

When a court abrogates unambiguous contractual provisions based on its own independent assessment of

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abrogation of the right of action, and (3) the action is not barred before the loss or damage can be ascertained. *Id*. at 127.

[19] *Harrington v Inter-State Business Men's Accident Ass'n,* 210 Mich 327; 178 NW 19 (1920); *Indemnity Ins Co of North America v Geist*, 270 Mich 510; 259 NW 143 (1935); *Cottrill v Michigan Hosp Service*, 359 Mich 472; 102 NW2d 179 (1960); *Henderson v State Farm Fire & Cas Co*, 460 Mich 348; 596 NW2d 190 (1999); *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588; 648 NW2d 591 (2002).

[20] *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002), quoting *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 356; 51 S Ct 476; 75 L Ed 1112 (1931).

"reasonableness," the court undermines the parties' freedom of contract.[21] As this Court previously observed:

> This approach, where judges . . . rewrite the contract . . . is contrary to 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. This Court has recently discussed, and reinforced, its fidelity to this understanding of contract law in *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002). The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art I, § 10, cl 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society. Few have expressed the force of this venerable axiom better than the late Professor Arthur Corbin, of Yale Law School, who wrote on this topic in his definitive study of contract law, Corbin on Contracts, as follows:
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> "One does not have 'liberty of contract' unless organized society both forbears and enforces, forbears to penal-

[21] Justice KELLY maintains that reviewing contract provisions for "reasonableness" is "essential in order to accurately implement the intent of the contracting parties." *Post* at 495. However, it is difficult to rationalize implementing the intent of the parties by imposing contractual provisions that are *completely antithetic* to the provisions contained in the contract. Rather, the intent of the contracting parties is best discerned by the language actually used in the contract. As this Court noted in *Quality Products & Concepts Co v Nagel Precision, Inc,* 469 Mich 362, 375; 666 NW2d 251 (2003), "an unambiguous contractual provision is reflective of the parties' intent as a matter of law."

> ize him for making his bargain and enforces it for him after it is made. [15 Corbin, Contracts (Interim ed), ch 79, § 1376, p 17.]"[22]

Accordingly, we hold that an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy. A mere judicial assessment of "reasonableness" is an invalid basis upon which to refuse to enforce contractual provisions. Only recognized traditional contract defenses may be used to avoid the enforcement of the contract provision.[23] To the degree that *Tom Thomas, Camelot,* and their progeny abrogate unambiguous contractual terms on the basis of reasonableness determinations, they are overruled.[24]

B. THE PROVISION IS NOT CONTRARY TO LAW OR PUBLIC POLICY

We next consider whether the contractually shortened period of limitations violates law or public policy. As noted by this Court, the determination of Michigan's

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[22] *Wilkie*, *supra* at 51-52.

[23] Examples of traditional defenses include duress, waiver, estoppel, fraud, or unconscionability. See *Quality Products & Concepts Co, supra* (waiver); *Beloskursky v Jozwiak*, 221 Mich 316; 191 NW 16 (1922) (estoppel); *Hackley v Headley*, 45 Mich 569; 8 NW 511 (1881) (duress); *Witham v Walsh*, 156 Mich 582; 121 NW 309 (1909) (fraud); *Gillam v Michigan Mortgage-Investment Corp*, 224 Mich 405; 194 NW 981 (1923) (unconscionability).

[24] Justice KELLY maintains that the *Camelot* Court "applied a very old and well tested legal rule" when it adopted the so-called "reasonableness doctrine." *Post* at 496. However, as even the *Tom Thomas Court* recognized, Michigan jurisprudence enforced contractually shortened limitations provisions without regard to the "reasonableness" of the provisions. See n 15 of this opinion. Citation of case law from other jurisdictions simply does not alter the fact that the "very old and well tested legal rule" of *Michigan* eschewed using "reasonableness" as a basis for abrogating contractually shortened limitations provisions.

public policy "is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law."[25] In ascertaining the parameters of our public policy, we must look to "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."[26]

As an initial matter, we note that this Court has previously held that Michigan has "no general policy or statutory enactment . . . which would prohibit private parties from contracting for shorter limitations periods than those specified by general statutes."[27] This is consistent with our case law, which had held that contractually shortened periods of limitations were valid, and were to be disregarded only where the insured could establish estoppel or prove that the insurer waived the contractual provision.[28]

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[25] *Terrien*, *supra* at 67.

[26] *Id*. at 66-67.

[27] *Camelot*, *supra* at 139.

[28] See n 15 of this opinion. Amicus cites *Price v Hopkin*, 13 Mich 318 (1865), and *Lukazewski v Sovereign Camp of the Woodmen of the World*, 270 Mich 415; 259 NW 307 (1935), in support of the claim that Michigan case law has a "long-standing policy" of disregarding "unreasonable" contractual limitations periods. However, both cases are distinguishable.

In *Price*, the Legislature shortened a statute of limitations from twenty to fifteen years, giving the amendment retroactive effect. The plaintiff's grantor "was entitled by the existing statutes to bring her action within twenty years," but the statutory amendment immediately severed her cause of action. *Price, supra* at 323-324. Justice COOLEY held that the retroactive statutory amendment was unconstitutional as violative of due process because it annihilated a vested right without permitting a "reasonable time" to bring the lawsuit. *Id.* at 324-328.

Likewise, *Lukazewski* is also distinguishable. There, the plaintiff was

Likewise, there is no Michigan statute explicitly prohibiting contractual provisions that reduce the limitations period in uninsured motorist policies. The Legislature has proscribed shortened limitations periods in only one specific context: life insurance policies. MCL 500.4046(2).[29]

Notwithstanding the fact that the Commissioner approved for use the contract at issue in this case, the

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the beneficiary of a life insurance policy that required "proof of the insured's actual death." The policy also required that all lawsuits be commenced within one year from the date of death. The insured disappeared in 1925, but proof of his death was not established until 1932. The defendant "denied liability on the ground that both the contractual and statutory limitations" had expired. *Lukazewski, supra* at 417-418.

The *Lukazewski* Court held that, because the policy required affirmative proof of the decedent's death, the one-year limitations period would not begin to run until the death was discovered. The *Lukazewski* Court utilized the doctrine of judicial tolling, which is not at issue in the present case, to suspend the running of the contractual limitations period. However, it is unclear why the contractual limitations period was considered at all, as the contract provision violated the law. 1917 PA 256 was enacted four years before the issuance of the life insurance policy. 1917 PA 256, part 3, ch 2, § 4, contains a provision that is substantively identical to our current MCL 500.4046(2), see n 29 of this opinion. Thus, because the policy required actual proof of death, the cause of action did not accrue until death could be proven. The plain language of the statute provided the plaintiff six years *from the time the cause of action accrued* to file suit.

[29] MCL 500.4046 states in pertinent part:

> No policy of life insurance other than industrial life insurance shall be issued or delivered in this state if it contain [sic] any of the following provisions:
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> * * *
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> (2) A provision limiting the time within which any action at law or in equity may be commenced to less than 6 years after the cause of action shall accrue[.]

Commissioner now argues to this Court that MCL 500.2254 precludes contractual periods of limitations that are less than six years. The statute provides in part:

> No article, bylaw, resolution or policy provision adopted by any life, disability, surety, or casualty insurance company doing business in this state prohibiting a member or beneficiary from commencing and maintaining suits at law or in equity against such company shall be valid and no such article, bylaw, provision or resolution shall hereafter be a bar to any suit in any court in this state: Provided, however, That any reasonable remedy for adjudicating claims established by such company or companies shall first be exhausted by the claimant before commencing suit: Provided further, however, That the company shall finally pass upon any claim submitted to it within a period of 6 months from and after final proofs of loss or death shall have been furnished any such company by the claimant.

The plain language of the statute states that "[n]o . . . policy provision . . . *prohibiting* a member or beneficiary from commencing and maintaining [a lawsuit] against [the insurer] . . . shall be valid . . . ." (Emphasis added.) The common definition of "prohibit" is "to forbid by authority or command."[30] Clearly, the statute proscribes contractual provisions that forbid or preclude the commencement or maintenance of a lawsuit. The statute does not, however, bar the imposition of conditions that may be placed on the commencement and maintenance of a lawsuit.[31]

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[30] *New International Dictionary of the English Language* (1954), p 1978.

[31] We note that Justice KELLY's construction of this provision would render invalid any contractual limitations provision in an insurance contract, even one that paralleled the applicable statutory limitations period. *Post* at 502-503.

While nothing in our statutes explicitly addresses contractually shortened limitations periods outside the context of life insurance policies, we note that the Legislature *has* provided a mechanism to ensure the reasonableness of insurance policies issued in the state of Michigan.

MCL 500.2236(1) requires that all "basic insurance policy" forms be filed with the Commissioner's office and be approved by the Commissioner before a policy may be issued by an insurance company. If the Commissioner fails to act within thirty days after the policy form is submitted, the form is deemed approved. MCL 500.2236(1). One of the factors that the Commissioner may consider in determining whether to approve an insurance policy is the reasonableness of the conditions and exceptions contained therein. MCL 500.2236(5) and (6) provide:

> (5) Upon written notice to the insurer, the commissioner *may* disapprove, withdraw approval or prohibit the issuance, advertising, or delivery of any form to any person in this state if it violates any provisions of this act, or contains inconsistent, ambiguous, or misleading clauses, or *contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy.* The notice shall specify the objectionable provisions or conditions and state the reasons for the commissioner's decision. If the form is legally in use by the insurer in this state, the notice shall give the effective date of the commissioner's disapproval, which shall not be less than 30 days subsequent to the mailing or delivery of the notice to the insurer. If the form is not legally in use, then disapproval shall be effective immediately.
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> (6) If a form is disapproved or approval is withdrawn under the provisions of this act, the insurer is entitled upon demand to a hearing before the commissioner or a deputy commissioner within 30 days after the notice of disapproval or of withdrawal of approval. After the hearing, the com-

> missioner shall make findings of fact and law, and either affirm, modify, or withdraw his or her original order or decision. [Emphasis added.]

Clearly, the Legislature has assigned the responsibility of evaluating the "reasonableness" of an insurance contract to the person within the executive branch charged with reviewing and approving insurance policies: the Commissioner of Insurance.[32] The statute permits, but does not require, the Commissioner to disapprove or withdraw an insurance contract if the Commissioner determines that a condition or exception is unreasonable or deceptive. The decision to approve, disapprove, or withdraw an insurance policy form is within the sound discretion of the Commissioner. In this instance, the Commissioner has approved the Continental policy form containing the shortened limitations provision for issuance and use in the state of Michigan.[33]

Our courts have a very limited scope of review concerning the decisions made by the Commissioner. MCL 500.244(1) provides that an aggrieved person may seek judicial review of an "order, decision, finding, ruling, opinion, rule, action, or inaction" of the Commissioner as provided by the Administrative Procedures Act, MCL 24.201 *et seq*. MCL 24.306 provides:

> (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful

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[32] In other contexts, the Legislature has *explicitly* assigned the responsibility of assessing the reasonableness of private contracts to the judiciary. See, for example, MCL 445.774a, which governs noncompetition covenants between an employer and an employee.

[33] Justice KELLY erroneously reads MCL 500.2236(5) as rendering the Commissioner's *review* of a policy form discretionary. *Post* at 504-505. However, under that statutory subsection, the Commissioner's discretion extends only to the ability to "disapprove, withdraw approval or prohibit the issuance" of a policy form.

and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

(a) In violation of the constitution or a statute.

(b) In excess of the statutory authority or jurisdiction of the agency.

(c) Made upon unlawful procedure resulting in material prejudice to a party.

(d) Not supported by competent, material and substantial evidence on the whole record.

(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law.

Here, plaintiffs have not challenged the decision of the Commissioner to allow issuance of the Continental policy, much less shown that the Commissioner's decision was arbitrary, capricious, or a clear abuse of discretion.[34] Accordingly, the explicit "public policy" of Michigan is that the reasonableness of insurance contracts is a matter for the executive, not judicial, branch of government. As such, the lower courts were not free to invade the jurisdiction of the Commissioner and determine de novo whether Continental's policy was reasonable.

C. ADHESION CONTRACTS

We turn finally to the trial court's conclusion that the policy was an "adhesion contract" and was therefore unenforceable. The trial court's ruling rested on the

[34] Certainly, if the Commissioner were to determine subsequently that the provision at issue unreasonably affected the risk assumed in the policy, MCL 500.2236(5) and (6) provide the appropriate mechanism for withdrawing approval of the policy condition.

assumption that "adhesion contracts" are subject to a greater level of judicial scrutiny than other contracts—and, indeed, that so-called adhesion contracts need not be enforced if the court views them as unfair. The Court of Appeals reached a similar conclusion:

> We further note that the concern the Court expressed in *Herweyer* is present here as well. The insured had the option of accepting uninsured motorist coverage or rejecting it, but could not have bargained for a longer limitations period. Accordingly, the policy should receive close judicial scrutiny. [262 Mich App at 687][35]

The contract construction approach of the lower courts is inconsistent with traditional contract principles. An "adhesion contract" is simply that: a *contract*.[36] It must be enforced according to its plain terms unless one of the traditional contract defenses applies.

Indeed, a careful examination of our contract jurisprudence reveals that the "adhesion contract doctrine" existed in Michigan solely in dicta until it was implicitly

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[35] Justice KELLY charges that, in addressing the *Herweyer* adhesion contract issue, we are "engag[ing] in judicial activism". *Post* at 512. This is a strange accusation given that *both* the trial court and the Court of Appeals relied on the adhesion contract principles announced in *Herweyer* as a basis for invalidating the contractual limitations provision at issue. We think it unremarkable for this Court to address an issue that all the lower courts addressed. Moreover, because it was *Herweyer* that literally ignored nearly a century of contrary precedent in adopting a new rule of contractual construction (see n 15 of this opinion), the claim of "judicial activism" would seem most accurately applied to the *Herweyer* majority.

[36] There are many descriptive labels that are used to categorize species of contracts: "unilateral," see, e.g., *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 138 n 9; 666 NW2d 186 (2003), "executory," see, e.g., *Kolton v Nassar*, 358 Mich 154, 156; 99 NW2d 362 (1959), "installment," *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 532 n 5; 676 NW2d 616 (2004), etc. The fact that a particular label is attached to a contract does not exempt the contract from the application of standard contract law principles.

adopted by this Court in *Herweyer v Clark Hwy Services, Inc*. Moreover, it was adopted in *Herweyer* without substantive analysis, and without reference to and in contravention of more than one hundred years of contrary case law from this Court.

Before turning to the state of the "adhesion contract doctrine" in our jurisprudence, it is important to begin with a sense of how the notion of an "adhesive" contract arose in the first place. The term "adhesion contract" was originally coined simply as a descriptive label for a common contract practice in the insurance industry. The term was introduced in a 1919 law review article by University of Colorado Law School professor Edwin W. Patterson to describe a life insurance policy term requiring "delivery of the policy to the applicant" before the policy became effective.[37] Professor Patterson made the observation that "[l]ife-insurance contracts are contracts of 'adhesion.' The contract is drawn up by the insurer and the insured, who merely 'adheres' to it, has little choice as to its terms."[38] Patterson noted that "a majority of the courts have strictly enforced" such contractual stipulations, although some courts had "executed successful flanking movements" to find either that the insurer had waived the requirement, or that the policy had been delivered.[39] Thus, the original designation of "adhesion contract" described a *type* of contract, but did not suggest that such a description rendered the contract or its provisions unenforceable.

It was not until a quarter-century later that Patterson's label for life insurance contracts evolved into something resembling a "doctrine." In 1943, Yale Law

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[37] Patterson, *The delivery of a life-insurance policy,* 33 Harv L R 198 (1919).

[38] *Id*. at 222.

[39] *Id*. at 221.

School Professor Friedrich Kessler expanded on Patterson's description of practices in the life insurance industry to argue that courts should simply refuse to enforce unfair provisions of "adhesion contracts" rather than utilize traditional contract law principles.[40] While conceding that "society as a whole ultimately benefits from the use of standard contracts," Professor Kessler nonetheless maintained that such contracts were typically used by enterprises with "strong bargaining power," and that the "weaker party" frequently could not "shop around for better terms, either because the author of the standard contract [had] a monopoly" or because all competitors used the same clauses.[41] Kessler expressed concern that "powerful industrial and commercial overlords" would impose "a new feudal order of their own making upon a vast host of vassals."[42]

While noting that "freedom of contract has remained one of the firmest axioms in the whole fabric of the social philosophy of our culture,"[43] Kessler asserted that the meaning of "freedom of contract" varied with "the social importance of the type of contract and with the degree of monopoly enjoyed by the author of the standardized contract."[44] Thus, Kessler advocated nonenforcement of clauses contained in standardized contracts, but *only* where the type of contract was of sufficient "social importance" and where the author of the contract enjoyed a monopoly over the socially important good or service.

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[40] Kessler, *Contracts of adhesion—some thoughts about freedom of contract,* 43 Colum L R 629 (1943). Kessler advocated that the "task of adjusting" contract law as it applied to adhesion contracts had to "be faced squarely and not indirectly." *Id*. at 637.

[41] *Id.* at 632.

[42] *Id*. at 640.

[43] *Id*. at 641.

[44] *Id*. at 642.

The groundwork for the "adhesion contract doctrine" was thus laid in academia, first in Patterson's positive analysis and then in Kessler's normative article. In Michigan, the notion was first imported into our case law in 1970. In *Zurich Ins Co v Rombough,*[45] the issue to be determined was whether an insurer had a duty to defend when its policy contained two apparently conflicting provisions.[46] The opinion noted that "[i]t is elemental insurance law that ambiguous policy provisions must be construed against the insurance company and most favorably to the premium-paying insured."[47] After noting this legal principle, the *Rombough* Court cited the following language from a California Supreme Court case to further support its rule of construction:

> Justice Tobriner, writing for the California Supreme Court in the case of *Gray* v. *Zurich Insurance Company* (1966), 65 Cal 2d 263 (54 Cal Rptr 104, 419 P2d 168), construing similar provisions, said:
>
> "In interpreting an insurance policy we apply the general principle that doubts as to meaning must be resolved against the insurer and that any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.
>
> "*These principles of interpretation of insurance contracts have found new and vivid restatement in the doctrine of the adhesion contract*. As this court has held, a contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized

[45] 384 Mich 228; 180 NW2d 775 (1970).

[46] The policy contained an exclusion clause, indicating that the policy did not apply if insured vehicles were "used to carry property in any business." *Id*. at 230. The policy also contained a provision indicating that the company would provide a defense for any lawsuit even if the suit was "groundless, false or fraudulent." *Id*. at 231.

[47] *Id*. at 232.

> contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a 'take it or leave it basis' carries some consequences that extend beyond orthodox implications. Obligations arising from such a contract inure not alone from the consensual transaction but from the relationship of the parties.
>
> "Although courts have long followed the basic precept that they would look to the words of the contract to find the meaning which the parties expected from them, they have also applied the doctrine of the adhesion contract to insurance policies, holding that in view of the disparate bargaining status of the parties we must ascertain that meaning of the contract which the insured would reasonably expect."[48]

The *Rombough* Court concluded by purporting to "adopt" the reasoning of *Gray v Zurich*, holding that the policy language was "sufficiently ambiguous" to require plaintiff to provide a defense.[49]

Thus, the term "adhesion contract" was first introduced in Michigan jurisprudence in support of the rule of *contra proferentem*,[50] wherein contract terms are construed against the drafter in the event of an ambiguity to meet the "reasonable expectations" of the insured. However, because *Rombough* was decided on the basis of *contra proferentem*—a rule of interpretation providing that truly ambiguous contractual language is to be construed against the drafter[51]—its language

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[48] *Id*. at 232-233. The practice of interpreting contracts on the basis of reasonable expectations rather that the plain language of the contract was repudiated by this Court in *Wilkie, supra* at 63.

[49] *Rombough, supra* at 234.

[50] See also *Klapp v United Ins Group Agency*, *Inc,* 468 Mich 459; 663 NW2d 447 (2003) (discussing *contra proferentem* as a rule of legal effect, to be utilized only after all conventional means of contract interpretation have been applied).

[51] See, e.g., *Twichel, supra* at 535 n 6.

regarding adhesion contracts is, as we stated in *Wilkie*,[52] properly classified as obiter dicta.

Subsequently, in *Cree Coaches, Inc v Panel Suppliers, Inc,*[53] this Court referred again to the "adhesion contract" concept. The defendant in *Cree Coaches* had constructed a building for the plaintiff pursuant to a contract that limited the warranty to one year after the contract was completed. Six years later, the building collapsed from the weight of snow. In *upholding* the provisions limiting the plaintiff's warranty claims and the warranty period, the Court noted in dicta—and without analysis—that the Court did not regard the construction contract "as a contract of adhesion from which public policy would grant relief."[54] This digression was cryptic at best, because this Court had never before declined to enforce an "adhesion contract."

The term "adhesion contract" was discussed again a decade later in *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co.*[55] In his concurring opinion, Justice LEVIN agreed with the majority that a clause in a construction insurance bond limiting the time within which the insured could bring suit to one year was enforceable. He stated, however, that "[a]n adhesion contract–such as most contracts of insurance–in which the shortened period has not actually been bargained for, or which operates to defeat the claim of an intended beneficiary not involved in the bargaining process," would "present a different case."[56] Again, the basis for Justice LEVIN's assertion is unclear, because character-

[52] *Wilkie, supra* at 55-56.

[53] 384 Mich 646; 186 NW2d 335 (1971).

[54] *Id*. at 649.

[55] 410 Mich 118; 301 NW2d 275 (1981).

[56] *Id*. at 142-143.

ization of an agreement as an adhesive contract had never before been pivotal in the Court's analysis or enforcement of a contract.

The development of the notion that adhesion contracts were subject to different standards of enforcement was dealt a significant blow in *Raska v Farm Bureau Mut Ins Co of Michigan*.[57] There, the plaintiff brought suit for breach of an automobile policy and for a declaratory judgment that an "owned automobile" exclusion was ambiguous and should be construed against the insurer, and was void as contrary to public policy. This Court not only *enforced* the contractual policy exclusion, but held that "[*a*]*ny* clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy."[58] In dissent, Justice WILLIAMS stated that he would have declined to enforce the contractual exclusion because "an insurance contract, as a contract of adhesion, is construed in favor of the insured," as well as because of the "reasonable expectations" of the insured.[59] *Raska*, therefore, stands for the proposition that an insurance contract must be interpreted like any other contract: according to its plain unambiguous terms.

This Court's first attempt at describing the elements of the adhesion contract doctrine—a doctrine the Court had yet to adopt—was the plurality opinion in *Morris v Metriyakool*.[60] There, the plaintiff signed an arbitration agreement upon admission to the hospital for medical treatment. The hospital presented the arbitration agreement pursuant to the former medical malpractice

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[57] 412 Mich 355; 314 NW2d 440 (1982).

[58] *Id*. at 361-362 (emphasis added).

[59] *Id*. at 364.

[60] 418 Mich 423; 344 NW2d 736 (1984).

arbitration act (MMAA).[61] At issue was the question whether the MMAA was unconstitutional as violative of the plaintiff's due process rights. After determining that the act did not implicate due process concerns, Justice KAVANAGH, joined by Justice LEVIN, rejected the plaintiff's assertion that the contract was one of adhesion, holding:

> Contracts of adhesion are characterized by standardized forms prepared by one party which are offered for rejection or acceptance without opportunity for bargaining and under the circumstances that the second party cannot obtain the desired product or service except by acquiescing in the form agreement. Regardless of any possible perception among patients that the provision of optimal medical care is conditioned on their signing the arbitration agreement, we believe that the sixty-day rescission period, of which patients must be informed, fully protects those who sign the agreement. The patients' ability to rescind the agreement after leaving the hospital allows them to obtain the desired service without binding them to its terms. *As a result, the agreement cannot be considered a contract of adhesion*.[62]

Writing separately, Justice RYAN, joined by Justice BRICKLEY, held that the MMAA did not violate due process concerns because there was no state action. In addressing the plaintiff's claim that the arbitration agreement was an adhesion contract, Justice RYAN stated:

> A contract of adhesion is a contract which has some or all of the following characteristics: the parties to the

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[61] Former MCL 600.5040 *et seq*.

[62] *Id*. at 440 (citations omitted; emphasis added). Justices KAVANAGH and LEVIN further determined that the arbitration agreement was not "unconscionable" because it was "not a long contract" and because arbitration was "the essential and singular nature of the agreement." *Id*. at 441.

> contract were of unequal bargaining strength; the contract is expressed in standardized language prepared by the stronger party to meet his needs; and the contract is offered by the stronger party to the weaker party on a "take it or leave it" basis. Therefore, the essence of a contract of adhesion is a nonconsensual agreement forced upon a party against his will. [63]

Justice RYAN agreed with the majority, however, that the contracts at issue in *Morris* were not adhesion contracts. Thus, while a majority of the *Morris* Court agreed that the contracts at issue were not contracts of adhesion, a majority could not agree on what, in fact, made a contract one of adhesion.[64]

The plurality opinion of *Powers v Detroit Automobile Inter-Ins Exch*[65] asserted that *all* insurance contracts are adhesion contracts: nonnegotiated, take-it-or-leave-it, standardized forms, drafted by "insurance and legal experts of a state, national, or international organization, hundreds and maybe thousands of miles away."[66] The plurality opinion utilized the now-repudiated doctrine of reasonable expectations to resolve the case,[67] noting that an ambiguity was not a necessary precondition for invoking that doctrine. Thus, rather than assessing whether the contract was indeed adhesive, the *Powers* plurality opinion decreed that all insurance contracts were contracts of adhesion, applying the rea-

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[63] *Id*. at 471-473 (citation omitted).

[64] Justice WILLIAMS concurred with Justice KAVANAGH on the ground of constitutionality only, while Justice CAVANAGH issued a dissent addressing only the constitutional issue. Justice BOYLE did not participate in the resolution of the case.

[65] 427 Mich 602; 398 NW2d 411 (1986), overruled by *Wilkie, supra* at 63.

[66] *Id.* at 608. Only Justice ARCHER joined Justice WILLIAMS'S opinion. Justices BRICKLEY and CAVANAGH concurred in the result only.

[67] See *Wilkie*, *supra*.

sonable expectations doctrine without regard to ambiguity.

The concept of "adhesion contracts" took yet another turn in *Auto Club Ins Ass'n v DeLaGarza*.[68] The *DeLaGarza* majority concluded that the insurance policy at issue was ambiguous and was therefore to be construed "against the drafter of the provision and in favor of coverage."[69] Again, in dicta, the Court endorsed the notion that certain contracts are adhesive and are therefore to be construed in favor of the insured.[70]

Finally, in *Herweyer v Clark Hwy Services, Inc,*[71] this Court declined to enforce the plain language of a contract arguably because the contract at issue was adhesive. *Herweyer* concerned the validity of a shortened limitations provision in an employment contract and the application of a saving clause that required enforcement of the contract "as far as legally possible." In concluding that the six-month limitations period in the contract at issue was unenforceable, *Herweyer* cited Justice LEVIN's concurring opinion in *Camelot*:

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[68] 433 Mich 208; 444 NW2d 803 (1989).

[69] *Id.* at 218.

[70] *Id*. at 215 n 7, noting the "judicial predisposition toward the insured," and quoting 7 Williston, Contracts (3d ed), § 900, pp 19-20:

> "The fundamental reason which explains this and other examples of judicial predisposition toward the insured is the deep-seated, often unconscious but justified feeling or belief that the powerful underwriter, having drafted its several types of insurance 'contracts of adhesion' with the aid of skillful and highly paid legal talent, from which no deviation desired by an applicant will be permitted, is almost certain to overreach the other party to the contract. The established underwriter is magnificently qualified to understand and protect its own selfish interests. In contrast, the applicant is a shorn lamb driven to accept whatever contract may be offered on a 'take-it-or-leave-it' basis if he wishes insurance protection."

[71] 455 Mich 14; 564 NW2d 857 (1997).

> In *Camelot*, Justice LEVIN expressed concerns about the development of a rule authorizing contractually shortened periods of limitation. He reasoned:
>
> "The rationale of the rule allowing parties to contractually shorten statutory periods of limitation is that the shortened period is a bargained-for term of the contract. Allowing such bargained-for terms may in some cases be a useful and proper means of allowing parties to structure their business dealings.
>
> "In the case of an adhesion contract, however, where the party ostensibly agreeing to the shortened period has no real alternative, this rationale is inapplicable."[72]

Solely on the basis of Justice LEVIN's concurring opinion in *Camelot*, the *Herweyer* Court indicated—for the first time in this Court's history—that a so-called "adhesion contract" was unenforceable simply because of the disparity in the contracting parties' "bargaining power":

> We share Justice LEVIN's concerns. Employment contracts differ from bond contracts. An employer and employee often do not deal at arms length when negotiating contract terms. An employee in the position of plaintiff has only two options: (1) sign the employment contract as drafted by the employer or (2) lose the job. Therefore, unlike in *Camelot* where two businesses negotiated the contract's terms essentially on equal footing, here plaintiff had little or no negotiating leverage. *Where one party has less bargaining power than another, the contract agreed upon might be, but is not necessarily, one of adhesion, and at the least deserves close judicial scrutiny.*[73]

The *Herweyer* Court did not cite a single majority opinion of this Court to support its conclusion. More astonishingly, the majority failed to recognize—much less distinguish or overrule—more than a century of

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[72] *Herweyer*, *supra* at 20-21 (citation omitted).

[73] *Id*. at 21 (emphasis added).

contrary case law belying its conclusion that a shortened limitations period was unenforceable.[74]

The preceding analysis shares many similarities with our decision in *Wilkie*, in which we also sought to clarify this state's contract jurisprudence. As in *Wilkie,* analyzing the concept of adhesive contracts in our jurisprudence requires that we confront "a confused jumble of ignored precedent, silently acquiesced to plurality opinions, and dicta, all of which, with little scrutiny, have been piled on each other to establish authority."[75]

Here, this "confused jumble" is exemplified by *Herweyer,* which held for the first time in our contract jurisprudence that an adhesion contract is subject to "close judicial scrutiny" and may be voided if the contract fails to meet the court's satisfaction. This holding was inconsistent not only with a century of case law to the contrary,[76] but with the very principles upon which that jurisprudence is based—namely, freedom of contract and the liberty of each person to order his or her own affairs by agreement.

Today we are faced with a choice. We may follow *Herweyer* and its summary conclusion that "[w]here one party has less bargaining power than another, the contract agreed upon might be, but is not necessarily, one of adhesion, and at the least deserves close judicial scrutiny."[77] Or we may, consistently with the many cases that *Herweyer* presumptively displaced without overruling them, hold that an adhesion contract is simply a type of contract *and* is to be enforced according to its plain terms just as any other contract. We choose

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[74] See n 15 of this opinion; see also *Tom Thomas, supra* at 592 n 4.

[75] *Wilkie*, *supra* at 60.

[76] See n 15 of this opinion.

[77] *Herweyer*, *supra* at 21.

the latter course because it is most consonant with traditional contract principles our state has historically honored.

As with any contract, the "rights and duties" of a party to an adhesion contract are "derived from the terms of the agreement."[78] A party may avoid enforcement of an "adhesive" contract only by establishing one of the traditional contract defenses, such as fraud, duress, unconscionability, or waiver.[79] As we stated in *Raska,*[80] and reaffirmed in *Wilkie*:[81]

> The expectation that a contract will be enforceable other than according to its terms surely may not be said to be reasonable. If a person signs a contract without reading all of it or without understanding it, under some circumstances that person can avoid its obligations on the theory that there was no contract at all for there was no meeting of the minds.
>
> But to allow such a person to bind another to an obligation not covered by the contract as written because the first person thought the other was bound to such an obligation is neither reasonable nor just.

Therefore, we hold that it is of no legal relevance that a contract is or is not described as "adhesive." In either case, the contract is to be enforced according to its plain language. Regardless of whether a contract is adhesive, a court may not revise or void the unambiguous language of the agreement to achieve a result that it views as fairer or more reasonable.[82]

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[78] *Wilkie*, *supra* at 62.

[79] See n 23 of this opinion.

[80] *Raska, supra* at 362-363.

[81] *Wilkie*, *supra* at 63.

[82] In dissent, Justice KELLY opines that adhesion contracts should be viewed "with skepticism" because "[m]ost people simply do not have the opportunity, time, or special ability to read the policy before agreeing to it." *Post* at 508, 509. However, an insured's failure to read his or her insurance contract has never been considered a valid defense. This Court

The term "adhesion contract" may, as Professor Patterson originally intended, be used to describe a contract for goods or services offered on a take-it-or-leave-it basis. But it may not be used as a justification for creating any adverse presumptions or for failing to enforce a contract as written. To the extent that *Herweyer* held to the contrary, it is overruled.[83]

In this case, plaintiffs do not argue that they were fraudulently induced to sign their agreement with defendant, that they entered into the contract under duress, or that any other traditional contract defense applies.[84] Therefore, irrespective of whether their contract is labeled "adhesive" under Kessler's standard, the competing *Morris* standards, or any other definition of the term, we must enforce the plain language of that agreement.[85]

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has historically held an insured to have knowledge of the contents of the policy, in the absence of fraud, even though the insured did not read it. See *Cleaver v Traders' Ins Co*, 65 Mich 527; 32 NW 660 (1887); *Wierengo v American Fire Ins Co*, 98 Mich 621; 57 NW 833 (1894); *Snyder v Wolverine Mut Motor Ins Co*, 231 Mich 692; 204 NW 706 (1925); *Serbinoff v Wolverine Mut Motor Ins Co*, 242 Mich 394; 218 NW 776 (1928); *House v Billman*, 340 Mich 621; 66 NW2d 213 (1954). Additionally, the Commissioner is precluded from approving an insurance policy that fails to obtain a prescribed "readability score" as set forth in MCL 500.2236(3).

[83] Justice KELLY believes that overruling *Herweyer* represents a "radical change of the law," and that this Court should continue to "right the wrongs of adhesion contracts." *Post* at 511. However, as stated previously, the dissent overlooks the fact that *Herweyer* created a "radical change of the law" in Michigan.

[84] Justice KELLY suggests that there is never a meeting of the minds with a standardized form contract "[i]f the consumer does not read and comprehend the individual clauses of the contract . . . ." *Post* at 508. If this is indeed the case, then *no contract exists at all*. See *Quality Products*, *supra* at 372 ("Where mutual assent does not exist, a contract does not exist.") If the contract does not exist, there is nothing for a court to "revise."

[85] We are at a loss to understand Justice WEAVER's dissent. Nothing in this opinion breaks new ground. Justice WEAVER's objection to the

IV. CONCLUSION

Consistent with our prior jurisprudence, unambiguous contracts, including insurance policies, are to be enforced as written unless a contractual provision violates law or public policy. Judicial determinations of "reasonableness" are an invalid basis upon which to refuse to enforce unambiguous contractual provisions. Traditional defenses to enforcement of the contract at issue, such as waiver, fraud, or unconscionability, have neither been pled nor proven. Moreover, nothing in our law or public policy precludes the enforcement of the contractual provision at issue. Finally, in the specific arena of insurance contracts, the Legislature has enacted a mechanism whereby policy provisions may be scrutinized and rejected on the basis of reasonableness. This responsibility, however, has been explicitly assigned to the Commissioner. The Commissioner has approved the policy form at issue. Plaintiffs have not challenged in the appropriate forum that this action was an abuse of discretion.

Accordingly, we reverse the Court of Appeals decision and remand for entry of summary disposition in favor of defendant.

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

KELLY, J. (*dissenting*). I dissent today because the majority has come to what I believe to be the incorrect conclusion on nearly every count. Not only does it reach the wrong result in this case, it takes a drastic step in

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proposition that an insurance contract be enforced in accordance with its plain terms, just as any other contract, is a proposition found in *Raska, Wilkie*, and *Klapp, supra*. We do not purport to address the laundry list of issues raised in her dissent.

the wrong direction with respect to contract law in general. The majority's decision constitutes a serious regression in Michigan law, and it gives new meaning to the term "judicial activism." Therefore, I cannot let it pass without comment.

It is a legitimate exercise for courts to review the reasonableness of contractual clauses that limit the period during which legal actions can be brought. Courts have conducted reviews of this type for well over a century. These reviews constitute a necessary step in ensuring accurate enforcement of the intent of parties to a contract.

Moreover, in deciding this case, it is unnecessary to reach the issue of adhesion contracts. Yet the majority does so, apparently using this dispute as a vehicle to reshape the law on adhesion contracts more closely to its own desires. I believe that the scrutiny and protections offered by traditional adhesion contract law offer appropriate safeguards for the people of this state. Therefore, I would leave that law unmolested and would affirm the decision of the Court of Appeals.

I. THE LONG HISTORY OF JUDGING LIMITATIONS PERIODS FOR REASONABLENESS

The majority opinion includes an extensive discussion of what its author believes to be the history of the "reasonableness doctrine" in Michigan. It effectively concludes that this Court created new law when it evaluated a shortened limitations period for reasonableness in *Herweyer v Clark Hwy Services*, 455 Mich 14, 20; 564 NW2d 857 (1997), *Armand v Territorial Constr, Inc*, 414 Mich 21, 27-28; 322 NW2d 924 (1982), *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co,* 410 Mich 118; 301 NW2d 275 (1981), and *Tom Thomas Org,*

Inc v Reliance Ins Co, 396 Mich 588, 592; 242 NW2d 396 (1976). This is not accurate.

It has long been the law that all limitations periods are subject to judicial review for reasonableness. Statutes of limitations enacted by the Legislature must be subject to such review. "Generally speaking, the time determined by the legislature within which an action may be brought is constitutional *where it is reasonable*." 54 CJS, Limitations of Actions, § 5, p 23. (Emphasis added.) This Court recognized and applied this rule more than 140 years ago when it wrote:

> [T]he legislative authority is not so entirely unlimited that, under the name of a statute limiting the time within which a party shall resort to his legal remedy, all remedy whatsoever may be taken away. . . . It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought[,] and a statute that fails to do this cannot possibly be sustained as a law of limitations . . . . [*Price v Hopkin*, 13 Mich 318, 324-325 (1865) (citations omitted).]

The essential reasoning behind this rule is that an unreasonable limitations period offers an aggrieved party no recourse to the courts. And it unfairly divests that party of a right that it supposedly provided. 54 CJS, Limitations of Actions, § 5, p 24.

For almost 140 years, this same rule and reasoning were applied to limitations periods created both by a contract and by a statute.

> [P]arties to a contract may, by an express provision therein, provide another and different period of limitation from the provided statute, and . . . such limitation, if reasonable, will be binding and obligatory upon the parties. [1 Wood, Limitation of Actions (4th ed, 1916), § 42, p 145.]

This rule of law was generally accepted and widely cited by courts throughout the country. See *Longhurst v Star*

Ins Co, 19 Iowa 364, 370-371 (1865), *Gulf, C & S F R Co v Trawick*, 68 Tex 314, 319-320; 4 SW 567 (1887), *Gulf, C & S F R Co v Gatewood*, 79 Tex 89, 94; 14 SW 913 (1890), *Sheard v United States Fidelity & Guaranty Co*, 58 Wash 29, 33-34; 107 P 1024 (1910), *Pacific Mut Life Ins Co v Adams*, 27 Okla 496, 503; 112 P 1026 (1910), *Fitger Brewing Co v American Bonding Co of Baltimore*, 127 Minn 330; 149 NW 539 (1914), *Gintjee v Knieling*, 35 Cal App 563, 565-566; 170 P 641 (1917), *Columbia Security Co v Aetna Accident & Liability Co*, 108 Wash 116, 120; 183 P 137 (1919), and *Page Co v Fidelity & Deposit Co of Maryland*, 205 Iowa 798; 216 NW 957 (1927).

The United States Supreme Court discussed a similar topic well over a century ago. In *Express Co v Caldwell*,[1] the Court considered a common carrier's right to enter into a contract to limit its liability.[2] It held that, while a common carrier could enter into such a contract, courts could review the contract provision for reasonableness. This review was deemed essential because carriers were in a position of advantage over members of the public requiring their service. *Express Co, supra* at 267.

In 1865, the Iowa Supreme Court used similar reasoning when it subjected contractual limitations periods to a reasonableness review. The court was asked to enforce a twelve-month limitations period under circumstances in which the necessary facts to bring a claim could not reasonably have been ascertained in twelve months. It refused, saying that to do so would impute a dishonest purpose to the company. *Longhurst*, *supra* at 371.

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[1] 88 US (21 Wall) 264; 22 L Ed 556 (1875).

[2] Under common law, a common carrier would act as an insurer against all loss or damage except that stemming from an act of God or "the public enemy." *Id*. at 266.

> By putting this construction upon the contract of insurance, you preserve the upright intent of the company intact. Whereas if you put the other construction upon it, you, by implication, charge, or perhaps it would be better to say, judicially determine, that the company granted a policy for a valuable consideration paid, which at the time, they had reason to believe, would be no risk to them and no protection to the insured, and thereby obtained money for themselves under false pretenses. True charity thinketh no evil. It is therefore right for us to presume, that it was the honest intent of the company, to insure the plaintiff's mechanic's lien upon the premises specified, against loss by fire, and, upon the other hand, that it was the expectation of the insured, in paying the required premium, that his policy would cover the loss and give him the requisite protection. [*Id*.]

From these cases, one can see that the reasonableness doctrine is far from a novel legal idea. It has a solid foundation well recognized by the courts of this country, most notably the United States Supreme Court.

Also from these cases, the necessity of having such a review becomes apparent. Courts have recognized that insurers are in a position of power and control over the people purchasing their product. Careful judicial review is imperative so that the power is not abused. *Express Co*, *supra*; *Longhurst*, *supra*. Moreover, this review is essential in order to accurately implement the intent of the contracting parties. Because the overriding intent of a contract of insurance is to provide protection, the contract should not be read so as to eliminate that protection unreasonably.[3] *Id*.; *Spaulding v Morse*, 322

[3] The majority argues that the best way to discern the intent of the parties is by using the language contained in the contract. But in truth, the majority's decision today indicates that this is the *only* way to discern their intent. I simply disagree, as does the majority of modern courts. As the great Learned Hand stated, "There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute,

Mass 149, 152-153; 76 NE2d 137 (1947). Otherwise, the insurer would collect money without providing coverage.

Hence, application of the reasonableness rule of contractual construction is well founded and reasoned. And Michigan courts following this rule have wisely joined the general trend of all courts in this country. Rather than creating new law or diverting from established contractual interpretation principles, our Court in *Camelot* applied a very old and well tested legal rule.[4]

II. MODERN COURTS DISCUSSION OF THE ISSUE AT HAND

The long-established rule that courts review contractual limitations periods for their reasonableness has not been abandoned in modern times. In fact, several state courts have faced the very issue presented in this case. Nearly every court that has considered an uninsured motorist insurance contract that limits the applicable statutory period of limitations has found the limitation unreasonable.

For example, in *Elkins v Kentucky Farm Bureau Mut Ins Co*,[5] the insurance contract limited an uninsured

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a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure." *Central Hanover Bank & Trust Co v Comm'r of Internal Revenue*, 159 F2d 167, 169 (CA 2, 1947). I believe that courts should give effect to the actual intent of the parties as expressed through the document as a whole. The protections contracted for should not be unreasonably eliminated.

[4] It is true that cases decided before *Tom Thomas* and *Camelot* upheld contractual limitations periods without discussing reasonableness. But this does not mean that Michigan courts "eschewed" the principle. Likely, the issue was not raised in those cases. When Michigan courts had the issue actually before them, they followed the well-tested legal rule established by courts throughout the United States legal system, including by the Supreme Court.

[5] 844 SW2d 423 (Ky App, 1992).

motorist claim to one year following the accident. This conflicted with the two-year statutory period of limitations for claims against a motorist. *Id*. The Kentucky court found the one-year limitations period unreasonable and refused to enforce it. It stated:

> [I]t makes no sense to allow two years (or more) to file a suit against an uninsured or underinsured tort-feasor and yet permit the insurer to escape liability if the suit involving it is not filed within one year. Such would not only be an unreasonably short time, but it would completely frustrate the no-fault insurance scheme. [*Id.* at 424.]

The Kentucky court noted that it was following the majority of courts that have ruled on the issue. See *Scalf v Globe American Cas Co*, 442 NE2d 8 (Ind App, 1982); *Sandoval v Valdez*, 91 NM 705; 580 P2d 131 (1978); *Signal Ins Co v Walden*, 10 Wash App 350; 517 P2d 611 (1973); *Burgo v Illinois Farmers Ins Co*, 8 Ill App 3d 259; 290 NE2d 371 (1972); *Nixon v Farmers Ins Exch*, 56 Wis 2d 1; 201 NW2d 543 (1972).

Therefore, the majority today has not only rejected the long-established rule regarding review for reasonableness, but it has also broken company with the majority of courts addressing the issue. This fact strongly suggests that the majority is not on the firm legal ground it claims. Rather, it is pushing Michigan law out on a tenuous ledge, distancing it from the law of our sister states.

III. THE LIMITATIONS PROVISION UNDER REVIEW WAS UNREASONABLE

Given that the "reasonableness doctrine" has been so well established, it should be applied without hesitation to the facts of this case. A review of the facts demon-

strates the shocking inequity of the one-year limitations provision in defendant's uninsured motorist insurances contract.

The section of the contract in question provides:

> We will pay compensatory damages which any *covered person* is legally entitled to recover from the owner or operator of an *uninsured motor vehicle* because of *bodily injury*:
>
> 1. Sustained by any *covered person;* and
>
> 2. Caused by an *accident* arising out of the ownership, maintenance or use of an *uninsured motor vehicle*;
>
> Claim or suit must be brought within 1 year from the date of the *accident*. [Emphasis in original.]

This Court in *Herweyer* articulated the three-pronged test for determining if a limitations clause is reasonable:

> It is reasonable if (1) the claimant has sufficient opportunity to investigate and file an action, (2) the time is not so short as to work a practical abrogation of the right of action, and (3) the action is not barred before the loss or damage can be ascertained. [*Herweyer*, *supra* at 20, citing *Camelot*, *supra*.]

All prongs of the test outlined in *Camelot* and *Herweyer* weigh against allowing a shortened limitations period in this case.

Plaintiffs did not have sufficient time to investigate and file an action. Under the contract, the liability for uninsured motorist coverage is triggered only once an uninsured motorist becomes liable for noneconomic loss pursuant to MCL 500.3135(1). Liability for noneconomic loss occurs only if the plaintiffs suffered "death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). While death

may be ascertainable at the time of the accident, the other two injuries are less readily identifiable.

A party may not know that his injury is permanent until considerable time elapses. During this time, he attends physical therapy and attempts to heal. This may well take longer than a year. Quite often, an injured individual will do everything in his power to escape the label "permanently impaired." I believe that most individuals are willing to work for a living and will exert considerable effort to recover from an injury in order to return to work. The contractual limitation contained in defendant's insurance form discourages attempts at recovery. For these reasons, it is unreasonable and should be held to be against public policy.

Also, a party may not learn that he has a serious impairment until after one year has passed. Some injuries, especially soft tissue injuries, are difficult to diagnose. And proper diagnosis and determination of permanency may take a long time. The Legislature seems to have recognized this fact by enacting a three-year statutory period of limitations for bringing suits for noneconomic damages. Given these considerations, the first prong of the *Herweyer* test weighs against finding this limitation reasonable.

The one-year limitation also works as a practical abrogation of the right created by the insurance agreement. This is the second consideration under the *Herweyer* test. *Herweyer*, *supra* at 20. The best way that a plaintiff can find out if a party is uninsured is to sue him. If an insurance company presents a defense, then the party is insured. However, the time required to reach this point can easily exceed one year.

Under a one-year period of limitations, an insured injured in an automobile accident would be forced to immediately ascertain whether a serious impairment

exists. He then would be obliged to file suit against the other motorist well before one year has elapsed. This is because the case might have to progress through at least part of the discovery process for the injured person to determine if the other motorist is uninsured. Then, the insured would have to make a claim with his insurance company. In many instances, all this cannot be accomplished within one year.

The clause providing the one-year limitations period mandates that injured insureds bring suit immediately after their automobile accident. This might be even before they determine if they have a permanent impairment. In effect, the clause requires that baseless lawsuits be filed. Filing such a lawsuit might be the only way a party could claim the uninsured motorist coverage that he paid for. But this early filing still might not move the case along quickly enough to satisfy the one-year limitation.

This is exactly what happened to plaintiffs, Shirley Rory and Ethel Woods. They did not know that the other party to the accident was uninsured until suit had been brought and discovery was underway. They did not delay in the least in making their claim with defendant. They filed well within the limitations period for claims of noneconomic damages. But the majority would still leave them without the uninsured motorist coverage they paid for. Clearly, this is a practical abrogation of plaintiffs' rights.

That the one-year limitations clause abrogates plaintiffs' rights becomes even clearer when one contemplates that an insurer for the third party might deny coverage well into the suit. That insurer could determine that its insured should not receive coverage only after defending him for many months. This delayed notice would be outside the control of the injured

motorist. But it could deny him the uninsured motorist coverage he paid for from his own insurer. If a third-party insurer waits for a year to deny coverage, the clause would absolutely bar the injured motorist from the benefit of his insurance. The majority simply ignores this inequity.[6]

Also, after one year, the injured party may still be receiving medical treatment. A permanent injury may not yet have been diagnosed. A third-party insurance company could deny coverage at that point. The injured motorist would have done everything in his power to bring suit against the third party. But he would not be able to sustain a claim under his uninsured motorist insurance policy because the third-party insurer did not deny coverage until too late. The contractual limitations clause simply fails to give an adequate period in which to ascertain the loss or damage. *Id*.

Given that the clause providing a one-year limitations period is found wanting under all three prongs of the *Herweyer* test, it must be adjudged to be unreasonable. *Id*. Therefore, the trial court correctly denied summary disposition in this case and the Court of Appeals appropriately affirmed that decision.

IV. THE ONE-YEAR LIMITATIONS PERIOD AND MCL 500.2254

The majority concludes that the one-year limitations clause is not contrary to the law or to public policy. But to reach this conclusion, it relies on a strained reading of MCL 500.2254. I agree with the Commissioner of the Office of Financial and Insurance Services who filed an amicus curiae brief concluding that MCL 500.2254 forbids a one-year limitations clause.

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[6] Some would see this ruling as an open invitation for insurance company gamesmanship.

MCL 500.2254 provides:

> Suits at law may be prosecuted and maintained by any member against a domestic insurance corporation for claims which may have accrued if payments are withheld more than 60 days after such claims shall have become due. *No* article, bylaw, resolution or *policy provision adopted by any life, disability, surety, or casualty insurance company doing business in this state prohibiting a member or beneficiary from commencing and maintaining suits at law or in equity against such company shall be valid and no such article, bylaw, provision or resolution shall hereafter be a bar to any suit in any court in this state*: Provided, however, That any reasonable remedy for adjudicating claims established by such company or companies shall first be exhausted by the claimant before commencing suit: Provided further, however, That the company shall finally pass upon any claim submitted to it within a period of 6 months from and after final proofs of loss or death shall have been furnished any such company by the claimant. [Emphasis added.]

Under the language of this statute, a policy provision may not prohibit a beneficiary from commencing and maintaining a suit. MCL 500.2254. But this is exactly what the one-year limitations clause does. After expiration of the one-year period, the beneficiary no longer is entitled to maintain a suit for uninsured motorist coverage, even though his claim is allowable by statute for another two years. The limitations clause contravenes the statute. This means it is contrary to Michigan law and Michigan public policy.

In order to support its position, the majority argues that nothing in the statute forbids conditions being placed on the commencement and maintenance of a lawsuit. But such conditions are exactly what the statute speaks of. It forbids a policy provision "*prohibiting a member or beneficiary from commencing and maintaining suits*[.]" MCL 500.2254. Any "condition" in a

policy would be a policy provision. Changing its label does not change what it is. Therefore, any condition prohibiting a beneficiary from commencing and maintaining a suit would equally violate the statute.[7]

In addition, the Legislature explicitly lists two "conditions" that are exceptions to the general rule in MCL 500.2254. Insurance companies may include in their policy provisions these two "conditions": (1) the claimant must exhaust any alternative remedies mandated by the policy, such as arbitration, and (2) the claimant must give the insurer six months to decide whether to honor the claim before the claimant may bring suit. MCL 500.2254. The inclusion of these two conditions indicates that the Legislature did not intend to allow any others.

This Court has long relied on the legal maxim *expressio unius est exlusio alterius*.[8] The maxim is a rule of construction that is a product of logic and common sense. *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 362; 459 NW2d 279 (1990), quoting 2A Sands, Sutherland Statutory Construction (4th ed), § 47.24, p 203. In fact, this Court long ago stated that no maxim is more uniformly used to properly construe statutes. *Taylor v Michigan Pub Utilities Comm*, 217 Mich 400, 403; 186 NW 485 (1922).

If exceptions such as the one-year limitations clause were permissible, it would be pointless for the Legislature to have listed only two exceptions in the statute. It

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[7] The majority claims that my interpretation would render invalid a contractual limitations period that paralleled the applicable statutory limitations period. This is not true. In such a situation, the contractual provision would not limit the commencement and maintenance of a lawsuit, but instead, the statute of limitations would.

[8] This translates as "the expression of one thing is the exclusion of another."

would contravene the well established maxim of *expressio unius est exlusio alterius*. And it would write into the statute what the Legislature chose to omit. Therefore, I cannot agree with the majority's interpretation of MCL 500.2254.

V. APPROVAL OF INSURANCE FORMS BY THE COMMISSIONER

The majority argues that the Legislature assigned the task of evaluating an insurance provision's reasonableness to the Commissioner of the Office of Financial and Insurance Services. It relies on MCL 500.2236(5), which provides:

> Upon written notice to the insurer, the commissioner *may* disapprove, withdraw approval or prohibit the issuance, advertising, or delivery of any form to any person in this state if it violates any provisions of this act, or contains inconsistent, ambiguous, or misleading clauses, or contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy. The notice shall specify the objectionable provisions or conditions and state the reasons for the commissioner's decision. If the form is legally in use by the insurer in this state, the notice shall give the effective date of the commissioner's disapproval, which shall not be less than 30 days subsequent to the mailing or delivery of the notice to the insurer. If the form is not legally in use, then disapproval shall be effective immediately. [Emphasis added.]

By using the term "may," the Legislature has signaled that what follows "may" is a discretionary act. This contrasts with the use of the term "shall," which signals a mandatory act. *Murphy v Michigan Bell Tel Co*, 447 Mich 93, 100; 523 NW2d 310 (1994). Nothing in this statute indicates that, in granting this discretion to the commissioner, the Legislature intended to rob the

courts of review of the same matter.[9] Moreover, it could be argued that, by not making the commissioner's review mandatory, the Legislature acknowledged that a court's exercise of similar review is well-founded and appropriate.

The majority ignores the discretionary nature of the commissioner's review when it concludes that plaintiffs can challenge the one-year limitations clause only by challenging the approval of the insurance form. But the commissioner is not required to review "conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy." MCL 500.2236(5).

The majority's argument amounts to little more than a red herring. It is an attempt to distract from the patent inequity of its ruling today. Because the commissioner's review is discretionary, reference to MCL 500.2236(5) adds little to this discussion. And it does not justify the majority's decision to radically change existing law.

VI. ADHESION CONTRACTS

Not content with overturning just one line of precedent used to protect the people of Michigan, the majority goes on to discuss the tangentially related topic of adhesion contracts. It overrules the line of cases offering protection to Michiganians from such contracts and

[9] The majority accuses me of reading the review of policy forms as discretionary. That is not my argument. While the commissioner is required to review all forms, the discretionary nature of his disapproval means that his review for reasonableness is also discretionary. The statute would allow the commissioner to let a form enter into use even if he found terms within it to be unreasonable. The statute does not mandate disapproval when a portion of the form is unreasonable. Therefore, the review for reasonableness is discretionary.

departs from well-established precedent and from the majority of other courts that have addressed the issue. Its decision also defies common sense.

A. THE HISTORY OF ADHESION CONTRACTS AND BALANCING THE INEQUITIES OF THESE CONTRACTS

In discussing the history of adhesion contracts, the majority misses one important point. Before courts applied protections from adhesion contracts, they struggled to deal with the problems presented by form contracts.[10] Although they did not always explicitly state what they were doing, they often acted in a way to balance out the inequities presented by such contracts.

In his early work in the field, Professor Karl N. Llewellyn noted:

> [W]e have developed a whole series of semi-covert techniques for somewhat balancing these [form-contract] bargains. A court can "construe" language into patently not meaning what the language is patently trying to say. It can find inconsistencies between clauses and throw out the troublesome one. It can even reject a clause as counter to the whole purpose of the transaction. It can reject enforcement by one side for want of "mutuality," though allowing enforcement by the weaker side because "consideration" in some other sense is present. [Book review, *The standardization of commercial contracts in English and Continental Law, by O. Prausnitz*, 52 Harv L R 700, 702 (1939).][11]

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[10] I would note that form contracts came into use only toward the end of the eighteenth century. Meyerson, *The reunification of contract law: The objective theory of consumer form contracts*, 47 U Miami L R 1263 (1993). Relatively speaking, it was a short time before there was discussion of treating them as contracts of adhesion. During the intervening time, courts found other ways to counterbalance the inequities of these one-sided contracts.

[11] See also Keeton, *Insurance law rights at variance with policy provisions*, 83 Harv L R 961, 968-973 (1970).

Courts have long recognized the inherent problems of form contracts and attempted through various methods to compensate for their inequities. The great legal minds of the early twentieth century began to see the drawbacks of this "semi-covert" action, and they called for uniformity in the field. From this developed the concept and protections of the adhesion contract theory. Meyerson, *The reunification of contract law: The objective theory of consumer form contracts*, 47 U Miami L R 1263, 1277-1278 (1993).

Despite the majority's argument, the idea of balancing the inequities of form contracts (or what are now more commonly known as "adhesion contracts") has been long recognized. And there is good reason for this longstanding recognition. Namely, the bargained-for exchange fundamental to traditional contracts simply does not exist in adhesion contracts.

As the Pennsylvania Supreme Court noted when abandoning the strict construction approach to which the majority regresses today:

> The rationale underlying the strict contractual approach reflected in our past decisions is that courts should not presume to interfere with the freedom of private contracts and redraft insurance policy provisions where the intent of the parties is expressed by clear and unambiguous language. We are of the opinion, however, that this argument, based on the view that insurance policies are private contracts in the traditional sense, is no longer persuasive. Such a position fails to recognize the true nature of the relationship between insurance companies and their insureds. An insurance contract is not a negotiated agreement; rather its conditions are by and large dictated by the insurance company to the insured. The only aspect of the contract over which the insured can "bargain" is the monetary amount of coverage. [*Brakeman v Potomac Ins Co*, 472 Pa 66, 72; 371 A2d 193 (1977).]

The average person does not sit down and bargain for each of the terms in his insurance contract. Quite the opposite is true. He may never read his insurance policies. Most are long and contain nuanced subclauses virtually indecipherable to people not experienced in contractual interpretation or insurance law. This is true despite the increased use of plain English in such policies. In most situations, the individual pays his insurance premiums and then receives the contract in the mail days or weeks later. Most people simply do not have the opportunity, time, or special ability to read the policy before agreeing to it.

And what incentive does the insurance industry have to assure that their insureds read their polices? If people were to read all the language in their insurance contracts, the insurance providers would be flooded with questions and requests to change clauses. It has been observed that "[i]f it is both unreasonable and undesirable to have consumers read these terms, courts should not fashion legal rules in a futile attempt to force consumers to read these terms[.]" Meyerson, *supra* at 1270-1271.

If the consumer does not read and comprehend the individual clauses of the contract, there can be no agreement on the particular terms in them. There can be no meeting of the minds. Moreover, when one side presents a contract on a take-it-or-leave-it basis and is in a place of considerable power over the other, there can be no bargained-for exchange. Hence, an outdated strict construction policy of construing these agreements is utterly unworkable.[12]

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[12] The majority contends that consumers should be assumed to know all the contents of their insurance policies. But it notes that without a meeting of the minds no contract exists. The purpose of modern judicial review of adhesion contracts is to balance the inequity that they present.

It is for that reason that the majority of the courts in this country has disavowed the strict construction policy in construing contracts of adhesion.[13] Instead, they follow the more equitable and balanced modern trend of viewing adhesion contracts with skepticism. I believe it is a serious mistake for the majority to regress Michigan law away from this well-accepted modern trend that has been created to protect individuals.[14]

Instead of either forcing a consumer to abide by a term that he never knew of or rejecting the entire contract, the court balances the inequities of the contract to enforce its overriding intent. Therefore, what was fairly bargained for is enforced and what the parties minds truly met on remains. But the majority, instead of continuing to balance these inequities, returns to the generally unworkable strict construction approach. In doing so, it ignores the true nature of adhesion contracts. *Brakeman*, *supra*.

[13] For but a few examples, see *Lechmere Tire & Sales Co v Burwick*, 360 Mass 718; 277 NE2d 503 (1972), *State Farm Mut Automobile Ins Co v Johnson*, 320 A2d 345 (Del, 1974), *Dairy Farm Leasing Co, Inc v Hartley*, 395 A2d 1135 (Me, 1978), *Jarvis v Aetna Cas & Surety Co*, 633 P2d 1359 (Alas, 1981), *State Farm Mut Automobile Ins Co v Khoe*, 884 F2d 401 (CA 9, 1989), *Jones v Bituminous Cas Corp*, 821 SW2d 798 (Ky, 1991), *Nieves v Intercontinental Life Ins Co*, 964 F2d 60 (CA 1, 1992), *Broemmer v Abortion Services of Phoenix, Ltd*, 173 Ariz 148; 840 P2d 1013 (1992), *Grimes v Swaim*, 971 F2d 622 (CA 10, 1992), *United States Fidelity & Guaranty Co v Sandt*, 854 P2d 519 (Utah, 1993), *Buraczynski v Eyring*, 919 SW2d 314 (Tenn, 1996), *Coop Fire Ins Ass'n v White Caps, Inc*, 166 Vt 355; 694 A2d 34 (1997), *Alcazar v Hayes*, 982 SW2d 845 (Tenn, 1998), *Andry v New Orleans Saints*, 820 So 2d 602 (La App, 2002), *Parilla v IAP Worldwide Services VI, Inc*, 368 F3d 269 (CA 3, 2004), and *Iberia Credit Bureau, Inc v Cingular Wireless LLC*, 379 F3d 159 (CA 5, 2004).

[14] The majority accuses the *Herweyer* Court of being the true judicial activists. It claims that *Herweyer* rejected "a century" of precedent. As noted, earlier in this opinion, this truly is not the case. Courts had been balancing the inequities of form contracts nearly since their inception. This Court in *Herweyer* merely followed that trend. It is only this majority that is reshaping Michigan law and clearly reversing longstanding precedent. In doing so, it is ignoring the current state of contract law and breaking away from the well-established modern trend of adhesion contract interpretation recognized throughout this country.

The majority contends that it bases its decision on the "freedom of contract and the liberty of each person to order his or her own affairs by agreement." *Ante* at 468, 488. It also states that contracts "voluntarily and fairly made" should be enforced. *Ante* at 468. In making these statements, the majority either ignores or intentionally obfuscates the fact that adhesion contracts are not fairly made or bargained for by individuals managing their own affairs.

Instead, the majority is creating a rule that permits insurance companies to bargain *unfairly* so that they can maximize their financial profit. The burden of this rule is carried by the average individual who has little, if any, bargaining power when purchasing insurance. The choice made by the majority regresses our judicial system by decades, if not centuries. It places the state back into the era when courts either used covert means of interpreting contracts or ignored equity altogether.

B. THE CONTINUED ATTACK ON INSURANCE CONTRACT PROTECTIONS

Today, the majority continues its attack on the well-developed protections created in insurance law that it started in *Wilkie v Auto-Owners Ins Co* 469 Mich 41; 664 NW2d 776 (2003). In *Wilkie*, the majority struck down, erroneously I believe, the doctrine of reasonable expectations. Adding this decision to *Wilkie*, the majority has now struck down all reasonable means of objectively interpreting insurance contracts. Without objective standards, courts cannot be expected to accurately discern the intent of the parties.

> An objective standard produces an essential degree of certainty and predictability about legal rights, as well as a method of achieving equity not only between insurer and insured but also among different insureds whose contribu-

> tions through premiums create the funds that are tapped to pay judgments against insurers. [Keeton, *Insurance law rights at variance with policy provisions*, 83 Harv L R 961, 968 (1970).]

The abandonment of these important equitable considerations destabilizes the system. The only ones benefited are the insurance companies. Those that are unscrupulous can now more easily create deliberately confusing insurance forms with hidden clauses that change the meaning of the policy. They may thereby collect payments for coverage that is wholly illusory without worry of interference from Michigan courts. I cannot agree with this position. As Justice CAVANAGH once wisely stated:

> I object to [the majority's] attempt to distance itself from the policy choices inherent in its decision today. Simply put, the majority and I differ with regard to the policies that should guide the interpretation of insurance law. I would prefer not to disregard the manner in which the insurance industry operates. Though an adhesion contract may be a necessary ingredient in the trade, I cannot condone a doctrine of interpretation that all but ignores the potentially precarious effect on the bound party. [*Wilkie*, *supra* at 70 (CAVANAGH, J., dissenting).]

This Court should not abandon the protections created to right the wrongs of adhesion contracts. I must dissent from its radical change of the law.

VII. CONCLUSION

The reasonableness doctrine is well-established in the law. Judicial review constitutes a necessary step to ensure that the actual intent of parties to a contract is enforced. Therefore, it is inappropriate to overturn the various decisions that support the ability of courts to

review for reasonableness the shortening of limitations periods.

In this case, the one-year time limit was so short that it acted as a practical abrogation of the right to bring a lawsuit. Therefore, plaintiffs paid for coverage from which they could never benefit. In such a situation, the only proper action by the Court is to find the limitations period unreasonable.

In deciding this case, it is unnecessary to reach the issue of adhesion contracts. The majority, by venturing into this area of the law and using this case as a vehicle, subjects itself to claims that it engages in judicial activism. The scrutiny and protections offered by traditional adhesion contract law offer a necessary aegis for the people of this state. I see no reason to attack this fundamental tenet of our law.

Therefore, I would affirm the decision of the Court of Appeals.

CAVANAGH, J. (*dissenting*). As the majority accurately observes, this Court is faced with a choice today. See *ante* at 488. This Court could continue to acknowledge the unique character of insurance agreements and follow well-reasoned precedent examining contractually shortened limitations periods for reasonableness. Or this Court could disregard the manner in which insurance agreements come into existence and abrogate the "reasonableness doctrine." Because the majority makes the wrong choice, I must respectfully dissent from today's decision and concur in the result reached by Justice KELLY's dissent.

As a general proposition, "[a]n insurance policy is much the same as any other contract." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431

(1992). Accordingly, a clear and unambiguous insurance policy is usually applied as written. *New Amsterdam Cas Co v Sokolowski*, 374 Mich 340, 342; 132 NW2d 66 (1965); *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). This general principle, however, is subject to numerous caveats that are deeply rooted in our jurisprudence, including the following: where a contractual limitations provision shortens the otherwise applicable period of limitations, the provision must be reasonable to be enforceable. *Herweyer v Clark Hwy Services, Inc*, 455 Mich 14, 20; 564 NW2d 857 (1997). See also 44A Am Jur 2d, Insurance, § 1909, p 370; anno: *Validity of contractual time period, shorter than statute of limitations, for bringing action*, 6 ALR3d 1197.

As noted by the majority, there is little doubt that parties may generally contract for shorter periods of limitations, and this Court has enforced such provisions where they have been reasonable. To this end, this Court in *Herweyer*, *supra* at 20, rearticulated the following factors to assist our courts in determining whether a contractual limitations provision is reasonable:

> It is reasonable if (1) the claimant has sufficient opportunity to investigate and file an action, (2) the time is not so short as to work a practical abrogation of the right of action, and (3) the action is not barred before the loss or damage can be ascertained.

In my view, this reasonableness inquiry is particularly fitting when insurance policies purport to shorten the otherwise applicable period of limitations. As Justice LEVIN once observed:

> The rationale of the rule allowing parties to contractually shorten statutory periods of limitation is that the shortened period is a bargained-for term of the contract.

> Allowing such bargained-for terms may in some cases be a useful and proper means of allowing parties to structure their business dealings.
>
> In the case of an adhesion contract, however, where the party ostensibly agreeing to the shortened period has no real alternative, this rationale is inapplicable. [*Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co,* 410 Mich 118, 141; 301 NW2d 275 (1981) (LEVIN, J., concurring).]

Nonetheless, the majority posits that the reasonableness inquiry no longer has any place in our jurisprudence because this inquiry undermines the parties' freedom of contract. In my view, however, such an approach ignores the manner in which the insurance industry operates. In this regard, I believe that the majority's approach is based on the fiction that the shortened limitations period was a truly bargained-for term.[1] In other words, I believe that the majority's entire premise must fail because it ignores the unique

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[1] In the typical insurance agreement, Justice LEVIN prudently noted,

> [t]here is no meeting of the minds except regarding the broad outlines of the transaction, the insurer's desire to sell a policy and the insured's desire to buy a policy of insurance for a designated price and period of insurance to cover loss arising from particular perils (death, illness, fire, theft, auto accident, "comprehensive"). The details (definitions, exceptions, exclusions, conditions) are generally not discussed and rarely negotiated.
>
> The policyholder can, of course, be said to have agreed to whatever the policy says—in that sense his mind met with that of the insurer. Such an analysis may not violate the letter of the concept that a written contract expresses the substance of a meeting of minds, but it does violate the spirit of that concept.
>
> To be sure, contract law principles are not confined by the concept of a "meeting of the minds." Nevertheless, a point is reached when the label "contract" ceases to fully and accurately describe the relationship of the parties and the nature of the

character of insurance agreements and disregards the notion that adhesion contracts inherently tend to "be a necessary ingredient in the trade . . . ." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 70; 664 NW2d 776 (2003) (CAVANAGH, J., dissenting).[2] Accordingly, I would not torture the term "adhesion contract" and turn a blind eye to the manner in which these adhesion contracts are made simply to bolster what is perceived as a preferred result. Instead, I would embrace, rather than divorce, reality and acknowledge how insurance policies

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transaction between insurer and insured. [*Lotoszinski v State Farm Mut Automobile Ins Co*, 417 Mich 1, 14 n 1; 331 NW2d 467 (1982) (LEVIN, J., dissenting).]

[2] I must additionally note that, contrary to the majority's rationale, decisions such as *Camelot Excavating*, *Herweyer*, and *Tom Thomas Org, Inc v Reliance Ins Co,* 396 Mich 588, 592; 242 NW2d 396 (1976), were not groundbreaking. For example, 44A Am Jur 2d, Insurance, § 1909, pp 370-371 provides:

> In the absence of statutory regulation to the contrary, an insurance contract may validly provide for a limitation period shorter than that provided in the general statute of limitations, *provided that the interval allowed is not unreasonably short*. [Emphasis added.]

Section 1909 cites the following cases in support of this view: *Thomas v Allstate Ins Co*, 974 F2d 706 (CA 6, 1992) (applying Ohio law); *Doe v Blue Cross & Blue Shield United of Wisconsin*, 112 F3d 869 (CA 7, 1997); *Wesselman v Travelers Indemnity Co*, 345 A2d 423 (Del, 1975); *Phoenix Ins Co v Aetna Cas & Surety Co*, 120 Ga App 122; 169 SE2d 645 (1969); *Nicodemus v Milwaukee Mut Ins Co*, 612 NW2d 785 (Iowa, 2000) (contractual limitations provision in an insurance policy is enforceable if it is reasonable); *Webb v Kentucky Farm Bureau Ins Co*, 577 SW2d 17 (Ky App, 1978); *Suire v Combined Ins Co of America*, 290 So 2d 271 (La, 1974); *L & A United Grocers, Inc v Safeguard Ins Co*, 460 A2d 587 (Me, 1983) (in property insurance, a limit of one year from the time of loss is not unreasonably short); *O'Reilly v Allstate Ins Co*, 474 NW2d 221 (Minn App, 1991); *Commonwealth v Transamerica Ins Co*, 462 Pa 268; 341 A2d 74 (1975); *Donahue v Hartford Fire Ins Co*, 110 RI 603; 295 A2d 693 (1972); *Hebert v Jarvis & Rice & White Ins, Inc*, 134 Vt 472; 365 A2d 271 (1976).

typically come into existence. Therefore, I would affirm the decision of the Court of Appeals and conclude that the shortened limitations period in this insurance policy is unreasonable and, thus, unenforceable.

I must also observe that my disagreement with the current majority with respect to the principles governing the interpretation of insurance policies is nothing new. See *Wilkie*, *supra*. I recognize that the majority's view in this case and others is theoretically consistent with the notion of freedom of contract. In the abstract, the majority's approach could arguably have some appeal. Nonetheless, while today's decision may placate the majority's own desire to demonstrate its self-described fidelity, I believe that the majority's position ignores how the insurance industry functions and discounts the effects today's decision will have on this state's citizens. Therefore, I must respectfully dissent from today's decision and concur in the result reached by Justice KELLY's dissent.

WEAVER, J. (*dissenting*). I respectfully dissent from the majority opinion's holdings that the "insurance policies *are* subject to the same contract construction principles that apply to any other species of contract," and that "unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Ante* at 461.

In so holding, the majority is eliminating over five decades' worth of precedent that created specialized rules of interpretation and enforcement for insurance contracts. These specialized rules recognize that an insured is not able to bargain over the terms of an insurance policy; indeed, it is common practice for the

insured to receive the actual terms of the contract, the insurance policy itself, only *after* having purchased the insurance. Further, in most cases the average consumer will not read the policy; the consumer will rely on the agent's representations of what is covered in the policy. Even if the insured were to read the policy, insurance policies are not easy to understand and contain obscure provisions, the meaning of which requires legal education to grasp.

The longstanding rules that the majority does away with by stating that insurance contracts are to be interpreted in the same way as any other contract include:

• Courts must interpret insurance policies from the perspective of an average consumer. The contract must be read using the ordinary language of the layperson, not using technical medical, legal, or insurance terms.[1] By contrast, the usual rule of contract interpretation is that "technical terms and words of art are given their technical meaning when used in a transaction within their technical field." 2 Restatement Contracts, 2d, ch 9, § 202, p 86. See also *Moraine Products, Inc v Parke, Davis & Co,* 43 Mich App 210, 213; 203 NW2d 917 (1972).

• If reading the contract one way provides that there is coverage, but reading it another way provides that there is not coverage under the same circumstances, then the contract is ambiguous and must be construed against its drafter and in favor of coverage.[2] This is

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[1] "Insurance policies should be read with the meaning which ordinary layman would give their words." *Bowman v Preferred Risk Mut Ins Co*, 348 Mich 531, 547; 83 NW2d 434 (1957).

[2] An ambiguity in an insurance policy is broadly defined to include contract provisions capable of conflicting interpretations. *Auto Club Ins Ass'n v DeLaGarza,* 433 Mich 208, 214; 444 NW2d 803 (1989).

different from general contract law, which finds a contract ambiguous "if its provisions may *reasonably* be understood in different ways." *Universal Underwriters Ins Co v Kneeland,* 464 Mich 491, 496; 628 NW2d 491 (2001). (Emphasis added.) The "reasonableness" requirement can be a severe limitation on finding an ambiguity.

• If a limitation on coverage is not expressed clearly enough to inform the insured of the extent of coverage purchased, the provision is construed against the drafter, the insurance company.[3]

• In interpreting a policy, exceptions to general liability are to be strictly construed against the insurer.[4]

• The contract of insurance may include not only the written policy, but also the advertising and the application.[5] The general rule of contract interpretation, in

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"If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances the contract is ambiguous and should be construed against its drafter and in favor of coverage." *Raska v Farm Bureau Mut Ins Co of Michigan,* 412 Mich 355, 362; 314 NW2d 440 (1982).

[3] When an insurer "has failed to clearly express a limitation on coverage so as to fairly apprise the insured of the extent of the coverage purchased, it is appropriate to construe the provision under consideration against its drafter." *Auto Club Ins Ass'n v DeLaGarza,* 433 Mich 208, 214-215; 444 NW2d 803 (1989).

[4] Technical constructions of insurance policies are not favored and exceptions to the general liability provided for in an insurance policy are to be strictly construed against the insurer. *Francis v Scheper,* 326 Mich 441, 448; 40 NW2d 214 (1949). Exclusion clauses in insurance policies are construed strictly against the insurer. *Century Indemnity Co v Schmick*, 351 Mich 622, 626-627; 88 NW2d 622 (1958).

[5] Where the advertising and the application stated that the policy would be in force as soon as the application and $1 for the first month's premium was received, but the policy was not issued until 18 days later,

contrast, is that "[a]bsent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement." *Universal Underwriters, supra* at 496.

These specialized rules of interpretation protect the consumer buying insurance, especially no-fault insurance, which every automobile owner is required by law to purchase; they should not be so lightly swept aside with no discussion and without regard for five decades of precedent. For these reasons, I dissent and concur in the result of Justice KELLY's dissent.

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the Court held that the advertising and the application created an ambiguity about when the policy should go into effect. The Court construed this ambiguity in favor of the insured, stating:

> If there is any doubt or ambiguity with reference to a contract of insurance which has been drafted by the insurer, it should be construed most favorably to the insured. Under that rule the application and advertising in the case before us must be construed most favorably to the insured. We construe this to mean the policy would be in effect without delay. [*Gorham v Peerless Life Ins Co,* 368 Mich 335, 343-344; 118 NW2d 306 (1962) (citation omitted).]

REED v YACKELL

Docket No. 126534. Argued May 10, 2005 (Calendar No. 4). Decided July 28, 2005.

Ricky Reed brought an action in the Wayne Circuit Court against Linda S. Yackell, Buddy L. Hadley, Gerald M. Herskovitz, and Mr. Food, Inc., seeking damages for injuries sustained in an automobile accident that occurred when a vehicle owned by Mr. Food, which is owned by Herskovitz, and driven by Hadley collided with a vehicle driven by Yackell. Reed was a passenger in the Mr. Food vehicle and was assisting Hadley in deliveries at the time of the accident. The action alleged negligence by Yackell and Hadley, liability by Herskovitz under the owner's liability statute, MCL 257.401, and liability by Mr. Food under a theory of respondeat superior. A jury returned a verdict in favor of the plaintiff and the court, Wendy M. Baxter, J., entered a judgment thereon. Hadley, Herskovitz, and Mr. Food (hereafter the defendants) appealed, claiming that the trial court erred by denying their motions for directed verdict and judgment notwithstanding the verdict after ruling that Reed was an independent contractor at the time of the accident and therefore was not limited to worker's compensation for his remedy and could maintain an action against the defendants. The Court of Appeals, MURPHY, P.J., and CAVANAGH and NEFF, JJ., affirmed in an unpublished opinion per curiam, issued February 14, 2003 (Docket No. 236588). The Supreme Court, in lieu of granting leave to appeal, vacated the judgment of the Court of Appeals and remanded the matter to the trial court for findings of fact regarding the plaintiff's employment status at the time of the accident. 469 Mich 960 (2003). On remand, the trial court again found that the plaintiff was not an employee at the time of the accident. The Supreme Court considered those findings of fact and, in lieu of granting leave to appeal, remanded the matter to the Court of Appeals for reconsideration. 469 Mich 1051 (2004). On remand, the same Court of Appeals panel affirmed the trial court's determination, but on a different basis, finding that the plaintiff was an employee under MCL 418.161(1)(*l*), but was removed from the definition of an employee by virtue of MCL 418.161(1)(n), because Reed had a separate business in which he held himself out to the public for performing the same service he was performing

for Mr. Food. Unpublished opinion per curiam, issued June 8, 2004 (Docket No. 236588). The Supreme Court granted the defendants' application for leave to appeal. 471 Mich 957 (2005).

In an opinion by Chief Justice TAYLOR, joined by Justices YOUNG and MARKMAN, and joined by Justices CAVANAGH and KELLY in result only, the Supreme Court *held*:

The judgment of the Court of Appeals must be reversed in part and the mater must be remanded to the trial court for the entry of a directed verdict in favor of Hadley, Herskovitz, and Mr. Food. Jurisdiction over this matter must thereafter be transferred to the Bureau of Worker's Disability Compensation.

Chief Justice TAYLOR, joined by Justices YOUNG and MARKMAN, stated that Reed was an employee of Mr. Food at the time of the accident within the meaning of MCL 418.161(1)(*l*), because the service he performed was pursuant to an expressed or implied contract of hire and the compensation was real and substantial. Reed was not an independent contractor under the three statutory criteria required for application of the exception in MCL 418.161(1)(n). Reed did not maintain his own business in relation to the service he provided Mr. Food, did not hold himself out to the public to render the same service he performed for Mr. Food, and was not himself an employer subject to the Worker's Disability Compensation Act.

Affirmed in part, reversed in part, and remanded.

Justice WEAVER, dissenting, would not resolve the issue whether the plaintiff was a employee within the meaning of the act, but would first direct the parties to brief the issue whether the circuit court had jurisdiction to determine whether the plaintiff was an employee.

Justice CORRIGAN dissented from the lead opinion's determination that the plaintiff is an employee within the meaning of the Worker's Disability Compensation Act, and would first address the question of the Supreme Court's jurisdiction to reach that issue before addressing any remaining issues. It appears the bureau has exclusive jurisdiction over consideration of the plaintiff's employment status. *Sewell v Clearing Machine Corp*, 419 Mich 56 (1984), holding that the bureau and the circuit court share jurisdiction to determine a worker's employment status, was wrongly decided and contradicted the plain language of the act and the legislative scheme concerning worker's compensation benefits. The parties should be directed to brief this jurisdictional issue.

John Carlisle and *Law Offices of Larry A. Smith* (by *Larry A. Smith*) for the plaintiff.

Vandeveer Garzia, P.C. (by *Hal O. Carroll*), for Buddy Lee Hadley, Gerald Michael Herskovitz, and Mr. Food, Inc.

Amicus Curiae:

Martin L. Critchell for the Workers' Compensation Section of the State Bar of Michigan.

TAYLOR, C.J. We granted leave in this case to determine whether plaintiff, Ricky Reed, who was fired from defendant Mr. Food, Inc., but continued to assist with deliveries on a periodic basis, was an employee of Mr. Food within the meaning of MCL 418.161(1)(*l*) and (n) of the Worker's Disability Compensation Act (WDCA)[1] and, thus, prohibited from maintaining a tort action for employment-related personal injury in the circuit court against Mr. Food, its owner, and its delivery supervisor. We determine that Reed was an employee of Mr. Food under MCL 418.161(1)(*l*) at the time he was injured because he was in the service of Mr. Food under a contract for hire. We therefore affirm the decision of the Court of Appeals in part. However, we further determine that Reed was an employee of Mr. Food under MCL 418.161(1)(n) at the time he was injured because he was performing a service as a deliveryman for Mr. Food in the course of its business and did not maintain a separate business offering that service, hold himself out to and render that service to the public, or qualify as an employer subject to the WDCA. We therefore reverse the decision of the Court of Appeals in part and remand this case to the circuit court for entry of a directed

[1] MCL 418.101 *et seq.*

verdict in defendants' favor. Jurisdiction is thereafter transferred to the Bureau of Worker's Disability Compensation.

FACTS AND PROCEDURAL HISTORY

Defendant Gerald Michael Herskovitz is the owner of defendant Mr. Food, Inc., which is a retail marketer of meat products. Defendant Buddy Lee Hadley is an employee of Mr. Food and is in charge of its meat deliveries. In 1997, Hadley suggested that Herskovitz hire Reed, whom Hadley had known for approximately ten years, and Herskovitz did so. Herskovitz was not pleased with Reed's performance, however, and fired Reed after a period of only five or six months in December 1997.

After being fired by Herskovitz, Reed primarily supported himself by painting his relatives' homes. But, Reed's association with Mr. Food did not end completely after he was fired, and he supplemented his income by occasionally helping Hadley with deliveries. Specifically, Hadley testified that, on approximately three to five occasions after Reed was fired near the end of 1997, he would hire Reed to help with his deliveries for the day, for which Reed would be paid between $35 and $40 in cash. Although Herskovitz authorized Hadley to obtain help with his deliveries on these days, he testified that he did not know that it was Reed that Hadley actually hired.

On May 7, 1998, during one of these days that deliveries were being made, Reed was riding in a cargo van owned by Mr. Food that was being driven by Hadley. As the van approached an intersection, a car driven by Linda Yackell did not stop at a red light because her brakes malfunctioned. Hadley, who was looking down at

paperwork, did not see Yackell's car in time and hit her car. Reed suffered a closed head injury as a result of the accident.

On December 10, 1998, Reed filed a complaint in the circuit court, alleging negligence by the drivers, Hadley and Yackell, liability by Herskovitz pursuant to the owner's liability statute, MCL 257.401, and liability by Mr. Food under the theory of respondeat superior. Hadley, Herskovitz, and Mr. Food (defendants)[2] as relevant to this appeal, defended by asserting that the suit was barred because Reed was an employee of Mr. Food under MCL 418.161(1)(*l*) and (n)[3] and, thus, his exclusive remedy was under the WDCA.[4] During trial, defendants moved for a directed verdict on this basis. Reed countered that he was not an employee, but was rather an independent contractor of day labor. The trial court

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[2] Yackell is not a party to the proceedings in this Court. Therefore, we will hereinafter use the term "defendants" in reference to Herskovitz, Hadley, and Mr. Food collectively.

[3] MCL 418.161 provides:

> (1) As used in this act, "employee" means:
>
> * * *
>
> (*l*) Every person in the service of another, under any contract of hire, express or implied, including aliens . . . .
>
> * * *
>
> (n) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act.

[4] MCL 418.131(1) provides that "[t]he right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease . . . ."

denied defendants' motion. At the end of trial, the jury returned a unanimous verdict in Reed's favor and awarded him $1,256,320, allocating sixty percent of the fault for the accident to Yackell and forty percent to Herskovitz, Hadley, and Mr. Food collectively. A judgment in the amount of $502,528 was subsequently entered against Hadley, Herskovitz, and Mr. Food.

Defendants thereafter moved for judgment notwithstanding the verdict (JNOV), again asserting that Reed was an employee at the time of the accident. The trial court again denied defendants' motion, stating that Reed was not an employee of Mr. Food at the time of the accident but was instead an independent contractor that held himself out to the public to perform general labor.

Defendants appealed to the Court of Appeals, which affirmed in an unpublished decision.[5] Defendants then sought leave to appeal in this Court. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacated the decision of the Court of Appeals and remanded this case to the circuit court with instructions that it determine, either on the existing record or after additional evidentiary hearings, whether Reed was an employee of Mr. Food at the time of the accident. The trial court was also to submit findings of fact to this Court regarding whether Reed was in the service of Mr. Food under either an express or implied contract for hire as set forth in MCL 418.161(1)(*l*) and explained in our then-recent decision in *Hoste v Shanty Creek Mgt, Inc,* 459 Mich 561; 592 NW2d 360 (1999). Further, in order to determine if he was outside the definition of employee in MCL 418.161(1) (n), the trial court was to

[5] *Reed v Yackell,* unpublished opinion per curiam of the Court of Appeals, issued February 14, 2003 (Docket No. 236588), vacated 469 Mich 960 (2003).

determine whether Reed both maintained a separate business and held himself out to the public as having such a business.[6]

On remand, the circuit court issued a written order and findings of fact, based on the existing record, stating that Reed was not an employee of Mr. Food at the time of the accident. With respect to MCL 418.161(1)(*l*) and *Hoste*, the trial court determined that Reed was not performing a service for Mr. Food under either an express or implied contract for hire. In reaching this conclusion, the trial court focused on the fact that Herskovitz had fired Reed before the accident, that Herskovitz had testified at trial that he did not know that Reed was helping Hadley at the time of the accident, and that no evidence had been introduced that income taxes had been withheld from Reed or that he had ever claimed employee status. The trial court reasoned that these facts negated the possibility that either an express or implied contract for hire had been formed because both parties were not aware of its existence and had not agreed to its terms. Finally, the trial court determined that Reed was not an employee under a contract "for hire," reasoning that he did not receive a regular income from Mr. Food but, instead, received only $35 to $40 on three to five occasions. The court concluded that this did not equate to "real, palpable, and substantial consideration" that was intended as wages[7] because, spread over the entire period of about five or six months when the occasional employment took place, it amounted to less than $1 per day.

In considering the questions under MCL 418.161(1)(n), the trial court held that Reed did have a qualifying separate business because he was a house

[6] 469 Mich 960 (2003).

[7] *Hoste*, *supra* at 576.

painter performing day labor. The court apparently concluded that there was a sufficient holding of himself out for this service to meet the requirements of MCL 418.161(1)(n). But, the court did not elaborate on the evidence it found to establish that.

After receiving the trial court's findings of fact, we remanded this case to the Court of Appeals for reconsideration of whether Reed was an employee within the meaning of MCL 418.161(1)(*l*) and (n) and, if necessary, of additional issues the Court of Appeals had addressed in its earlier decision.[8]

On remand, in an unpublished decision that echoed the previously vacated one, the Court of Appeals affirmed the trial court's determination that Reed was not an employee of Mr. Food at the time of the accident.[9] Unlike the circuit court, the Court of Appeals determined that Reed was an employee under MCL 418.161(1)(*l*) because he was under a contract for hire. Yet, because he had, in the view of the Court of Appeals, a separate business in which he held himself out for the performance of the same service he was performing for Mr. Food, he was removed from the definition of employee by virtue of MCL 418.161(1)(n). Interestingly, while expressly acknowledging that in *Hoste* we held that the common-law "economic realities test" for determining whether a worker is an employee or an independent contractor was superseded to the extent that it was inconsistent with MCL 418.161(1)(n),[10] the Court then expressly focused on those same superseded common-law factors (such as how Reed was paid, whether taxes were withheld, whether Mr. Food, Her-

[8] 469 Mich 1051 (2004).

[9] *Reed v Yackell,* unpublished opinion per curiam of the Court of Appeals, issued June 8, 2004 (Docket No. 236588).

[10] *Hoste, supra* at 572.

skovitz, and Hadley had control of Reed's duties, and whether the services Reed performed were an integral part of Mr. Food's business) in making its holding regarding whether Reed was an employee. At no point was an effort undertaken to reconcile this approach with the holding in *Hoste* precluding the consideration of these no longer recognized common-law "economic realities" factors.

Unsurprisingly, defendants again filed an application with this Court for leave to appeal, and we granted defendants' application limited to the issue whether Reed was an employee within the meaning of MCL 418.161(1)(*l*) and (n) at the time of the accident.[11]

STANDARD OF REVIEW

Defendants' contention is that the trial court erroneously denied their motions for a directed verdict and JNOV. We review a trial court's denial of both motions de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan,* 469 Mich 124, 131; 666 NW2d 186 (2003). In doing so, we " 'review the evidence and all legitimate inferences in the light most favorable to the nonmoving party.' " *Id*., quoting *Wilkinson v Lee,* 463 Mich 388, 391; 617 NW2d 305 (2000). Only if the evidence, when viewed in this light, fails to establish a claim as a matter of law should a motion for a directed verdict or JNOV be granted. *Id*.

This case also involves the interpretation of statutes, which is a question of law that is also reviewed de novo by this Court. *Hoste, supra* at 569. Our fundamental obligation when interpreting statutes is "to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Koontz v*

[11] 471 Mich 957 (2005).

Ameritech Services, Inc, 466 Mich 304, 312; 645 NW2d 34 (2002). If the statute is unambiguous, judicial construction is neither required nor permitted. In other words, "[b]ecause the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute." *Id*.

DISCUSSION

A. PRINCIPLES OF THE WDCA

As we have discussed frequently in the past, by enacting Michigan's Worker's Disability Compensation Act, the Legislature replaced common-law liability for negligence in the workplace, and its related defenses, with a comprehensive, statutory compensation scheme that requires employers to provide compensation to employees for injuries arising out of and in the course of employment without regard to fault. MCL 418.301; *Hoste, supra* at 570; *Clark v United Technologies Automotive, Inc,* 459 Mich 681, 686-687; 594 NW2d 447 (1999); *Farrell v Dearborn Mfg Co,* 416 Mich 267, 274-275; 330 NW2d 397 (1982). In exchange for this almost automatic entitlement to compensation, the WDCA limits the amount of compensation that an employee may collect and, moreover, prohibits the employee from bringing a tort action against the employer except in limited circumstances.[12] This principle is expressed in MCL 418.131(1), which provides, "The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." As we have explained:

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[12] *Hoste, supra*; *Clark, supra*; *Farrell, supra*.

> Th[is] language expresses a fundamental tenet of workers' compensation statutes that if an injury falls within the coverage of the compensation law, such compensation shall be the employee's only remedy against the employer or the employer's insurance carrier. The underlying rationale is that the employer, by agreeing to assume automatic responsibility for all such injuries, protects itself from potentially excessive damage awards rendered against it and that the employee is assured of receiving payment for his injuries. [*Farrell, supra* at 274.]

Accordingly, the threshold question in this case is whether Reed is an "employee" under any of the definitions in MCL 418.161 of the WDCA and, therefore, has traded his right to bring a tort action for the assured payment of benefits without regard to fault. *Hoste, supra* at 570-571. As in *Hoste*, several of the definitions set forth in MCL 418.161 do not apply in this case and, therefore, the resolution of this issue requires us to focus only on subsections 161(1)(*l*) and 161(1)(n).[13] As we explained in *Hoste*, these subsections "must be read together as separate and necessary qualifications in establishing employee status." *Hoste, supra* at 573. In other words, our first task is to determine whether Reed was an employee under the definition set forth in subsection 161(1)(*l*). If he was, we must then determine whether he meets the requirements of subsection 161(1)(n). *Id*.

B. ANALYSIS OF MCL 418.161(1)(*l*)

Subsection 161(1)(*l*) requires us to determine whether Reed was in the service of Mr. Food under any express or implied "contract of hire." Because it is undisputed that Reed was in the service of Mr. Food at

[13] At the time of the plaintiff's injuries in *Hoste,* the definitions now found in subsections 161(1)(*l*) and 161(1)(n) were found in former subsections 161(1)(b) and 161(1)(d), respectively. *Hoste, supra* at 566 n 2.

the time of the accident, our determination of this issue requires a two-pronged analysis focusing first on whether Reed was in that service pursuant to an express or implied contractual relationship and, second, as explained in *Hoste, supra* at 573-577, whether that contractual relationship was one "of hire."

With regard to the first inquiry, we agree with the Court of Appeals conclusion that the facts in this case are at least sufficient to establish that Reed was in the service of Mr. Food pursuant to an implied in fact contractual relationship. " 'A contract implied in fact arises when services are performed by one who at the time expects compensation from another who expects at the time to pay therefor.' " *In re Spenger Estate,* 341 Mich 491, 493; 67 NW2d 730 (1954), quoting *In re Pierson's Estate,* 282 Mich 411, 415; 276 NW 498 (1937). As the Court of Appeals noted, Reed was expecting to be compensated for the services that he performed that day, just as he had been several times before. Moreover, Herskovitz, having told Hadley to obtain the help he needed to make his deliveries that day, expected to compensate whomever Hadley recruited, just as he had done in the past. The defendants argue that the failure of Herskovitz to know exactly who Hadley would hire is relevant to whether there was an implied in fact contract with Reed. This is not the case. All that is required to establish a contract with Reed is that Hadley had authority to hire.[14] Hadley incontestably had that authority.

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[14] See *Central Wholesale Co v Sefa,* 351 Mich 17, 25; 87 NW2d 94 (1957), quoting 2 CJS, Agency, § 96, pp 1210-1211:

> "Whenever the principal, by statements or conduct, places the agent in a position where he appears with reasonable certainty to be acting for the principal, or without interference suffers the agent to assume such a position, and thereby justifies those dealing with the agent in believing that he is acting within his mandate, an apparent authority results . . . ."

Accordingly, having determined that the services Reed was performing for Mr. Food were pursuant to an express or implied contractual relationship, our next inquiry is whether that contractual relationship was "of hire." As we explained in *Hoste, supra* at 576, the linchpin to determining whether a contract is "of hire" is whether the compensation paid for the service rendered was not merely a gratuity but, rather, "intended as wages, i.e., real, palpable and substantial consideration as would be expected to induce a reasonable person to give up the valuable right of a possible claim against the employer in a tort action and as would be expected to be understood as such by the employer."

In the present case, the $35 to $40 that Reed received for the approximately eight hours of services he rendered satisfies the requirement we set forth in *Hoste*. In finding otherwise, the circuit court did not dispute that the wages were real, palpable, and substantial on an hourly basis but, instead, calculated them by averaging them over the entire five- to six-month period of the occasional employment to conclude that the wages were less than one dollar a day. This is a puzzling and even arbitrary approach to this issue of calculation that ignores the parties' actual contracted for rate of per diem compensation and replaces it with an approach not taken by the parties. In fact, it seems to be without justification other than it effectively serves to reduce the compensation rate by a high multiple. In contrast, when the neutrally derived approach we are adopting is used, examining the actual agreement to determine the unit of pay, it is clear that this compensation was indeed real, palpable, and substantial when measured against the services performed.

Here, Reed provided approximately eight hours of unskilled, manual labor helping Hadley deliver meat

products. This was a service that did not require any particular level of skill, education, or experience. Indeed, the testimony at trial concerning Reed's duties showed only that they consisted of carrying and moving boxes,[15] while even such minimal tasks as handling the paperwork, arranging the delivery schedule, and driving the delivery truck were handled by Hadley. For these eight hours of unskilled, manual labor delivering meat, Reed was paid approximately $35 to $40. Because this was roughly equivalent to the minimum wage rate at the time, it is confounding that a court could conclude that this was not a "real" or "substantial" wage and that it was, instead, as it has to be under the *Hoste* test, a mere gratuity. We reject, with some impatience, such a counterintuitive conclusion.

It is also appropriate to point out that the circuit court's ad hoc approach of averaging over the entire period of occasional employment, even though there was no such agreement between the parties, would, were it the law, cause most any occasional worker's wage to be insubstantial under *Hoste*, thus making worker's compensation protections for, say, all persons working episodically on a part-time basis unavailable. The facile answer to this, no doubt, is that such workers will have a tort remedy. But, they probably will not. These injured people will be, simply, injured without a remedy. History shows no less. In fact, the leaders of this state a century ago were painfully familiar with the crushing inequity created by this illusory solution of leaving workers with only a tort remedy. As they made

[15] Herskovitz testified that Reed's duties were "[n]othing major. It's to get a box or bring it up or take this out. It's that kind of work." Hadley testified that, in between deliveries, he would have his helpers "go [to the] back [of the delivery truck] and set more stuff up at the door, or if it's up to the front, move it this way or whatever at the time."

clear in passing our original worker's compensation law, this tort remedy was hollow because of the fellow servant rule, as well as the difficulty of the worker's burden of demonstrating, among other things, employer negligence and an absence of contributory negligence on the worker's part. As the Worker's Compensation Commission appointed in 1912 by Governor Chase S. Osborn to draft our first "Workmen's Compensation" law concluded, after examining data regarding the average compensation paid and the wage loss sustained, on average, injured workers did not receive compensation proportionate to their injuries under the common-law, negligence based system. According to the commission, "[t]his low average was, of course, brought about by the large number of accidents to which, there being no negligence on the part of the employer, there was no legal liability to pay damages."[16] Moreover, the commission concluded that, even in cases where injured workers did procure recovery in the courts, the compensation received was inadequate because of the expense of litigation and attorney fees, and because of the "great delay" that generally occurred between the time of the injury and the final settlement of the action. Indeed, the commission's examination of the cases that were actually litigated revealed that "the damages for injuries similar in effect and extent were widely variant in amount and were on average less than the compensation proposed under suggested compensation acts."[17] It is the case then that our courts, rather than straining to devise some too clever reading of the parties' agreement that has as its end game the allowing of tort claims by a particular injured worker (which formula invariably

[16] Report of the Employer's Liability and Workmen's Compensation Commission of the State of Michigan, p 16 (1911) (Report).

[17] *Id.*, pp 16-23.

will be devastating to yet unknown injured workers who, under the new formula, will be unable to secure worker's compensation), should simply look to the parties' actual contract to determine the nature of what was actually agreed on and rule accordingly. All of which is to say that we should recall the venerable axiom that hard cases make bad law and not fall into the practice of allowing them to do so.

Therefore, we conclude that Reed was an employee of Mr. Food at the time of his injuries within the meaning of subsection 161(1)(*l*) because the service he performed was pursuant to an expressed or implied contract of hire and the compensation was real and substantial. It was a wage. Accordingly, our next task is to determine whether Reed meets the requirements of subsection 161(1)(n).

C. ANALYSIS OF MCL 418.161(1)(n)

Subsection 161(1)(n) provides that every person performing a service in the course of an employer's trade, business, profession, or occupation is an employee of that employer. However, the statute continues by excluding from this group any such person who: (1) maintains his or her own business in relation to the service he or she provides the employer, (2) holds himself or herself out to the public to render the same service that he or she performed for the employer, and (3) is himself or herself an employer subject to the WDCA. In other words, subsection 161(1)(n) sets forth three criteria for determining whether a person performing services for an employer qualifies as what is commonly called an "independent contractor" rather than an employee. As we explained in *Hoste*, these three statutory criteria have superseded the former common-law-based economic realities test for determining

whether an individual is an independent contractor to the extent that they differ from the test. *Hoste, supra* at 572.[18]

In the present case, it is undisputed that Mr. Food, or Herskovitz, is an employer subject to the WDCA and that Reed was performing *a* service in the course of Mr. Food's business. We thus turn to the three criteria required for the exception in subsection 161(1)(n): whether Reed, in relation to the service he provided for Mr. Food, (1) maintained a separate business offering *the same* service, (2) held himself out to and rendered *the same* service to the public, and (3) is an employer subject to the WDCA.

Reed's argument, adopted by the Court of Appeals, is that he is an independent contractor because he maintained a separate business and held himself out to the public as a day laborer. Even assuming that Reed had a separate business and held it out to the public, these facts do not establish enough to meet the statutory requirement of subsection 161(1)(n). The first requirement is that the service held out and provided by the separate business be "this service," i.e., the same service that he performed for the employer. It is not enough under the statute that he has any business and holds it out. The reason is that such a reading fails to

[18] As we have explained, the Court of Appeals ignored our statement in *Hoste, supra* at 572, that the economic realities test cannot be used to supersede subsection 161(1)(n) by adding factors to the statute that the Legislature did not see fit to incorporate, and based its analysis on such factors from older cases discussing the economic realities test. These were things such as how Reed was paid and whether taxes were withheld, whether Herskovitz and Hadley had control over Reed's duties, and whether Reed's services were an integral part of Mr. Food's business. The Legislature did not see fit to include such factors in subsection 161(1)(n) and, therefore, the Court of Appeals reliance on them was error. This means then that the prelegislation cases were superseded by the legislation and are thus without authority as law on these issues.

give effect to all the words in the statute. This we cannot do because we are bound by oath to give meaning to every word, phrase, and clause in a statute. Said conversely, we cannot render parts of the statute surplusage and nugatory. *State Farm Fire & Cas Co v Old Republic Ins Co,* 466 Mich 142, 146; 644 NW2d 715 (2002). Yet, it is this the plaintiff requests, and this we cannot grant.

Therefore, contrary to the conclusions of the trial court and the Court of Appeals, the "service" performed by the person cannot be placed in such broad and undefined classifications as general labor. Rather, it must be classified according to the most relevant aspects identifiable to the duties performed in the course of the employer's trade, business, profession, or occupation.[19] Thus, for example, if the service that the person performs for the employer is roofing, to be an independent contractor and, thus, be ineligible for worker's compensation, the person must maintain a separate roofing business, which roofing business he holds himself or herself out to the public as performing. Accordingly, in this case where the most Reed can point to is that he was a house painter at times, the tests to take him out of the worker's compensation system are not met.

We would again caution that the contrary reading of this requirement, as engaged in by the Court of Appeals and the trial court, would inescapably mean that any moonlighting worker, say an industrial worker at General Motors, Ford, or DaimlerChrysler, who has a janitorial service, lawn care business, a Mary Kay distributorship, or even serves as a compensated choir director at her church, would be without worker's compensation

[19] Cf. *Michael H v Gerald D,* 491 US 110, 127 n 6; 109 S Ct 2333; 105 L Ed 2d 91 (1989).

when injured at her day job. This is not what the words of the Legislature allow, and to twist them into saying it is shortsighted in the extreme.

Accordingly, we conclude that Reed is not an independent contractor and is subject to the worker's compensation system.

SUBJECT-MATTER JURISDICTION

As a final matter, we note that the Workers' Compensation Section of the State Bar of Michigan has filed a provocative amicus brief. It argues that this Court's decision in *Sewell v Clearing Machine Corp,* 419 Mich 56; 347 NW2d 447 (1984), holding that the circuit court shares concurrent jurisdiction with the worker's compensation adjudicatory system to determine, in the first instance, whether a person was an employee at the time of the person's injury, is in error. Amicus argues that Const 1963, art 6, § 13[20] and MCL 418.841(1),[21] in tandem, effectively divest the circuit court of subject-matter jurisdiction on this issue and, thus, this case is improperly before us on appeal. Instead, amicus argues, the worker's compensation system has exclusive jurisdiction to determine this question. Neither party raised or briefed this jurisdictional issue but were asked at oral argument to address it.

Justice CORRIGAN has persuasively argued in her dissent that *Sewell* was indeed wrongly decided. How-

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[20] Const 1963, art 6, § 13 provides that "[t]he circuit court shall have original jurisdiction in all matters not prohibited by law . . . ."

[21] MCL 418.841(1) provides:

> Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and *all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate*, as applicable. [Emphasis added.]

ever, we decline to overrule *Sewell* on this record. Both Justice CORRIGAN and amicus curiae are appropriately critical of the unseemly atmospherics surrounding the *Sewell* decision: it was decided peremptorily without plenary consideration, briefing, or argument.[22] Appreciative of that criticism of *Sewell,* we believe it prudent to not replicate it and accordingly decline to overrule *Sewell* in the same peremptory fashion that it was adopted.

As we have made clear in the past, "[w]e do not lightly overrule precedent."[23] Indeed, in *Robinson v Detroit,* 462 Mich 439, 464; 613 NW2d 307 (2000), we discussed several factors to consider before overruling a prior decision. Rather than address the various considerations mentioned in *Robinson,* the amicus only argues that *Sewell* was wrongly decided, and the parties do not even address that. We believe this is an unsatisfactory predicate for overruling *Sewell,* especially when it is debatable whether *Sewell* was wrongly decided. As plaintiff hurriedly pointed out at oral argument in this case, the relevant language ("all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate") may mean that, before deciding any "questions arising under this act," it is necessary to determine if the cause of action is in tort or worker's compensation. It is only after that is determined, *and* if it is determined that it is indeed a worker's compensation matter, that the bureau's jurisdiction is exclusive. While Justice CORRIGAN makes a compelling case that this rebuttal argument to the amicus will be found unconvincing upon full consideration, that is not entirely clear at this point. Moreover,

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[22] *Sewell, supra* at 65 (LEVIN, J., concurring).

[23] *Pohutski v City of Allen Park,* 465 Mich 675, 693; 641 NW2d 219 (2002).

even if one assumes that Justice CORRIGAN and amicus curiae's assertion regarding jurisdiction is the stronger argument, we have had no briefing concerning whether the other stare decisis considerations discussed in *Robinson* are satisfied in the present case.

Further, while all courts must upon challenge, or even sua sponte, confirm that subject-matter jurisdiction exists,[24] that does not mean that once having done so, as we did in *Sewell,* that a court must repeatedly reconsider it de novo. Subsequent courts can rely on the earlier determination that has the force of stare decisis behind it. It is that situation that we are in and until a record exists that is full and developed and causes us to question our earlier holding, pursuant to the *Robinson* tests, we see no justification at present to disturb the *Sewell* dual jurisdiction holding.

Finally, given the interest this issue of jurisdiction has generated on the Court, we have no doubt it will be presented to us again in the near future. On that occasion, presumably all parties will have a full opportunity to brief and argue this issue, and it may at that time be appropriate to reconsider *Sewell*.

CONCLUSION

We conclude that Reed was an "employee" of Mr. Food as the Legislature has unambiguously defined that term in MCL 418. 161(1)(*l*) and (n). Accordingly, we reverse in part the judgment of the Court of Appeals and remand this case to the circuit court for entry of a directed verdict in defendants' favor. Jurisdiction over this case is thereafter transferred to the Bureau of

[24] *Bowie v Arder,* 441 Mich 23; 490 NW2d 568 (1992); *Fox v Univ of Michigan Bd of Regents,* 375 Mich 238, 242-243; 134 NW2d 146 (1965); *In re Estate of Fraser,* 288 Mich 392, 394; 285 NW 1 (1939); *Ward v Hunter Machinery Co,* 263 Mich 445, 449; 248 NW 864 (1933).

Worker's Disability Compensation. Should Reed desire to pursue a claim for benefits under the WDCA, he shall present an appropriate claim for compensation to the bureau no later than thirty days after the date this opinion is issued. For the purposes of MCL 418.381(1),[25] the bureau shall treat Reed's claim for benefits as having been filed on December 10, 1998, the date he filed his complaint in the circuit court.

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

CAVANAGH and KELLY, JJ., concurred in the result only.

WEAVER, J. *(dissenting).* I dissent from the lead opinion's determination that plaintiff is an "employee" within the meaning of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.* Instead of resolving this issue, I would first direct the parties to brief the jurisdictional issue that was raised in the amicus brief filed by the Workers' Compensation Law Section of the State Bar of Michigan concerning whether the circuit court had jurisdiction to determine whether plaintiff was an employee within the meaning of the WDCA.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the lead opinion's determination that plaintiff is an "employee" within the meaning of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*.

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[25] This statute provides:

> A proceeding for compensation for an injury under this act shall not be maintained unless a claim for compensation for the injury, which claim may be either oral or in writing, has been made to the employer or a written claim has been made to the bureau on forms prescribed by the director, within 2 years after the occurrence of the injury.

Although I agree with the lead opinion's analysis of this substantive issue, and would also conclude that plaintiff was Mr. Food's employee at the time of his accident, I believe that we should first address the question of our jurisdiction.[1] It appears that the Worker's Compensation Bureau (WCB)[2] has exclusive jurisdiction over consideration of plaintiff's employment status. I would specifically direct the parties to brief the important jurisdictional question presented in the amicus brief of the Workers' Compensation Law Section of the State Bar of Michigan.[3]

I am persuaded that *Sewell v Clearing Machine Corp*, 419 Mich 56; 347 NW2d 447 (1984), was wrongly decided. It held that the WCB and the circuit court share jurisdiction to determine a worker's employment status. *Sewell*'s assumption of jurisdiction shared with the WCB violated the plain language of MCL 418.161 without even so much as an analytic nod to the statutory scheme conferring jurisdiction in the WDCA. *Sewell* overruled longstanding authority that had correctly implemented the statute, including *Szydlowski v Gen Motors Corp*, 397 Mich 356; 245 NW2d 26 (1976).[4] Moreover, it contradicted the legislative scheme estab-

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[1] MCL 418.161(1)(n) of the WDCA controls this question.

[2] The Worker's Compensation Bureau was created by MCL 418.201. Pursuant to Executive Order No. 2003-18, MCL 445.2011, effective December 7, 2003, that agency is now the Workers' Compensation Agency.

[3] Contrary to the lead opinion's assertion, I do not advocate overruling *Sewell* in a "peremptory fashion." *Ante* at 539. I would direct briefing on the jurisdictional issue.

[4] See *Jesionowski v Allied Products Corp,* 329 Mich 209; 45 NW2d 39 (1950); *Dershowitz v Ford Motor Co,* 327 Mich 386; 41 NW2d 900 (1950); *Morris v Ford Motor Co,* 320 Mich 372; 31 NW2d 89 (1948); *Munson v Christie*, 270 Mich 94; 258 NW 415 (1935); *Houghtaling v Chapman,* 119 Mich App 828; 327 NW2d 375 (1982); *Buschbacher v Great Lakes Steel*

lished to determine disputes involving the award of worker's compensation benefits.

We should review the fundamental question of our jurisdiction as it affects not only the proper exercise of judicial authority in this case, but in the myriad cases involving the exclusive remedy provision. I believe that the parallel universe that *Sewell* created is illegitimate. It offends the separation of powers and should be ended.

Because of the major jurisprudential significance of the jurisdictional issue, I would follow the same approach that we employed in *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146; 665 NW2d 452 (2003), and *Lapeer Co Clerk v Lapeer Circuit Judges,* 465 Mich 559; 640 NW2d 567 (2002). I would sever and resolve the jurisdictional problem before tackling any remaining issues.

I. FACTS AND PROCEDURAL HISTORY

In summer 1997, plaintiff was hired as a full-time delivery person by defendant Mr. Food, Inc. Unsatisfied with plaintiff's performance, Mr. Food terminated plaintiff's employment in December 1997. Between December 1997 and May 7, 1998, defendant Hadley, an employee of Mr. Food, hired plaintiff to assist him in deliveries on an as-needed basis. Defendant Herskovitz, the owner of Mr. Food, paid plaintiff about $35 to $40 a day in cash on five to seven occasions. Plaintiff also worked at various jobs, including house painting and general labor, during this four-month period.

On May 7, 1998, plaintiff was a passenger in defendant Mr. Food's delivery truck, assisting defendant

Corp, 114 Mich App 833; 319 NW2d 691 (1982); *Dixon v Sype,* 92 Mich App 144; 284 NW2d 514 (1979); *Herman v Theis,* 10 Mich App 684; 160 NW2d 365 (1968).

Hadley as he had on earlier occasions. Plaintiff expected to be paid for his services in cash that day. The truck was struck by defendant Yackell's vehicle when it did not stop at a red light.[5] Plaintiff was seriously injured as a consequence of the accident.

Plaintiff filed suit, alleging that Yackell was negligent in failing to stop at the red light, and that Mr. Food was vicariously liable for defendant Hadley's negligence in failing to avoid the collision. Defendants properly raised and preserved their claim that the worker's compensation exclusive remedy provision barred plaintiff's cause of action, as the *Sewell* regime provided. For example, the joint pretrial order reflects that whether the exclusive remedy provision precluded plaintiff's claim was an issue of law to be litigated. Even plaintiff's opening statement raised the applicability of the WDCA's exclusivity provision:

> On that day, Ricky Reed received a telephone call from Buddy Hadley, and asked him to work-under-the-table for $40, as he had done several times since being let go from Mr. Food. And Mr. Herskovitz would pay him $40 to help Mr. Hadley deliver meat on his route in a big freezer truck.
>
> The evidence is going to show that not only had Mr. Herskovitz paid him in the past, but he [was] going to pay him to assist Mr. Hadley on this case.

At the close of plaintiff's proofs, Mr. Food moved for a directed verdict, arguing again that plaintiff was an employee of Mr. Food at the time of the accident, so that the WDCA was plaintiff's exclusive remedy. MCL 418.131(1). The circuit court denied the motion. Following a jury verdict in plaintiff's favor, Mr. Food moved for judgment notwithstanding the verdict (JNOV) under MCR 2.610(1), reiterating its argument that plaintiff's

[5] Defendant Yackell is not a party to this appeal.

exclusive remedy under worker's compensation precluded plaintiff's claim.[6] The circuit court again denied that motion.

The Court of Appeals affirmed the trial court's denial of Mr. Food's motions for a directed verdict and JNOV.[7] It held that, although plaintiff was under an implied contract of hire with Mr. Food, he was an independent contractor at the time of the accident and, therefore, worker's compensation benefits were not plaintiff's exclusive remedy.

Mr. Food sought leave to appeal in this Court. In lieu of granting leave, this Court vacated the Court of Appeals opinion and remanded the case to the circuit court to determine whether plaintiff was an employee within the meaning of MCL 418.161(l)(*l*) and (n).[8] On remand, the circuit court held that plaintiff was not an employee, but an independent contractor, because he maintained a separate business as a day laborer and held himself out to the public as a day laborer. This Court then remanded the case to the Court of Appeals to reconsider whether plaintiff was an employee within the meaning of MCL 418.161(1)(*l*) and (n) in light of the

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[6] The motion for JNOV stated:

> 1. . . . Plaintiff's own testimony established that he was an employee of Mr. Food, and the exclusive remedy provision of the Workers Disability Compensation Act (WDCA) deprives the court of subject matter jurisdiction . . . .
>
> 2. Plaintiff meets the statutory definition of "employee" in the WDCA because part-time workers are employees, and Plaintiff Reed was "performing service in the course of the . . . business . . . of an employer at the time of the injury.["]

[7] Unpublished opinion per curiam of the Court of Appeals, issued February 14, 2003 (Docket No. 236588).

[8] 469 Mich 960 (2003).

circuit court's findings of fact.[9] The Court of Appeals affirmed.[10]

This Court granted the application of defendants Mr. Food and Hadley for leave to appeal on the issue of plaintiff's employment status on the date of the accident.[11] On April 12, 2005, the Workers' Compensation Law Section filed an amicus brief squarely raising the *Sewell* jurisdictional issue for the first time. Neither plaintiff nor defendants answered the amicus brief.

II. STANDARD OF REVIEW

The issue of subject-matter jurisdiction turns on questions of statutory and court rule interpretation and thus presents a question of law. *Lapeer Circuit Judges, supra* at 566. This Court reviews questions of law de novo. *Id.*; *Cain v Waste Mgt, Inc (After Remand),* 472 Mich 236; 697 NW2d 130 (2005). This case also has constitutional implications regarding the legitimate scope of judicial power, which is also subject to review de novo. *Warda v Flushing City Council,* 472 Mich 326; 696 NW2d 671 (2005).

III. DISCUSSION & ANALYSIS

A. SUBJECT-MATTER JURISDICTION

Subject-matter jurisdiction may be raised at any time by the parties, or sua sponte by a court. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 630; 684 NW2d 800 (2004); MCR 2.116(D)(3). Subject-matter jurisdiction involves the power of a court to hear

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[9] 469 Mich 1051 (2004).

[10] Unpublished opinion per curiam of the Court of Appeals, issued June 8, 2004 (Docket No. 236588).

[11] 471 Mich 957 (2005).

and determine a cause or matter. *Langdon v Wayne Circuit Judges*, 76 Mich 358, 367; 43 NW 310 (1889). Since subject-matter jurisdiction is the foundation for a court to hear and decide a claim, it may be considered by the court on its own at any time. *In re Estate of Fraser,* 288 Mich 392, 394; 285 NW 1 (1939).

In *Joy v Two-Bit Corp*, 287 Mich 244, 253-254; 283 NW 45 (1938), this Court defined subject-matter jurisdiction as

> "the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial." [Citation omitted.]

Subject-matter jurisdiction is conferred on the court by the authority that created the court. *Detroit v Rabaut,* 389 Mich 329, 331; 206 NW2d 625 (1973). Const 1963, art 6, § 1 created the current judicial system in Michigan; it provides for one Supreme Court, the Court of Appeals, one circuit court of general jurisdiction, one probate court, and "courts of limited jurisdiction that the legislature may establish . . . ."

Const 1963, art 6, § 4 provides that this Court has "general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court." This Court's appellate jurisdiction to review and pass on decisions of the lower courts necessarily assumes that the lower courts properly exercised subject-matter jurisdiction over the case. If a lower court improperly exercised jurisdiction over a matter delegated to another governmental branch, this

Court is devoid of appellate jurisdiction over the subject matter of the case because the Constitution provides no basis for this Court to exercise a power delegated to another department of government. On the contrary, Const 1963, art 3, § 2 specifically 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."

As this Court explained in *Bowie v Arder,* 441 Mich 23, 56; 490 NW2d 568 (1992):

> When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void. Further, a court must take notice of the limits of its authority, and should on its own motion recognize its lack of jurisdiction and dismiss the action at any stage in the proceedings. [Citation omitted.]

The specific threshold jurisdictional issue here is whether the Legislature has exclusively delegated to the WCB the power to decide the application of the WDCA to the class of cases that includes plaintiff's case. If that is so, then this Court and the lower courts are divested of subject-matter jurisdiction to determine a plaintiff's employment status for WDCA purposes, and this Court has no choice but to dismiss this case. Proper resolution of this jurisdictional question is critical because it determines whether a jury or a specialized agency will hear and decide the claim. The WDCA actually prohibits a circuit court from exercising subject-matter jurisdiction to decide any questions arising under the WDCA by assigning jurisdiction to the WCB or a worker's compensation magistrate. MCL 418.841(1).

B. WORKER'S DISABILITY COMPENSATION ACT

The predecessor to the WDCA, known as the "Workmen's Compensation Act," was enacted in 1912 during

a special legislative session. *Cain, supra* at 247-248.[12] The worker's compensation system assures employees that they will receive compensation for employment-related injuries, without regard to fault, through worker's compensation benefits. In exchange for "this almost automatic liability, employees are limited in the amount of compensation they may collect from their employer, and, except in limited circumstances, may not bring a tort action against the employer." *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 687; 594 NW2d 447 (1999); MCL 418.131(1). Worker's compensation is thus an injured worker's "exclusive remedy" for a qualifying work-related injury. *Id.*

MCL 418.301(1) of the WDCA provides, in relevant part:

> An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act.

Thus, worker's compensation benefits are available under the WDCA when (1) an employment relationship exists, and (2) a personal injury arose out of, and in the course of, that employment.

The term "employee" for WDCA purposes is defined in MCL 418.161(1). That section controls employment status determinations regarding government workers (§ 161[1][a]), foreign nationals (§ 161[1][b]), public safety personnel (§§ 161[1][c] and [f]), volunteer fire fighters (§§ 161[1][d] and [e]), volunteer civil defense workers (§ 161[1][g]), public health volunteers (§§ 161[1][h] and [i]), emergency rescue workers (§

[12] 1975 PA 279 changed the title of the act from the "Workmen's Compensation Act of 1969" to the "Worker's Disability Compensation Act of 1969" to reflect its applicability to workers of either sex.

161[1][j], peace officers (§ 161[1][k]), workers under contract (§ 161[1][*l*]), trainee program participants (§ 161[1][m]), and even independent contractors (§ 161[1][n]).[13]

The only apparent exception that confers jurisdiction on the circuit court is found in MCL 418.131(1):

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury.

Here, plaintiff has not presented an intentional tort claim. The fundamental question presented here is whether the circuit court has jurisdiction over a case after a party has raised the question whether the claim sounds in worker's compensation rather than tort.

C. THE WDCA AND THE CIRCUIT COURT SUBJECT-MATTER JURISDICTION

MCL 418.841(1) of the WDCA provides:

> *Any* dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and *all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate*, as applicable. [Emphasis supplied.]

The WDCA sets up comprehensive procedures for resolving disputes "arising under" the act. For example, MCL 418.847(1) provides that a "party in interest" may apply for a hearing before a worker's compensation magistrate. MCL 418.847(2) provides that a magistrate

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[13] The question the majority addresses is thus first assigned to the WCB.

must file a written order and "a concise written opinion stating his or her reasoning for the order including any findings of fact and conclusions of law."

MCL 418.859a and 418.861a establish the procedures a party must follow in order to appeal a magistrate's decision within the WCB. MCL 418.859a provides that "a claim for review of a case for which an application under section 847 is filed . . . shall be filed with the appellate commission." MCL 418.861a(1) provides that any claim for review filed pursuant to § 859a "shall be heard and decided by the appellate commission [WCAC]." During that process, the WCAC may "remand [the] matter to a worker's compensation magistrate for purposes of supplying a complete record if it is determined that the record is insufficient for purposes of review." MCL 418.861a(12).

Judicial review of magistrate and WCAC decisions is circumscribed under the WDCA. MCL 418.861 provides:

> The findings of fact made by the board acting within its powers, in the absence of fraud, shall be conclusive. The court of appeals and the supreme court shall have power to review questions of law involved in any final order of the board, if application is made by the aggrieved party within 30 days after such order by any method permissible under the rules of the courts of the laws of this state.

MCL 418.861a(14) similarly provides:

> The findings of fact made by the commission acting within its powers, in the absence of fraud, shall be conclusive. The court of appeals and the supreme court shall have the power to review questions of law involved with any final order of the commission, if application is made by the aggrieved party within 30 days after the order by any method permissible under the Michigan court rules.

Significantly, the WDCA sets up no substantive right to or procedural mechanism for circuit court resolution or review of legal or factual questions regarding application of the WDCA. On the contrary, as noted earlier, in MCL 418.841, the Legislature directed that "[*a*]*ny dispute* or controversy concerning compensation or other benefits shall be submitted to the bureau and *all questions* arising under this act shall be determined by the bureau or a worker's compensation magistrate . . . ." (Emphasis supplied.)

Where, as here, the employment status of an injured plaintiff is in dispute, the issue is whether that dispute is one "arising under" the WDCA. If the dispute over employment status is not one "arising under" the WDCA, then MCL 418.841 does not preclude a circuit court from exercising jurisdiction over that determination. Conversely, if the dispute over employment status *is* a question "arising under" the WDCA, then a circuit court lacks subject-matter jurisdiction over those initial determinations by virtue of the Legislature's direction in MCL 418.841(1) that "all" such questions "*shall* be determined by the bureau or a worker's compensation magistrate . . . ." (Emphasis supplied.) The Legislature's use of the word "shall" in a statute "indicates a mandatory and imperative directive" *Burton v Reed City Hosp Corp,* 471 Mich 745, 752; 691 NW2d 424 (2005).

As already discussed, the criteria for determining employment status are comprehensively set forth in, and controlled by, MCL 418.161(1) *of the WDCA*. The question of employee status falls within the category of "all questions arising under" the act. Because the Legislature directed that *all* questions concerning the meaning and application of every provision in the WDCA are to be decided by the WCB or a magistrate,

and any dispute regarding whether an injured party is an "employee" is necessarily one "arising under" the WDCA, the WCB is the designated forum to determine that question.

Const 1963, art 6, § 13 provides that "[t]he circuit court shall have original jurisdiction in all matters *not prohibited by law* . . . ." (Emphasis supplied.) By virtue of MCL 418.841(1), it appears that the Legislature "prohibited by law" the exercise of original jurisdiction in the circuit court. Therefore, jurisdiction regarding a party's employment status rests in the first instance exclusively with the WCB or a magistrate. As noted earlier, because the circuit court lacked jurisdiction over the subject matter, the Court of Appeals and this Court lack subject-matter jurisdiction to review that circuit court decision.

D. *SEWELL v CLEARING MACHINE CORP*, 419 MICH 56; 347 NW2D 447 (1984)

Despite the clear and unambiguous directive set forth in MCL 418.841, *Sewell, supra,* overrode the statute and declared that the courts and the WCB shared jurisdiction. The *Sewell* Court held that

> the bureau has exclusive jurisdiction to decide whether injuries suffered by an employee were in the course of employment. *The courts, however, retain the power to decide the more fundamental issue whether the plaintiff is an employee (or fellow employee) of the defendant*. [*Sewell, supra* at 62 (emphasis supplied).]

There is no authority cited for this assertion of power. Indeed, the judiciary is powerless to modify unambiguous statutory language in order to inject its own policy preferences. *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005). Nonetheless, *Sewell* dictated that courts and the WCB would effectively

share the power to decide whether an injured party is an "employee" within the meaning of the WDCA. The WCB, however, would retain exclusive jurisdiction over determining whether an injury occurred in the course of employment.

Although *Sewell* cited MCL 418.841, it provided no analysis of that section's sweeping directive that "all questions arising under [the] act shall be determined by the" WCB. Indeed, the opinion is devoid of any analysis of *any* WDCA provisions whatsoever.

Moreover, the perfunctory decision in *Sewell* swept away almost *fifty years of precedent* in which this Court and the Court of Appeals had consistently held that courts lack jurisdiction to determine employment status. *Szydlowski, supra; Jesionowski v Allied Products Corp,* 329 Mich 209; 45 NW2d 39 (1950); *Dershowitz v Ford Motor Co,* 327 Mich 386; 41 NW2d 900 (1950); *Morris v Ford Motor Co,* 320 Mich 372; 31 NW2d 89 (1948); *Munson v Christie*, 270 Mich 94; 258 NW 415 (1935); *Houghtaling v Chapman,* 119 Mich App 828; 327 NW2d 375 (1982); *Buschbacher v Great Lakes Steel Corp,* 114 Mich App 833; 319 NW2d 691 (1982); *Dixon v Sype,* 92 Mich App 144; 284 NW2d 514 (1979); *Herman v Theis,* 10 Mich App 684; 160 NW2d 365 (1968).

Sewell wholly disregarded this extensive body of case law, stating:

> Taken alone, those general statements suggest that the bureau's jurisdiction takes precedence over that of the circuit court whenever there is an issue concerning the applicability of the Worker's Disability Compensation Act. *The rule is not so broad, however.* [*Sewell, supra* at 62.]

Again, the Court cited no authority for that proposition. It is hard to imagine a *broader* rule than the one established by the Legislature in the WDCA, i.e., one

covering "*all* questions." This Court's usurpation of legislative power in *Sewell* is nothing short of breathtaking. This Court has stood firm against just such usurpations of legislative power by this branch of government. *Warda, supra; Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 129 (2004); *Lapeer Circuit Judges, supra; Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2000); *Massey v Mandell*, 462 Mich 375, 379-380; 614 NW2d 70 (2000); *DiBenedetto v West Shore Hosp,* 461 Mich 394, 402; 605 NW2d 300 (2000); *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).

I fully agree with Justice LEVIN's statement in *Sewell*. He pointed out that the majority's "more fundamental" test was "proffered without analysis, explanation, or justification" and that it "offers no guidance for the resolution of future cases and does not satisfactorily explain the result reached . . . ." *Id.* at 65. He argued that "[t]he issue whether [defendant] was [plaintiff's] employer is no more 'fundamental' than the issue whether [plaintiff's] injuries were suffered in the course of employment." *Id.* at 70.

In announcing a shared jurisdiction paradigm when determining whether the WDCA applies to a claim, *Sewell* overruled *Szydlowski, supra.* In *Szydlowski,* we held that

> "a plaintiff's remedy against an employer based on an injury allegedly arising out of an employment relationship *properly belongs within the workmen's compensation department for initial determination as to jurisdiction and liability*." [*Szydlowski, supra* at 359, quoting *Herman, supra* at 691 (emphasis supplied).]

This Court explained in *Szydlowski* that "the procedures for workmen's compensation cases have been statutorily established. [*Herman*] properly cautions us

against a shortcut or circumvention of those procedures." *Szydlowski, supra* at 359. The WDCA scheme is a complete departure from the common law and equity jurisprudence, as this Court recognized in *Andrejwski v Wolverine Coal Co,* 182 Mich 298, 302-303; 148 NW 684 (1914):

> The act in question, like all similar acts, provides for compensation, and not for damages, and in its consideration and construction all of the rules of law and procedure, which apply to recover damages for negligently causing injury or death, are in these cases no longer applicable, *and there is substituted a new code of procedure fixed and determined by the act in question.* [Emphasis supplied.]

The shared jurisdiction paradigm established in *Sewell* not only contradicts the plain language of the WDCA, but it also does violence to the legislative scheme.

E. PRUDENTIAL PROBLEMS WITH *SEWELL*

As discussed in the previous section, *Sewell* contradicted the clear legislative directive that "*all* questions arising under" the WDCA are to be addressed within the worker's compensation system. That is a sufficient basis to overturn the decision.[14] But *Sewell*'s shared jurisdiction paradigm implicates other prudential concerns, quite apart from the absence of judicial authority to negate the legislative scheme. Specifically, it fails to accord the proper deference to agency expertise, and thwarts the goal of consistent and uniform decisions by the WCB.

1. AGENCY EXPERTISE

This Court has acknowledged that administrative agencies possess "superior knowledge and expertise in

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[14] *See Robinson v Detroit,* 462 Mich 439, 473; 613 NW2d 307 (2000) (CORRIGAN, J., concurring).

addressing recurring issues within the scope of their authority." *Travelers Ins Co v Detroit Edison Co,* 465 Mich 185, 200; 631 NW2d 733 (2001). In *Mudel v Great Atlantic & Pacific Tea Co,* 462 Mich 691, 702 n 5; 614 NW2d 607 (2000), this Court explained that the Legislature created a "two-tier reviewing process, which delegates to the WCAC the role of ultimate factfinder, while limiting the judiciary to the role of guardian of procedural fairness." *Mudel* correctly recognized that

> administrative agencies possess expertise in particular areas of specialization. Because the judiciary has neither the expertise nor the resources to engage in a fact-intensive review of the entire administrative record, that type of detailed review is generally delegated to the administrative body. In the particular context of worker's compensation cases, a highly technical area of law, the judiciary lacks the expertise necessary to reach well-grounded factual conclusions . . . . The judiciary is not more qualified to reach well-grounded factual conclusions in this arena than the administrative specialists. Therefore, the Legislature has decided that factual determinations are properly made at the administrative level, as opposed to the judicial level. [*Id.*]

The rationale underlying this Court's decision in *Sewell* is that resolving the legal question regarding a plaintiff's employment status is not an issue that requires agency expertise. The instant case, however, belies that understanding. Here, three courts have interpreted the same facts three different ways in deciding plaintiff's employment status. The trial court held that plaintiff was not under a "contract of hire" at the time of the accident. The Court of Appeals held that plaintiff was under a contract of hire, but that he was an independent contractor. Here, the lead opinion concludes that plaintiff was under a contract of hire and was not acting as an independent contractor.

This case itself reflects that the legal question regarding the employment status of an injured party for WDCA purposes can be a complicated and highly fact-driven question. For that reason, employment status is best determined first by the administrative agency legislatively charged with applying the WDCA.

Even if the Legislature had not clearly directed that *all* questions regarding application of the WDCA be answered within the worker's compensation system, the pre-*Sewell* approach simply works best. Allowing the agency to decide first which tribunal has jurisdiction over a claim in which the WDCA is implicated maximizes the strengths of both tribunals. The WCB may apply its expertise to resolve issues of fact in the employment context, while courts, of course, retain appellate review of WCB decisions and resolve questions of law.

2. UNIFORMITY AND CONSISTENCY

The goal of consistent and uniform administrative decision-making is similarly thwarted where multiple forums may decide the same factual question. As we stated in *Travelers, supra* at 199:

> "[U]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." [Citation omitted.]

Resort to the WCB in the first instance ensures that employment status issues will be resolved in a consistent manner.

Moreover, the shared jurisdiction approach established by *Sewell* suffers from an unconvincing rationale and lack of clarity in application. As Justice LEVIN aptly opined, there is little reason to assume that employment status determinations are any "more fundamental" than other questions involved in determining whether a plaintiff's claim sounds in worker's compensation or tort. *Sewell, supra* at 70 (LEVIN, J., concurring). Thus, *Sewell*'s "more fundamental" rationale for concurrent jurisdiction appears both unprincipled and groundless.

F. *SZYDLOWSKI'S* APPROACH

This Court's opinion in *Szydlowski* provides the more textually faithful approach to determining jurisdiction when the WDCA is implicated. Contrary to *Sewell,* the jurisdictional inquiry in the first instance should be referred to the WCB upon petition by either party in a court action.

In addition to being more textually faithful to the WDCA, this approach would avoid lengthy, duplicative litigation by providing a definite jurisdictional starting point. Consider this case: for seven years, the circuit court, the Court of Appeals, and now this Court have grappled with defining and applying the WDCA's terms of art to the facts of this case. The forum legislatively charged with determining *all* questions arising under the WDCA is the WCB, not the courts. That forum is where this class of cases belongs.

I agree that this Court should not lightly overrule precedent.[15] As this Court discussed recently in *People v Davis*, 472 Mich 156, 168 n 19; 695 NW2d 45 (2005),

> the doctrine of stare decisis is not applied mechanically to

[15] *Ante* at 539.

> prevent the Court from overruling previous decisions that are erroneous. We may overrule a prior decision when we are certain that it was wrongly decided and " 'less injury will result from overruling than from following it.' " *People v Moore*, 470 Mich 56, 69 n 17; 679 NW2d 41 (2004), quoting *McEvoy v Sault Ste Marie*, 136 Mich 172, 178; 98 NW 1006 (1904).

Sewell's shared jurisdiction approach is not at all faithful to the plain text of the WDCA. The doctrine of stare decisis should not prevail over a legislative directive. As I noted in *Robinson v Detroit*, 462 Mich 439, 472-473; 613 NW2d 307 (2000):

> I agree that too rapid change in the law threatens judicial legitimacy, as it threatens the stability of any institution. But the act of correcting past rulings that usurp power properly belonging to the legislative branch does not threaten legitimacy. Rather, it restores legitimacy. Simply put, our duty to act within our constitutional grant of authority is paramount. If a prior decision of this Court reflects an abuse of judicial power at the expense of legislative authority, a failure to recognize and correct that excess, even if done in the name of stare decisis, would perpetuate an unacceptable abuse of judicial power. [CORRIGAN, J., concurring.]

IV. CONCLUSION

In sum, *Sewell*'s assumption of circuit court jurisdiction over determining employment status contradicts the plain language of the WDCA. Determining employment status is a fact-driven undertaking requiring interpretation and application of the WDCA. Such questions should be determined first by the forum legislatively charged with interpreting and applying the act. For the foregoing reasons, I conclude that the circuit court and the Court of Appeals lack subject-matter jurisdiction over this matter. Although I agree that the

jurisdictional issue was posed at a very late stage, I would nonetheless direct the parties to brief this jurisprudentially significant problem of jurisdiction and submit the case on this narrow question.

DEVILLERS v AUTO CLUB INSURANCE ASSOCIATION

Docket No. 126899. Argued April 12, 2005 (Calendar No. 7). Decided July 29, 2005.

Eva Devillers, as guardian and conservator of Michael J. Devillers, brought an action in the Oakland Circuit Court against the Auto Club Insurance Association, seeking payment for home health-care services as personal protection insurance (PPI) benefits under a no-fault insurance policy. The defendant moved for partial summary disposition with respect to the PPI benefits for the period that was more than one year before the plaintiff filed her action, arguing that the plaintiff was precluded from recovering those benefits under the one-year-back rule of MCL 500.3145(1). The circuit court, Nanci J. Grant, J., denied summary disposition, agreeing with the plaintiff that, under *Lewis v DAIIE*, 426 Mich 93 (1986), the one-year limitations period was tolled until the date the defendant sent a letter memorializing the termination of the PPI benefits. The defendant filed an emergency application for leave to appeal in the Court of Appeals, and a bypass application for leave to appeal in the Supreme Court, arguing that *Lewis* should be overruled. The Court of Appeals, FITZGERALD, P.J., and GAGE and COOPER, JJ., denied the defendant's application for leave to appeal in an unpublished order, entered September 21, 2004 (Docket No. 257449). The Supreme Court granted leave to appeal. 471 Mich 923 (2004).

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

The clear and unambiguous language of MCL 500.3145(1) precludes recovery of PPI benefits for any portion of the loss that occurred more than one year before the action was commenced. Because *Lewis* contravenes this plain statutory directive and, by applying a judicial tolling mechanism to the one-year-back limitation, represents an unconstitutional usurpation of legislative authority, *Lewis* and its progeny must be overruled. Because this case presents no exigent circumstances warranting prospective-only application, the decision is to be given limited retroactivity.

Circuit court reversed and case remanded to the circuit court for entry of order of partial summary disposition for the defendant consistent with this opinion.

Justice CAVANAGH, joined by Justice KELLY, dissenting, would hold that equitable tolling, as carefully applied in *Lewis*, is a long-recognized rule of equity that is justified in rare, but compelling, circumstances such as those present in this case and under this statute. It furthers the legislative purposes underlying the no-fault system, particularly the reduction of litigation. Without equitable tolling, the one-year-back limitation would permit an insurer to delay approving or denying a claim, and thus eliminate benefits owed to the insured and even profit from these actions. The majority's decision will require an insured party to initiate a lawsuit before an insurer denies a claim to avoid this risk. The statutory penalties for an insurer's unreasonable delay or denial do not protect an insured who loses benefits. Application of equitable tolling to this statute strikes a balance between the rights of insureds and insurers that has worked since *Lewis*, and the Legislature has not amended the statute in that time, despite numerous amendments of the no-fault act. Consideration of stare decisis reveals no basis for overruling *Lewis*. Furthermore, the majority's decision should not be applied retroactively.

Justice WEAVER, dissenting, agreed that *Lewis* was wrongly decided, but disagreed that it should be overruled after nineteen years as precedent. No need has been shown to unsettle the law and disregard the doctrine of stare decisis. Furthermore, the majority's decision overruling *Lewis* should be applied prospectively because it interprets a statute and overrules case law that has been relied on for so long without a change in interpretation being foreshadowed. Limited retroactive effect could result in injustice for claimants who postponed suit in reliance on *Lewis*.

INSURANCE — NO-FAULT INSURANCE — PERSONAL PROTECTION BENEFITS — LIMITATION ON RECOVERY.

A claimant who brings an action to recover personal protection insurance benefits may not recover benefits for any portion of the loss incurred more than one year before the date on which the claimant commenced the action; the one-year period is not subject to judicial tolling (MCL 500.3145[1]).

Ihrie O'Brien (by *Harold A. Perakis* and *Robert D. Ihrie*) for the plaintiff.

Gross, Nemeth & Silverman, P.L.C. (by *James G. Gross*), and *Schoolmaster, Hom, Killeen, Siefer, Arene & Hoehn* (by *Gregory Van Tongeren*) for the defendant.

Amici Curiae:

Plunkett & Cooney, P.C. (by *Mary Massaron Ross*), for The Insurance Institute of Michigan.

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *George T. Sinas* and *Steven A. Hicks*), for the Coalition Protecting Auto No-Fault.

YOUNG, J. In its bypass application for leave to appeal, defendant insurer asks that we overrule *Lewis v DAIIE*[1] and apply as written the "one-year-back" limitation provided for in MCL 500.3145(1) for recovering no-fault personal protection insurance benefits. In *Lewis*, this Court adopted a judicial tolling doctrine under which the one-year statutory period is tolled from the time a specific claim for benefits is filed to the date the insurer formally denies liability. The trial court in this case relied on *Lewis* in rejecting defendant's assertion that plaintiff's claim was limited by the statutory one-year-back rule.

No member of this Court disputes that § 3145(1) clearly and unambiguously states that a claimant "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." Because the *Lewis* rule contravenes this plain statutory directive and ignores almost a century of contrary precedent, it is hereby overruled. Defendant is entitled to summary disposition to the extent that plaintiff seeks benefits for losses incurred more than one year prior to the date on which this action was commenced.

I. FACTS AND PROCEDURAL HISTORY

Michael Devillers was an insured under a policy of no-fault automobile insurance issued to his parents by

[1] 426 Mich 93; 393 NW2d 167 (1986).

defendant Auto Club Insurance Association. In September 2000, Michael, then age sixteen, was seriously injured in an automobile accident. His injuries included a traumatic brain injury. Michael's mother, plaintiff in this case, cared for him after he was discharged from the hospital.

Defendant paid plaintiff benefits for home health care for the period of October 20, 2000, to February 14, 2001. On February 14, 2001, defendant received a physician's prescription stating that Michael could function without close supervision. Defendant discontinued home health care payments effective February 15, 2001, based on the prescription indicating that Michael did not require supervision.[2] Plaintiff continued, without payment, to provide services for Michael, including driving him to and from school and the doctor's office. On October 7, 2002, defendant wrote a letter to plaintiff memorializing the February 2001 discontinuation of benefits.

Plaintiff filed a complaint on November 12, 2002, seeking payment for services allegedly rendered for which she did not receive payment. At issue in this case is the nine-month period beginning on February 16, 2001 (the day after defendant discontinued paying home health care benefits), and ending on November 12, 2001 (one year prior to the filing of the complaint). Defendant moved for partial summary disposition with respect to the benefits sought for that nine-month period, arguing that plaintiff was precluded from recovering benefits under the one-year-back rule of MCL 500.3145(1).

Plaintiff contested defendant's motion, arguing that, pursuant to *Lewis,* the one-year limitations period provided for in § 3145(1) was tolled from February 15,

[2] However, based upon a later prescription, defendant began paying plaintiff for home health care and attendant care as of October 15, 2003, and it continues to make these payments.

2001 (the date that defendant discontinued home health care benefits and attendant care benefits) to October 7, 2002 (the date of defendant's letter memorializing the termination).

The trial court denied defendant's motion for partial summary disposition, citing *Lewis*. Defendant then filed an emergency application for leave to appeal in the Court of Appeals, arguing that the judicial tolling doctrine adopted in *Lewis* should be abrogated. Defendant additionally filed a bypass application for leave to appeal in this Court, noting that only this Court has the power to overrule *Lewis*.

The Court of Appeals denied leave to appeal. This Court entered an order staying trial, and we subsequently entered an order granting defendant's application for leave to appeal. Because we believe that the *Lewis* Court exceeded its constitutional authority by engrafting onto the statutory one-year period a judicial tolling mechanism, we overrule *Lewis*. Moreover, because this case does not fall into that limited category of decisions in which prospective application is justified, we give our decision retroactive effect for this and pending cases in which a *Lewis* challenge has been preserved. Accordingly, we remand to the trial court with directions to enter partial summary disposition in favor of defendant with respect to the benefits sought for the period from February 16 to November 12, 2001.

II. STANDARD OF REVIEW

Issues of statutory construction and other questions of law are subject to review de novo by this Court.[3]

[3] *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 513; 684 NW2d 847 (2004); *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002).

Similarly, we review de novo a trial court's decision whether to grant summary disposition.[4]

III. ANALYSIS

A. BACKGROUND: JUDICIAL TOLLING AS APPLIED TO PRIVATE INSURANCE CONTRACTS AND STATUTORY FORM INSURANCE POLICIES

The germination of the idea that a judicial tolling doctrine should be applied to § 3145(1) can be traced to this Court's 1976 decision in *Tom Thomas Organization, Inc v Reliance Ins Co*.[5] Rather than a statutory provision, *Tom Thomas* concerned a contractual provision in an inland marine policy of insurance limiting the time for bringing suit under the policy to twelve months "after discovery by the insured of the occurrence which gives rise to the claim." Noting that this Court had long enforced such policy limitations as written,[6] the *Tom Thomas* Court nevertheless rejected this prevailing rule in favor of the judicial tolling approach taken by the

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[4] *Jarrad v Integon Nat'l Ins Co*, 472 Mich 207, 212; 696 NW2d 621 (2005); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[5] 396 Mich 588; 242 NW2d 396 (1976).

[6] See *Tom Thomas, supra* at 592 n 4. Policy limitations of less than six years have been enforced by this Court without discussion of reasonableness. See, e.g., *Lombardi v Metropolitan Life Insurance Co*, 271 Mich 265; 260 NW 160 (1935) (group disability plan; two-year limitation); *Bashans v Metro Mutual Insurance Co*, 369 Mich 141; 119 NW2d 622 (1963) (accidental injury and illness; two-year limitation); *Dahrooge v Rochester German Insurance Co*, 177 Mich 442; 143 NW 608 (1913) (standard fire insurance policy; one-year limitation); *Betteys v Aetna Life Insurance Co*, 222 Mich 626; 193 NW 197 (1923) (disability or death indemnity policy; one-year limitation); *Harris v Phoenix Accident & Sick Benefit Ass'n*, 149 Mich 285; 112 NW 935 (1907) (accident and sick benefit policy; six-month limitation).

While it acknowledged this contrary line of precedent, *Tom Thomas* did not overrule any of those cases. This appears to have been a common practice of this Court during this era. See, e.g., *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355; 314 NW2d 440 (1982); *People v Jones*, 395 Mich 379; 236 NW2d 461 (1975), and *People v Chamblis*, 395 Mich

New Jersey Supreme Court in *Peloso v Hartford Fire Ins Co,*[7] which held that the twelve-month limitation of actions provision in a *statutory* form insurance policy[8] was tolled from the time an insured gave notice of loss until the insurer formally denied liability. The *Peloso* court, opining that statutory proof of loss and payment of claim provisions operated to shorten the time for bringing suit, stated that tolling the limitations period would ensure that the insured was "not penalized for the time consumed by the company while it pursues its contractual and statutory rights to have a proof of loss, call the insured in for examination, and consider what amount to pay . . . ."[9]

In adopting wholesale the approach of the *Peloso* court, this Court in *Tom Thomas* stated that doing so was necessary in order to reconcile the twelve-month policy limitation with other policy provisions that incorporated "[s]ubstantial delays"[10] into the claim process:

> The insured is generally allowed 60 to 90 days to file proof of loss. The insurer is generally given another 60 days to pay or settle the claim.
>
> Notwithstanding diligence by both parties at all stages of the claim procedure, considerable time often elapses before the insured learns whether the insurer will pay. Even if the insured promptly reports a loss to his insurance agent, discussions concerning resolution of the claim may

408; 236 NW2d 473 (1975), both overruled in part in *People v Cornell*, 466 Mich 335 (2002); *Simon v Security Ins Co*, 390 Mich 72; 210 NW2d 322 (1973).

[7] 56 NJ 514; 267 A2d 498 (1970).

[8] A "statutory form" insurance policy refers to an insurance policy that includes mandatory terms and provisions compelled by statute. See, e.g., former MCL 500.2832, discussed later in this opinion, concerning fire insurance policies issued in Michigan.

[9] *Peloso, supra* at 521.

[10] *Tom Thomas, supra* at 592.

> take weeks. Additional time often passes before the insurance company provides a form for filing proof of loss. Even then the insured does not know whether it will be necessary to start an action; under the policy in this case, payment is not required until 60 days after "acceptance" by the insurer of the proof of loss. No time limit for acceptance is imposed.[11]

Thus, the *Tom Thomas* Court held that the insured's action, which was filed more than twelve months after the date of the loss, but less than twelve months after the insurer denied liability, was not barred by the twelve-month policy limitation.[12]

In *In re Certified Question (Ford Motor Co v Lumbermens Mut Cas Co)*,[13] this Court extended the *Peloso*/*Tom Thomas* tolling doctrine to Michigan's statutory standard form fire insurance policy, former MCL 500.2832, which then provided that

> [n]o suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Noting that § 2832 contained proof-of-loss and claim payment provisions identical to those contained in the New Jersey statutory policy form at issue in *Peloso*,[14] this Court held that

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[11] *Id*. at 592-593.

[12] Justice LINDEMER, joined by Justice COLEMAN, dissented, noting that "[t]o adopt [the *Peloso* approach] is, in effect, to rewrite the contract in favor of the party which, for a six-month period, was guilty of sleeping on its bargained-for rights." *Tom Thomas, supra* at 601.

[13] 413 Mich 22; 319 NW2d 320 (1982).

[14] See *Ford, supra* at 31, 32 n 4. The statutory policy provided a sixty-day period for the insured to supply proof of loss and a sixty-day period following proof of loss and ascertainment of the loss for the insurer to pay the claim. MCL 500.2832.

> [l]ogic requires that we apply the same analysis when faced with Michigan's *statutory* policy provisions which are identical to the provisions reconciled in *Peloso*. By permitting the limitation period to be tolled, we reconcile the apparently identical incongruity between the statutory proof-of-loss and payment provisions, and the limitation clause.[15]

The *Ford* Court rejected the defendants' argument that our 1913 decision in *Dahrooge v Rochester German Ins Co*[16] was controlling and had expressly repudiated judicial revision of the terms of the statute. In *Dahrooge*, this Court had refused to engraft onto the terms of the statutory standard fire insurance policy then in effect[17] a judicial tolling provision that would have tolled the commencement of the twelve-month limitations period until sixty days after the filing of the proof of loss:

> Standard policies similar to that before us have been adopted, and their use made compulsory by statute in many States. It has been repeatedly held, in passing on their various provisions, that they should be construed according to the plain meaning of the language used, and that the trend of authority is towards enforcing the legislative command when clearly expressed, rather than to nullify and modify by strained constructions. The provision that an action cannot be sustained "unless commenced within twelve months next after the fire" is very plain, clear, and simple language. If it was the legislative intent that this should have other than the natural meaning, it would have been a simple matter to have so provided.[18]

Rather than explicitly overruling *Dahrooge*, the *Ford* Court "distinguished" that case on the basis that its

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[15] *Id*. at 31-32 (emphasis in original).

[16] 177 Mich 442; 143 NW 608 (1913).

[17] 1905 PA 277. This predecessor of former MCL 500.2832 contained essentially the same terms as the version of § 2832 at issue in *Ford*.

[18] *Dahrooge, supra* at 451.

> narrow reasoning . . . did not attempt to reconcile the obvious incongruity between the proof-of-loss and payment provisions, and the limitation provision of the statute. Accordingly, *Dahrooge* did not address the *Tom Thomas-Peloso* tolling analysis.
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> * * *
>
> Since our focus today must fairly encompass all interwoven statutory provisions, we cannot subscribe to a narrow analysis which unduly emphasizes a single statutory provision. While the limitation provision commands that the insured has a clear 12 months to institute suit, the proof of loss and payment clauses shrink this period.
>
> * * *
>
> . . . The statutory standard policy provisions are reconciled, as was stated in *Peloso*, 521, to reach a "fair resolution of the statutory incongruity". The period of limitation begins to run from the date of the loss, but the running of the period is tolled from the time the insured gives notice until the insurer formally denies liability.[19]

Justice RYAN, joined by Chief Justice COLEMAN, opined in dissent that there existed no justification "for writing into the Michigan statutory form of fire insurance policy the tolling provision which the Court has announced today."[20] Justice RYAN noted that in once

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[19] *Ford, supra* at 33-38. Because *Dahrooge* pointedly refused to adopt judicial tolling in contravention of the statutory limitation, it is hard to understand why *Ford* and *Dahrooge* are not irreconcilably in conflict. However, as noted previously, see n 6 of this opinion, during this era, this Court frequently paid little attention to the inconsistencies among its cases and declined to reduce confusion in its jurisprudence by overruling conflicting decisions. *Dahrooge* has never been overruled. *Dahrooge,* and cases like *Dahrooge* extending back to the turn of the 20th century, still appear to be good law, despite *Lewis*.

[20] *Id*. at 39.

again subscribing to the approach of "the villain in the piece," *Peloso,* the majority "completely disregards, indeed rejects, the plainly expressed intent of the Legislature in favor of the appearance of judicial consistency."[21] Justice RYAN further noted that *Dahrooge* had addressed and rejected the claim made by the plaintiff, and that it ought to have been followed as binding authority:

> It is noteworthy that the Court today does not overrule *Dahrooge*, it merely denigrates it as employing "narrow reasoning" for its failure to "reconcile the obvious incongruity between the proof of loss and payment provisions, and the limitation provision of the statute." The *Dahrooge* Court's "failure" to undertake such reconciliation was evidently its inability, like mine, to perceive that the proof of loss and payment provisions, and the limitation provision of the statute, are "incongruous", "conflicting" or "inconsistent".
>
> The proof of loss and settlement provisions of the statutory policy provide that a proof of loss must be filed by the insured within 60 days of the loss and suit may not be brought until 60 days after the proof of loss is filed. The limitation provision declares that suit upon a loss must be brought within 12 months of the loss.
>
> I am unable to see how those provisions are incongruous, inconsistent or conflicting. The first of them announces that the insurer is liable 60 days after the proof of loss is filed by the insured—a period obviously intended to afford opportunity for notification of the loss by the insured and assessment of it by the insurer. The limitation provision provides that the insured has 12 months from the date of the loss to start suit.
>
> Where is the inconsistency?

* * *

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[21] *Id*. at 45.

> The majority opinion suggests to me rather forcefully that the Court's concern is not that the Legislature has really contradicted itself in establishing a proof of loss plus 60 days no-suit period for perfecting the claim and a 12-month limitation of action provision, but that, in the Court's view, a fairer, more desirable and more reasonable approach would be a tolling of the running of the period of limitation while the parties are negotiating a settlement of the claim. Needless to say, had the Legislature wanted to do it that way, it could easily have done so . . . .[22]

Like Justice RYAN, we believe that the *Tom Thomas* and *Ford* majorities found inconsistencies where none existed and, under this thin veil, inserted their own policy views into the otherwise contrary statutory language at issue.

B. EXTENSION OF THE JUDICIAL TOLLING DOCTRINE TO THE NO-FAULT "ONE-YEAR-BACK" PROVISION OF § 3145(1)

MCL 500.3145(1) provides, in relevant part, as follows:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivors loss has been incurred. *However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.* [Emphasis supplied.]

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[22] *Id*. at 46-49.

As we noted in *Welton v Carriers Ins Co*,[23] § 3145(1) contains two limitations on the time for filing suit and one limitation on the period for which benefits may be recovered:

> (1) An action for personal protection insurance [PIP] benefits must be commenced not later than one year after the date of accident, *unless* the insured gives written notice of injury or the insurer previously paid [PIP] benefits for the injury.
>
> (2) *If* notice has been given or payment has been made, the action may be commenced at any time within one year after the most recent loss was incurred.
>
> (3) Recovery is limited to losses incurred during the one year preceding commencement of the action.[24]

Thus, although a no-fault action to recover PIP benefits may be *filed* more than one year after the accident and more than one year after a particular loss has been incurred (provided that notice of injury has been given to the insurer or the insurer has previously paid PIP benefits for the injury), § 3145(1) nevertheless limits *recovery* in that action to those losses incurred within the one year preceding the filing of the action. It is this "one-year-back" provision that is at issue in this case.[25]

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[23] 421 Mich 571; 365 NW2d 170 (1985).

[24] *Id*. at 576 (emphasis in original).

[25] MCL 500.3141 permits an insurer to require written notice to be given "as soon as practicable" after an accident involving an insured motor vehicle. MCL 500.3142(2) provides generally that PIP benefits are overdue if not paid within thirty days after an insurer receives reasonable proof of the fact and amount of loss sustained. Moreover, the insurer is subject to penalties for delaying payment: MCL 500.3142(3) provides for a twelve-percent annual interest rate on delayed payments, and MCL 500.3148(1) renders the insurer liable for a claimant's attorney fees if the court determines that "the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment."

The *Tom Thomas* judicial tolling doctrine was first applied to § 3145(1) by our Court of Appeals in *Richards v American Fellowship Mut Ins Co.*[26] In *Richards*, the plaintiff insured filed an action to recover PIP benefits more than one year after the automobile accident in which he was injured, seeking to recover the balance of a hospital bill for a term of hospitalization that had ended more than one year prior to the commencement of the action. Rejecting the defendant insurer's defense that the one-year-back provision barred recovery, the Court held that the purpose of the no-fault law–that persons injured in automobile accidents be promptly and adequately compensated for their losses–required application of *Tom Thomas* tolling to § 3145(1):

> If we were to accept defendant's interpretation of the statutory provision, we would in effect be penalizing the insured for the time the insurance company used to assess its liability. To bar the claimant from judicial enforcement of his insurance contract rights because the insurance company has unduly delayed in denying its liability would run counter to the Legislature's intent to provide the insured with prompt and adequate compensation.
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> * * *
>
> Applying the approach taken by the [*Tom*] *Thomas* Court to § 3145 would effectuate the legislative intent in enacting the no-fault act. Unable to profit from processing delays, insurance companies will be encouraged to promptly assess their liability and to notify the insured of their decision. At the same time, the insured will have a full year in which to bring suit.[27]

Accordingly, the *Richards* Court held that the one-year-back provision was tolled from the date that the plain-

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[26] 84 Mich App 629; 270 NW2d 670 (1978).

[27] *Id*. at 634-635.

tiff gave notice of loss until liability was formally denied by the defendant.

This Court first addressed judicial tolling of § 3145 in *Welton*. We held that, assuming arguendo that *Richards* was correct and that the judicial tolling doctrine should be applied to the one-year-back rule, the plaintiff's notice to the defendant insurer was insufficient to trigger *Tom Thomas* tolling of his no-fault claim. The *Welton* Court noted that it found the *Richards* analysis "persuasive."[28] However, apparently recognizing the imbalance created by the judicially created tolling rule, the *Welton* Court stated that something more than a general notice of injury, such as the type submitted by the plaintiff in that case, should be required to trigger tolling; rather, tolling should not begin until a claim for specific benefits is submitted to the insurer:

> While a rule which protects insureds from delays attributable to their insurers is salutary, it also must be remembered that tolling represents a departure from the legislatively prescribed one-year-back cap on no-fault recoveries. Thus, any tolling of the statutory period would properly be tailored to prevent the former type of abuse while preserving the legislative scheme to the fullest possible extent.
>
> Tolling the statute when the insured submits a claim for specific benefits would not appear to detract from the policies underlying the one-year limitation on recovery. By submitting a timely and specific claim, the insured serves the interest in preventing stale claims by allowing the insurer to assess its liability while the information supporting the claim is relatively fresh. A prompt denial of the

[28] *Welton, supra* at 578. Although we recognized that MCL 500.3142(2) dictates that benefits are overdue if not paid within thirty days after a claim is submitted to an insurer, we ventured that, "[a]s a practical matter, . . . it appears unlikely that insureds will commence suit immediately because of the expense involved in bringing an action and the very real possibility that the claim will be paid without the necessity of legal action." *Id*. at 579 n 3.

> claim would barely affect the running of the limitation period, while a lengthy investigation would simply "freeze" the situation until the claim is eventually denied. In effect, the insured would be charged with the time spent reducing his losses to a claim for specific benefits plus the time spent deciding whether to sue after the claim is denied.[29]

In *Lewis,* this Court was again presented with the question whether the judicial tolling doctrine should be extended to the one-year-back provision of § 3145(1). This time, we adopted the rule, drawn from *Richards* and *Welton*, that the one-year-back limitation is tolled from the time the insured makes a specific claim for benefits until the date that liability is formally denied. To this rule, we added the "caveat" that

> the insured must seek reimbursement with reasonable diligence or lose the right to claim the benefit of a tolling of the limitations period. Such a condition should alleviate the defendant's fear that adoption of the tolling principle will result in "open-ended" liability in cases in which the claimant, having made a specific claim for benefits, there-

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[29] *Id*. at 578-579.

Interestingly, in further defense of limiting application of *Tom Thomas* tolling in the one-year-back context to those cases in which a claim for *specific benefits* was submitted, the *Welton Court* noted (1) the fact that § 3145(1) included a "built-in" tolling provision permitting later suit once notice was given or partial payment was made (in contrast to the fire insurance context, in which the limitations provision operated as an absolute bar to suits not brought within one year of discovery or inception of the loss); (2) the fact that the specified procedure for claim and recovery of fire insurance benefits included greater built-in delays than the no-fault law (some 150 days for fire insurance, versus the thirty-day payment requirement for no-fault benefits); and (3) the fact that the Legislature had already provided in § 3145(1) that tolling was triggered by "notice of injury," suggesting that notice of injury was to have no greater tolling effect. *Id*. at 580 n 4. None of these considerations apparently caused the *Welton* Court to reconsider the propriety of applying its tolling rule to MCL 500.3145(1).

> after refuses to respond to the carrier's legitimate requests for more information needed to process the claim.[30]

In adopting this modified tolling rule, *Lewis* explained that application of judicial tolling to the one-year-back limitation served the Legislature's purposes in enacting the no-fault law:

> Most persons are confident that, in the event of a loss, their insurer will pay their claim without the necessity for litigation. It is only when an insurer denies liability that it is unequivocally impressed upon the insured that the extraordinary step of pursuing relief in court must be taken. A contrary result today would require the prudent claimant to file suit as a precautionary measure when the one-year deadline approached, regardless of the status of the claim. In addition to requiring a level of sophistication many claimants may not possess, such an approach would encourage needless litigation. One of the important reasons behind the enactment of the no-fault system was the reduction of automobile accident litigation.[31]

Justice BRICKLEY, joined by Justice RILEY, vigorously dissented, noting that the majority's approach constituted an impermissible departure from the plain and unambiguous language of § 3145(1). With some prescience, Justice BRICKLEY predicted that "this judicial amendment of a clear legislative directive will have a pernicious long-term effect."[32] Justice BRICKLEY further opined that the majority had supplanted the will of the Legislature with its own assessment of policy and consumer expectations:

> The majority observes that most people expect that insurance companies will pay their claims without having to begin litigation, and that it is only when a claim is

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[30] *Lewis*, *supra* at 102-103.

[31] *Id.* at 101-102.

[32] *Id*. at 104.

> formally denied that litigation will be necessary. The majority thus concludes that to follow the statute as written would require a claimant to file a suit as a "precautionary measure" when the one-year deadline approached. Although the majority approach may further the general policy of reducing litigation, the statute is not necessarily inconsistent with other purposes and provisions of the act. For example, §§ 3142 and 3148 impose sanctions upon an insurer for late payments. Thus, § 3145 may be viewed as a complementary provision which "sanctions" an insured who is not diligent in pursuing a claim. . . . This Court was not privy to all of the arguments and purposes presented to the Legislature when it drafted these specific tolling requirements. When statutory language is as clear as it is here, it is outside our province to second-guess the Legislature as to which policy is paramount in regard to § 3145.[33]

With respect to the majority's addition of a requirement that the insured pursue reimbursement with "reasonable diligence," Justice BRICKLEY remarked that "[t]he necessity for this addition demonstrates the fact that this Court has engaged in judicial legislation."[34]

Finally, Justice BRICKLEY noted a curious incongruity in the majority opinion, as carried forward from *Welton*:

> The majority does not suggest that § 3145 contains any ambiguity or that the Legislature was not in full command of what it intended to do. To the contrary, the Legislature was cognizant of a need for some tolling. Again, as we said in *Welton, supra*, and as pointed out by the majority:
>
> "[T]he fact that the Legislature has already provided a tolling provision for commencing a no-fault action, trig-

[33] *Id.* at 107-108.

[34] *Id*. at 108.

> gered by 'notice of injury,' suggests both that notice of injury was intended to have no greater effect and that there is less justification for this Court to interfere with the statutory scheme. [*Welton, supra*, 580, n 4.]"[35]

In attestation of Justice BRICKLEY's admonition that the *Lewis* rule would have far-reaching implications, our Court of Appeals in *Johnson v State Farm Mut Automobile Ins Co*[36] further extended the judicial tolling doctrine. The plaintiff's decedent in *Johnson* was insured under a motorcycle policy and an automobile policy, both written by the same agent and issued by the defendant insurer. Although the plaintiff immediately notified the agent of the accident and requested coverage under the motorcycle policy, she did not specifically request payment of benefits under the automobile policy until shortly before filing suit, several years after the accident. Noting that this Court did not define in *Lewis* and *Welton* what constituted a "specific claim for benefits," the *Johnson* Court held that the plaintiff's notice of injury under the motorcycle policy constituted sufficient notice of a claim for PIP benefits under the automobile insurance policy, and that the § 3145(1) one-year-back provision was therefore tolled. Additionally, the Court announced a completely new, and quite broad, tolling rule:

> [E]ven if tolling under *Lewis, supra*, is not applicable to the case at bar, the one-year-back rule should nevertheless be tolled for that period from which defendant knew or reasonably should have known that plaintiff was entitled to benefits under the automobile policy until such time as defendant either formally and explicitly denied liability for benefits or affirmatively informed plaintiff that she might be entitled to benefits under the

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[35] *Id.*

[36] 183 Mich App 752; 455 NW2d 420 (1990).

> policy and requested that she file a formal claim of benefits under the policy.[37]

Thus, not only did the *Johnson* Court disregard *Lewis*'s admonition that a "specific claim" must be filed in order to initiate tolling, the *Johnson* Court, in expanding the Lewis doctrine to include a vague "knew or should have known" standard, dismantled the certainty that the Legislature intended to create in enacting the one-year limitation.

C. *LEWIS* MUST BE OVERRULED AS WRONGLY DECIDED

As is no doubt evident from the foregoing discussion of the questionable lineage of *Lewis*, as well as the expansion of the *Lewis* doctrine by our Court of Appeals, we are today compelled to overrule *Lewis* to reaffirm the Legislature's prerogative to set policy and our long-established commitment to the application of statutes according to their plain and unambiguous terms to preserve that legislative prerogative.

The long road leading to the judicial negation of the statutory one-year-back rule began with this Court's abrupt departure from settled precedent and adoption of the inapposite minority *Peloso* rule in *Tom Thomas*. Then, in *Ford*, finding ourselves "figuratively examining [our] own tail,"[38] we determined that it would be illogical to apply *Peloso* in the off-point *private* contract setting without also applying that rule in the context for which it was designed, the *statutory* fire

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[37] *Id*. at 762-763; see also *id*. at 765. The panel noted that "once the insured files such a claim, the provisions of *Lewis, supra*, apply and the one-year-back rule is *again* tolled until such time as that claim is denied." *Id*. at 765 n 4 (emphasis supplied).

[38] *Ford, supra* at 43 (RYAN, J., dissenting).

insurance form setting. Along the way, we shrugged off the weight of binding precedent, purporting to distinguish *Dahrooge* as a "narrow" decision that simply did not address the judicial tolling question.[39] Finally, we deigned in *Lewis*, purely for policy reasons and in direct contravention of the statutory language at issue, to extend application of *Tom Thomas* and *Ford* to the one-year-back rule of § 3145(1). Our substitution of the "specific claim" rule and the addition of the "reasonable diligence" requirement to the *Tom Thomas*/*Ford* approach stand as testimony to the lengths to which the *Lewis* Court went in crafting its own amendment to § 3145(1). Further distortion of the *Lewis* rule by our Court of Appeals in *Johnson* demonstrates the unmanageability of the judicial tolling doctrine and represents the vitiation of the clear statutory directive limiting a PIP claimant's recovery to benefits for losses incurred one year or less before the date on which the action was commenced.

In short, we wholly agree with the views expressed by the dissenting justices in *Tom Thomas, Ford*, and *Lewis*. Statutory–or contractual–language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court. The *Lewis* majority impermissibly legislated from the bench in allowing its own perception concerning the lack of "sophistication" possessed by no-fault claimants, as well as its speculation that the average claimant expects payment without the necessity for litigation, to super-

[39] See *Ford, supra* at 33 (noting that *Dahrooge* "did not attempt to reconcile the obvious incongruity between the proof-of-loss and payment provisions, and the limitation provision of the statute"); see also *Tom Thomas, supra* at 597 n 10 (disregarding *Dahrooge* as binding authority on the ground that it failed to reconcile the various policy terms at issue).

sede the plainly expressed legislative intent that recovery of PIP benefits be limited to losses incurred within the year prior to the filing of the lawsuit.

Although a claimant may well find himself in a bind similar to that of the *Lewis* plaintiffs, and of the plaintiff in the case at bar, should that claimant delay the commencement of an action (as permitted by § 3145) more than one year beyond the accident leading to the injury, our observation is simply this: the Legislature has made it so. The *Lewis* Court acted outside its constitutional authority[40] in importing its own policy views into the text of § 3145(1). "[T]he 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."[41]

In any event, we are unable to perceive any sound policy basis for the adoption of a tolling mechanism with respect to the one-year-back rule. Although the Lewis majority, echoing the concerns of the *Tom Thomas* and *Ford* Courts, speaks of potential delays attributable to the " 'lengthy investigation' " of a PIP claim,[42] the only delay possible under the no-fault law is the thirty-day payment period following receipt of proof of loss by the insurer.[43] To repeat Justice RYAN's query in *Ford*, "Where is the inconsistency?"[44]

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[40] See Const 1963, art 3, § 2; See also Const 1963, art 6, § 1, directing the judiciary to exercise its "judicial power . . . ."

[41] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co,* 471 Mich 608, 637; 684 NW2d 800 (2004).

[42] *Lewis, supra* at 101, quoting *Welton, supra* at 578.

[43] MCL 500.3142(2). As noted by Justice BRICKLEY in *Lewis, supra* at 107, the no-fault act requires the insurer to pay penalties for any delayed payment. See MCL 500.3142(3); MCL 500.3148(1).

[44] *Ford, supra* at 47 (RYAN, J., dissenting).

Just as the *Ford* plaintiff had many months, even after expiration of the potential delays permitted in the statutory fire insurance scheme, in which to file suit, plaintiff in the case at bar had a full year following the February 2001 termination of payment for home health-care benefits within which to seek reimbursement. In no way was plaintiff's ability to file suit thwarted by dilatory tactics on the part of defendant or by the exercise of defendant's statutory right to delay payment for thirty days following receipt of proof of loss. As soon as PIP payments stopped, plaintiff had the surest notice that her claim was no longer being honored by the insurer.

We conclude, therefore, that *Lewis* and its progeny were wrongly decided. We must decide whether the doctrine of stare decisis nevertheless obliges us to adhere to its holding. Although stare decisis is generally " 'the preferred course,' "[45] we will nevertheless depart from erroneous precedent "when governing decisions are unworkable or are badly reasoned."[46] In determining whether stare decisis compels adherence to the *Lewis* tolling doctrine, we may examine, among other factors, the extent to which the *Lewis* Court erred; the " 'practical workability' " of that decision; whether reliance interests would work an undue hardship if the decision were overruled; and whether changes in the law or facts no longer justify the questioned decision.[47]

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[45] *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998).

[46] *Robinson, supra* at 464, citing *Holder v Hall*, 512 US 874, 936; 114 S Ct 2581; 129 L Ed 2d 687 (1994).

[47] *Robinson, supra* at 464; see also *Mitchell v W T Grant Co*, 416 US 600, 627-628; 94 S Ct 1895; 40 L Ed 2d 406 (1974).

Lewis does not reflect a simple "misunderstanding" of the statute at issue;[48] the *Lewis* decision demonstrates an act of judicial *defiance* in which this Court substituted its own judgment concerning "fairness" for the plainly expressed will of the Legislature. Such an act of judicial usurpation of the legislative function should not be permitted to stand.

Moreover, *Lewis* has not "become so embedded, accepted or fundamental to society's expectations that overruling [it] would produce significant dislocations."[49] Rather, it is highly likely that the average no-fault claimant who has profited from *Lewis* was quite unaware of this decision, and simply received a windfall in being permitted to collect benefits that the statute proclaims are nonrecoverable. We need not, and indeed *should* not, slavishly adhere to the doctrine of stare decisis where no legitimate reliance interest is affected. As we noted in *Robinson,*

> if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. [50]

Additionally, the *Lewis* judicial tolling doctrine defies "practical workability," as evidenced by this Court's efforts to cabin tolling and by the confusion of the Court of Appeals in *Johnson*. On the basis that *Lewis* failed to delineate what constituted a "specific claim for ben-

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[48] See *Robinson, supra* at 465.

[49] *Id*. at 466.

[50] *Id*. at 467.

efits," the *Johnson* Court took license to apply the judicial tolling doctrine to a situation that even the *Lewis* Court would presumably have found lacking. Furthermore, it appears that the impact of *Lewis* is increasingly producing a tax on the no-fault system as claimants are being permitted to seek recovery for losses incurred much more than one year prior to commencing suit. Thus, far from "produc[ing] chaos,"[51] overruling *Lewis* will *prevent* potential chaos by according insurers, and the public that funds the no-fault system through payment of premiums, the certainty that the Legislature intended.

We today overrule *Lewis* and its progeny as wrongly decided. The one-year-back rule of MCL 500.3145(1) must be enforced by the courts of this state as our Legislature has written it, not as the judiciary would have had it written.

D. RETROACTIVITY

In our order granting leave to appeal, we directed the parties to address whether a decision overruling *Lewis* should be given only prospective application.

Typically, our decisions are given retroactive effect, "applying to pending cases in which a challenge . . . has been raised and preserved."[52] Prospective application is a departure from this usual rule and is appropriate only in "exigent circumstances."[53] This case presents no "exigent circumstances" of the sort warranting the "extreme measure" of prospective-only application.[54]

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[51] *Id*. at 466 n 26.

[52] *Wayne Co v Hathcock*, 471 Mich 445, 484; 684 NW2d 765 (2004).

[53] *Id.* at 484 n 98.

[54] See *Gladych v New Family Homes, Inc*, 468 Mich 594, 606 n 6; 664 NW2d 705 (2003).

As we reaffirmed recently in *Hathcock*, prospective-only application of our decisions is generally " 'limited to decisions which overrule *clear and uncontradicted* case law.' "[55] *Lewis* is an anomaly that, for the first time, engrafted onto the text of § 3145(1) a tolling clause that has absolutely no basis in the text of the statute. *Lewis* itself rests upon case law that consciously and inexplicably departed from decades of precedent holding that contractual and statutory terms relating to insurance are to be enforced according to their plain and unambiguous terms.

Thus, *Lewis* cannot be deemed a "clear and uncontradicted" decision that might call for prospective application of our decision in the present case. Much like *Hathcock,* our decision here is not a declaration of a new rule, but a return to an earlier rule and a vindication of controlling legal authority—here, the "one-year-back" limitation of MCL 500.3145(1).[56]

Accordingly, our decision in this case is to be given retroactive effect as usual and is applicable to all pending cases in which a challenge to *Lewis*'s judicial tolling approach has been raised and preserved.[57]

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[55] *Hathcock, supra* at 484 n 98, quoting *Hyde v Univ of Michigan Bd of Regents,* 426 Mich 223, 240; 393 NW2d 847 (1986) (emphasis supplied).

[56] *See Hathcock, supra* at 484.

[57] *Id.* In our case law, this form of retroactivity is generally classified as "limited retroactivity." See *Stein v Southeastern Michigan Family Planning Project, Inc*, 432 Mich 198, 201; 438 NW2d 76 (1989).

We disagree with Justice WEAVER's assertion that our decision to overrule *Lewis* should be given prospective application. As we explained in *Hathcock, supra* at 484 n 97, to accord a holding only prospective application is, essentially, an exercise of the legislative power to determine what the law shall be for all *future* cases, rather than an exercise of the judicial power to determine what the existing law is and apply it to *the case at hand*. Const 1963, art 3, § 2 prohibits this Court from exercising powers properly belonging to another branch of government except when expressly authorized by the Constitution. As we further explained in

E. RESPONSE TO JUSTICE CAVANAGH'S DISSENT

Given the characterization by Justice CAVANAGH's dissent of the majority's position as "overwrought [with] scorn"[58] and an "outright fabrication,"[59] it is easy to lose sight of the fact that there is substantial agreement between Justice CAVANAGH and the majority. Both the majority and Justice CAVANAGH agree that the plain text of § 3145(1) provides that an insured "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." The fundamental difference between the position of the majority and Justice CAVANAGH lies in how one perceives the judicial role.

The majority believes that statutes are to be enforced *as written*, unless, of course, a statute violates the Constitution. Such a view of the judicial role is not merely a preference shared by a majority of this Court, but rather a constitutional mandate.[60] Justice CAVANAGH, on the other hand, apparently believes that a court's equitable power is an omnipresent and unassailable judicial trump card that can be used to rewrite a constitutionally valid statute simply because a particular judge considers the statute to be "unfair."

The view of the majority—that statutes are to be enforced as written unless they are unconstitutional—

Hathcock, supra at 484 n 98, prospective opinions are, in essence, advisory opinions, and our only constitutional authorization to issue advisory opinions is found in Const 1963, art 3, § 8, which does not apply in this case.

We also note, however, that payments properly made under *Lewis* prior to this opinion are not subject to recoupment or setoff.

[58] *Post* at 618.

[59] *Id*.

[60] Const 1963, art 3, § 2 and art 6, § 1.

represents a more limited view of the role of the judiciary. It is grounded not just in the separation of powers mandate of our Constitution,[61] but also on prudential concerns. The majority believes that policy decisions are properly left for the people's elected representatives in the Legislature, not the judiciary. The Legislature, unlike the judiciary, is institutionally equipped to assess the numerous trade-offs associated with a particular policy choice. Justice CAVANAGH, however, apparently believes that judges are omniscient and may, under the veil of equity, supplant a specific policy choice adopted on behalf of the people of Michigan by their elected representatives in the Legislature.[62] We could not disagree more.

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[61] Const 1963, art 3, § 2.

[62] The fact that Justice CAVANAGH is willing to make policy choices through a court's equitable powers is evident from his extensive discussion of the "costs" associated with enforcing the plain text of § 3145(1). *Post* at 602-603. While the majority believes that the Legislature is better equipped to evaluate the costs and benefits associated with a specific policy choice, and that the Legislature actually evaluated such trade-offs in enacting § 3145(1), Justice CAVANAGH apparently believes that a judge is free to second-guess a legislative policy choice based on the judge's own preconceived notions of fairness.

Not surprisingly, Justice CAVANAGH cites no support for his conclusion that enforcing the unambiguous language of § 3145(1) will increase costs to insurers and insureds. In fact, there has been no evidence presented to this Court on which such a determination could be made. If anything, it would seem that the uncertainty associated with subjecting insurers and insureds to the whims of individual judges and their various conceptions of "equity" would *increase* overall insurance costs because insurers would no longer be able to estimate accurately actuarial risk. See, e.g., Popik & Quackenbos, *Reasonable expectations after thirty years: A failed doctrine,* 5 Conn Ins L J 425, 431-432 (1998) ("When the courts invalidate unambiguous exclusions, the insurance industry's ability to calculate and manage risk is severely impaired. The insurers' only alternative to this uncertainty is to hedge their bets by increasing premiums or restricting coverage."); Rappaport, *The ambiguity rule and insurance law: Why insurance contracts should not be construed against the drafter,* 30 Ga L R 171, 203 (1995) ("Uncertainty about how judges will interpret insurance contracts may significantly increase the costs of insurance.");

Although courts undoubtedly possess equitable power,[63] such power has traditionally been reserved for "unusual circumstances" such as fraud or mutual mistake.[64] A court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking, as Justice CAVANAGH implies.[65]

Comment, *A critique of the reasonable expectations doctrine,* 56 U Chi L Rev 1461, 1489 (1989) (" '[J]udicial . . . intervention renders costs quite unpredictable and makes insurers fearful, tightening the market.' " [citation omitted]).

[63] Const 1963, art 6, § 5.

[64] *Cincinnati Ins Co v Citizens Ins Co,* 454 Mich 263, 270; 562 NW2d 648 (1997) (stating that this Court has been reluctant to recognize equitable estoppel, a corollary of fraud, "absent intentional or negligent conduct designed to induce a plaintiff from bringing a timely action") (emphasis omitted); *Flynn v Korneffel*, 451 Mich 186, 199; 547 NW2d 249 (1996) ("this Court has exercised its equitable power in *unusual circumstances* such as fraud . . .") (emphasis in original); *Solo v Chrysler Corp (On Rehearing)*, 408 Mich 345, 352-353; 292 NW2d 438 (1980); *Panozzo v Ford Motor Co*, 255 Mich 149, 150-151; 237 NW 369 (1931); *Gee v Gee*, 254 Mich 415, 416-417; 236 NW 820 (1931).

[65] Justice CAVANAGH asserts that because we granted equitable relief in *Bryant v Oakpointe Villa Nursing Ctr, Inc,* 471 Mich 411, 432; 684 NW2d 864 (2004), there is no reason not to apply equity in this case. This argument illustrates the fundamental disagreement between a majority of this Court and Justice CAVANAGH, as well as the *Lewis* Court, concerning the proper application of equitable relief.

In *Bryant*, our grant of equitable relief was a pinpoint application of equity based on the particular circumstances surrounding the plaintiff's claim; namely, the preexisting jumble of convoluted case law through which the plaintiff was forced to navigate. Accordingly, our limited application of equity in *Bryant* was entirely consistent with the "unusual circumstances" standard for equitable relief discussed above. In *Lewis*, however, the Court chose to adopt an a priori rule of equity without regard to the particular circumstances of litigants in a given case. In granting blanket equity to an entire *class* of cases, therefore, the *Lewis* Court essentially rewrote § 3145(1). Such a categorical redrafting of a statute in the name of equity violates fundamental principles of equitable relief and is a gross departure from the proper exercise of the "judicial power." Const 1963, art 3, § 2

Section 3145(1) plainly provides that an insured "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." There has been no allegation of fraud, mutual mistake, or any other "unusual circumstance" in the present case. Accordingly, there is no basis to invoke the Court's equitable power. Justice CAVANAGH errs, as did the *Lewis* Court, in assuming that equity may trump an unambiguous and constitutionally valid statutory enactment.

Indeed, if a court is free to cast aside, under the guise of equity, a plain statute such as § 3145(1) simply because the court views the statute as "unfair," then our system of government ceases to function as a representative democracy. No longer will policy debates occur, and policy choices be made, in the Legislature. Instead, an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity. While such an approach might be extraordinarily efficient for a particular litigant, the amount of damage it causes to the separation of powers mandate of our Constitution and the overall structure of our government is immeasurable. Justice CAVANAGH apparently sees no problem with using a court's equitable power in this manner. We, however, believe the judicial role to be

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and art 6, § 1. Accordingly, Justice CAVANAGH's unmitigated praise for the *Lewis* Court's holding is, in our view, quite misplaced.

Moreover, we note that, in *Bryant*, there was no controlling statute negating the application of equity. Instead, the disputed issue in *Bryant*—whether a claim sounds in medical malpractice or ordinary negligence—was controlled by this Court's case law. On the other hand, in the present case, there is a statute that controls the recovery of PIP benefits: § 3145(1). Section 3145(1) specifically states that a claimant "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced," and this Court lacks the authority to say otherwise.

far more limited than our colleague in dissent.[66]

The judicial philosophy of the majority has been the subject of much discussion from some in the bench and bar. This is entirely to be expected and is desirable in a vibrant, healthy republic. Yet, in his discourse on the flaws of the majority's judicial philosophy, Justice CAVANAGH has avoided *his* responsibility of explaining his own *consistent* approach to interpretation. Parties before this Court, as well as the people of Michigan generally, have been clearly apprised over the years that the philosophy set forth in this opinion will constitute the process by which this Court interprets the law. Justice CAVANAGH would do well to describe, with as much care as the majority, his own philosophy.

What, for example, are the standards upon which *he* is determined *consistently* to give meaning to the law in future cases coming before this Court? What are the standards upon which litigants can reasonably predict *his* future interpretations, the rule of law being depen-

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[66] Justice CAVANAGH also argues that "this case is an ideal candidate for applying the ... legislative reenactment rule." *Post* at 613. However, as we recently explained:

> [N]either "legislative acquiescence" nor the "reenactment doctrine" may "be utilized to subordinate the plain language of a statute." [*People v Hawkins*, 468 Mich 488, 507-510; 668 NW2d 602 (2003).] "Legislative acquiescence" has been repeatedly rejected by this Court because "Michigan courts [must] determine the Legislature's intent from its *words*, not from its silence." *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999). . . . "[I]n the absence of a clear indication that the Legislature intended to either adopt or repudiate this Court's prior construction, there is no reason to subordinate our primary principle of construction—to ascertain the Legislature's intent by first examining the statute's language—to the reenactment rule." [*Hawkins, supra*] at 508-509. [*Neal v Wilkes,* 470 Mich 661, 668 n 11; 685 NW2d 648 (2004).]

dent upon such predictability? What are the standards that *he* is prepared to articulate, *in advance of his decisions*, in order to communicate that his decisions are guided by the law and are not merely a function of the results that he might prefer in a given case? What are the standards upon which *he* would rely in order to ensure the appearance and reality of integrity in his judicial decision-making? What judicial principles does *he* represent beyond opposition to a philosophy that he wrongly characterizes as one of "automation-like textualist analysis"[67] of the law? The justices in the majority, by opinions such as this, have addressed these questions. Justice CAVANAGH should do the same.

Justice CAVANAGH, no less than the justices in the majority, owes it to the people of Michigan to articulate the precise standards by which he attempts to do justice *under* the law.

IV. CONCLUSION

Our decision in *Lewis* to apply a judicial tolling mechanism to the one-year-back limitation of MCL 500.3145(1) contravenes the unambiguous text of that statutory provision and represents an unconstitutional usurpation of legislative authority. Accordingly, *Lewis* and its progeny, *Johnson,* are overruled. Moreover, we perceive no reason to depart from the general rule that our decisions are to be given retroactive effect. Defendant is entitled to summary disposition to the extent that plaintiff's claim is barred by the one-year-back rule. Accordingly, we reverse the decision of the trial court and remand this case to that court for entry of an order of partial summary disposition for defendant consistent with this opinion.

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[67] *Post* at 609.

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

CAVANAGH, J. *(dissenting).* Contrary to the majority's refusal to recognize as much, equitable tolling[1] is a time-honored, purposeful, and carefully crafted rule of equity that is employed when rare but compelling circumstances so justify its use. In *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986), the latest case to fall prey to the majority's chopping block, this Court employed this important mechanism for critical and justifiable equitable reasons that the current majority carelessly relegates to oblivion under an overwrought—and unnecessary—cloak of textualism. What the majority unfortunately fails to recognize is that judicial tolling needs no basis in statutory language. It is an equitable measure. Thus, the majority's ardent devotion to the strict language of the statute is admirable, but really quite misplaced. As a result, the majority unnecessarily ties the judiciary's hands from importing measures of equity in situations that require it. Because I believe that the judicial tolling rule established in *Lewis* was well-reasoned and necessary, and because the majority has not established a persuasive reason for disregarding twenty years of stare decisis, I respectfully dissent.

I. EQUITABLE TOLLING IS AN EQUITABLE REMEDY THAT NEEDS NO BASIS IN STATUTORY LANGUAGE

The long-recognized equitable remedy of judicial tolling has been applied in a variety of circumstances. In

[1] "Equitable tolling" is also referred to as "judicial tolling," "the doctrine of *contra non valentem*," and, in shareholder suits, "the doctrine of adverse domination." Equitable tolling is usually discussed in the context of statutes of limitations. MCL 500.3145(1), in that it precludes recovering no-fault benefits incurred during a certain time period, is, for tolling purposes, no different than a statute of limitations.

fact, "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling[.]' " *Irwin v Dep't of Veterans Affairs*, 498 US 89, 95; 111 S Ct 453; 112 L Ed 2d 435 (1990), quoting *Hallstrom v Tillamook Co*, 493 US 20, 27; 110 S Ct 304; 107 L Ed 2d 237 (1989). This "break[s] [no] new ground." *American Pipe & Constr Co v Utah*, 414 US 538, 558; 94 S Ct 756; 38 L Ed 2d 713 (1974). Rather, equitable tolling operates to relieve the "strict command" of a legislatively prescribed limitation because of "considerations '[d]eeply rooted in our jurisprudence.' " *Id.* at 559, quoting *Glus v Brooklyn Eastern Terminal*, 359 US 231, 232; 79 S Ct 760; 3 L Ed 2d 770 (1959).

For instance, "in cases where the plaintiff has refrained from commencing suit during the period of limitation because of inducement by the defendant, [*Glus, supra*] or because of fraudulent concealment, *Holmberg v Armbrecht*, 327 US 392[; 66 S Ct 582; 90 L Ed 743 (1946)], this Court has not hesitated to find the statutory period tolled or suspended by the conduct of the defendant." *American Pipe, supra* at 559. See also *Irwin*, *supra* at 96 (recognizing that the remedy of equitable tolling can be afforded even where a plaintiff files a defective pleading within the statutory time period); *In re MGS*, 756 NE2d 990, 997 (Ind App, 2001) (recognizing that equitable tolling was an available remedy to a statute of limitations); *Harsh v Calogero*, 615 So 2d 420, 422 (La App, 1993) (acknowledging the doctrine of *contra non valentem*); *Regents of the Univ of Minnesota v Raygor*, 620 NW2d 680, 687 (Minn, 2001) (holding that equitable tolling is an available equitable remedy under the proper circumstances), aff'd 534 US 533; 122 S Ct 999; 152 L Ed 2d 27 (2002); *Friedland v Gales*, 131 NC App 802, 806-809; 509 SE2d 793 (1998) (recognizing equitable estoppel of a statute of limitations defense); *Resolution Trust Corp v Grant*, 901 P2d

807, 812 nn 13, 16 (Okla, 1995) (noting that the doctrine of adverse domination is "widely applied" by federal courts, and collecting cases from eleven states recognizing the doctrine).

Most recently, our Michigan Court of Appeals observed the following:

> This Court in *United States Fidelity & Guaranty Co v Amerisure Ins Co*, 195 Mich App 1, 6; 489 NW2d 115 (1992), noted that "Michigan and federal case law provides precedent for the principle that limitation statutes are not entirely rigid, allowing judicial tolling under certain circumstances[.]"
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> In *Bryant* [*v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004)], Justice MARKMAN, writing for the majority, applied the principles of the doctrine of equitable tolling in a medical malpractice action, while not specifically referring to the doctrine by name[.]
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> Equitable tolling has been applied where "the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass." [*Ward v Rooney-Gandy*, 265 Mich App 515, 518-520; 696 NW2d 64 (2005), quoting 51 Am Jur 2d, Limitation of Actions, § 174, p 563.]

Thus, applying equitable tolling is neither a novel measure nor one employed by cunning judicial activists seeking to advance their personal philosophies, as the majority implies. Although equitable tolling must be sparingly applied, *Irwin*, *supra* at 96, equitable remedies are, nonetheless, entirely within the sanctioned parameters of the judiciary's powers. Indeed, when the circumstances dictate the need, it is the obligation of

the judiciary to mete out the appropriate justice. See, e.g., *Howard v Mendez*, 304 F Supp 2d 632, 638-639 (MD Pa, 2004) (concluding that "common sense requires tolling of the limitations period when a litigant's right to file suit depends on the timely conduct of the opposing party's agent in assisting in the exhaustion of mandatory administrative remedies"); *Harris v Hegmann*, 198 F3d 153, 158-159 (CA 5, 1999) (recognizing a Louisiana "judicial rule" that tolls the limitations period during the time in which a plaintiff is legally unable to act).

The considerations behind equitable tolling tip the scales in favor of the remedy even when a statute requires strict construction and the tolling will result in the waiver of governmental immunity. For example, in *Irwin*, *supra* at 95-96, the United States Supreme Court found that statutes of limitations that operated against the government, like those that operate against private parties, should be subject to the already existing rebuttable presumption of equitable tolling. This was true despite the fact that the civil rights statute at issue, 42 USC 2000e-16(c), had to be strictly construed because compliance with the statute was a condition to a waiver of sovereign immunity. *Irwin, supra* at 94. The Supreme Court duly recognized that " 'Congress was entitled to assume that the limitation period it prescribed meant just that period and no more.' " *Id.*, quoting *Soriano v United States*, 352 US 270, 276; 77 S Ct 269; 1 L Ed 2d 306 (1957). But despite this important restriction, the Court found that the period of limitations should be equitably tolled when the circumstances of a particular case warranted it. The Court explained that although this type of equitable relief should be afforded only in rare instances, it is justified "in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period,

or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.* at 96; see also 51 Am Jur 2d, Limitation of Actions, § 174, p 563 ("The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff.").[2]

Equitable tolling is precluded, however, if a claimant does not "exercise due diligence in preserving his legal rights." *Irwin*, *supra* at 96, citing *Baldwin Co Welcome Ctr v Brown*, 466 US 147, 151; 104 S Ct 1723; 80 L Ed 2d 196 (1984). With regard to the particular claim before it in *Irwin*, the Supreme Court found that the plaintiff's untimeliness was "at best a garden variety claim of excusable neglect," and, thus, equitable tolling was not available in that circumstance. *Irwin, supra* at 96.

Of course, equitable tolling must be consonant with the legislative purpose of a statute to which it is applied. *American Pipe*, *supra* at 559, see also 54 CJS, Limitations of Actions, § 86, p 122 ("In order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations, provided it is in conjunction with the legislative scheme."). And the legislative branch is free to indicate that it does not want equitable tolling to apply to any particular statute. *Irwin*, *supra* at 96. In the absence of such an indication here, equitable tolling is available, as long as the reasons for

[2] Indeed, the majority explicitly recognizes that equitable tolling is necessary in exactly the type of circumstance described in *Irwin* and 51 Am Jur 2d, p 563. See *ante* at 590 n 64, citing *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997). Its failure, discussed later in this opinion, is in refusing to acknowledge that this case presents exactly this type of circumstance.

applying the remedy serve a justifiable purpose and comport with legislative intent.

II. APPLYING EQUITABLE TOLLING TO MCL 500.3145(1) IS NECESSARY TO PREVENT UNJUST RESULTS AND TO EFFECT LEGISLATIVE INTENT

In *Lewis*, this Court thoroughly examined the purposes of statutes of limitations, the purposes of and legislative intent behind the no-fault act, and the parameters and conditions of employing equitable tolling before invoking the delicately chosen remedy. This Court did not misapprehend that the statute at issue was in some way ambiguous or that the text of the statute contained a tolling requirement.[3] Rather, after careful consideration, we concluded that an equitable measure was necessary to further the purposes of the no-fault act and to eliminate the statute's inherent blockade to an insured's right to receive what is rightfully his.

Nothing about the purpose of the act, the purpose of the time limitation in the act, or the parameters of equitable tolling have changed since *Lewis* to justify

[3] After this Court applied judicial tolling to MCL 500.3145(1) in *Lewis*, this Court considered whether judicial tolling was also applicable to MCL 500.3145(2). *Secura Ins Co v Auto-Owners Ins Co*, 461 Mich 382; 605 NW2d 308 (2000). In refusing to apply tolling to subsection 2, the *Secura* majority misunderstood the *Lewis* majority's reasoning. The *Secura* majority stated, "The *Lewis* majority recognized tolling under subsection 1. However, that subsection includes language indicating that the Legislature intended that the one-year limitation period would be suspended by the giving of notice[.]" *Id.* at 386. As I noted in my dissent, "A careful reading of *Lewis*, however, reveals that the basis of our decision there was preserving legislative purposes, and not the sentence the majority highlights. . . . Thus, the majority relies on a phantom distinction to differentiate the instant case from *Lewis*, because applying the same analysis used in *Lewis* supports tolling the statute." *Secura*, *supra* at 389 n 1 (CAVANAGH, J., dissenting).

overruling that well-reasoned case. Tellingly, the only variable that has fluctuated is the makeup of this Court.

As we recognized in *Lewis*, one of the foremost underlying purposes of our no-fault scheme was to reduce litigation. *Lewis*, *supra* at 101-102, citing *Welton v Carriers Ins Co*, 421 Mich 571, 578-579; 365 NW2d 170 (1984). Of equal importance, the act

> was offered as an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or "fault") liability system. 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. [*Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978) (emphasis added).]

The portion of the no-fault act at issue in *Lewis* and being reexamined in the present case, MCL 500.3145(1), governs when an insured must bring suit to recover benefits due under the act. The statute states in pertinent part:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. *If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.* [*Id.* (emphasis added).]

Simply stated, an insured who has received benefits or requested his insurer to pay recoverable expenses has one year after the most recent allowable expense or loss was incurred to sue the insurer to recover those benefits. Thus, as long as expenses are being incurred, the time for bringing a lawsuit is not restricted. However, the insured will only be permitted to recover benefits that were incurred in the one-year period before the suit was brought.

Once an insured submits a claim for benefits, she has no way of knowing, other than an indication from the insurer, whether the claim will be paid. Quite obviously, then, when an insured acts with due diligence in notifying the insurance company of a claim, whether the insured ultimately collects the full amount of benefits due is completely at the whim of the insurance company. When an insured submits a claim for benefits, an insurer can take as long as it wants to approve or deny the claim. If the insurer takes more than one year, then under the one-year-back rule, the benefits that were due to the insured dissipate into thin air through no fault whatsoever of the insured.

Indeed, that was precisely what occurred in this case. After plaintiff's son was catastrophically injured in an automobile accident, defendant began paying plaintiff for her attendant care services. Defendant paid those benefits for approximately a year and a half. But a day after receiving a February 15, 2001, physician's notice that Michael had been "cleared to function without close supervision," defendant abruptly stopped paying benefits. Defendant waited, however, until October 7, 2002, to notify plaintiff that it was formally denying further benefits.

Shortly thereafter, on November 12, 2002, plaintiff filed a complaint to recover the benefits defendant had

ceased paying.[4] But under MCL 500.3145(1), plaintiff could only recover benefits from the one-year period that preceded her complaint, November 12, 2001, to November 12, 2002, even though defendant allegedly wrongfully withheld benefits beginning on February 16, 2001. Thus, if plaintiff was entitled to benefits from the period February 16, 2001, to November 12, 2001, the one-year-back rule precluded her from recovering them, even though plaintiff was allegedly diligent in providing notice of her claim to her insurer.[5]

Plaintiff's case aptly demonstrates the need for equitable tolling. Her insurer waited nearly two years to formally deny her claim for attendant benefits. Although plaintiff *could* have brought suit earlier, before defendant formally denied her claim, such a tactic hardly advances our Legislature's goal of *reducing* litigation. In fact, it appears from the limited record before us that plaintiff and defendant were involved in extensive dealings and communication regarding many types of benefits from the time plaintiff's son was injured onward.[6] An insured engaged in the complex

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[4] Defendant ultimately resumed paying the benefits on October 15, 2003.

[5] Defendant claims that plaintiff did not notify it of her claim. Plaintiff presented evidence of a claims adjuster's notes that suggest that plaintiff did notify defendant. Moreover, defendant was already paying attendant care benefits and stopped after it received information that it claims relieved it of its obligation to pay further benefits. Thus, it is difficult for me to conclude that defendant had no notice of plaintiff's claim for benefits. In any event, whether plaintiff properly notified defendant would be a factual matter to be resolved on remand.

[6] The majority claims that defendant's cessation of payments gave plaintiff the "surest notice" that it would not be honoring her claim for benefits. *Ante* at 584. This simplistic approach fails to account for the inherent complexities of no-fault claim resolution. In many cases involving extensive injuries, there are hundreds if not thousands of claims for different types of benefits presented for payment, and there are extensive negotiations, resubmissions, evaluations, investigations, and the like.

day-to-day dealings with an insurer that are common after a serious accident would quite conceivably destroy any semblance of goodwill and cooperation by filing a lawsuit before the insurer has even denied a particular claim. Further, an insurer could simply defend by stating that the plaintiff's claim is premature because the insurer is still investigating the claim, at which point the lawsuit would not only have precipitated antagonism, but would have amounted to a colossal waste of time and resources.

Insurers, too, are hurt by today's ruling. With the proliferation of litigation that is now bound to occur, insurers will be paying the costs of defending the lawsuits, and converting resources that could otherwise go toward investigating claims and communicating with their insureds into payments for billable hours. This will, in turn, translate into higher premiums, further denigrating the opposite goal of the no-fault act.

How the majority's abandonment of equitable tolling in this situation furthers the legislative intent behind the no-fault act escapes me.

Defendant claims that a deterrent mechanism that would encourage an insurer to promptly deny claims is built into the no-fault act and that, as such, equitable tolling is unnecessary. I disagree. While §§ 3142(3) and 3148(1) penalize the insurer for unreasonable delay or unreasonable denials by attaching interest to overdue payments and making the insurer liable for an insured's attorney fees, those provisions fall short of protecting insureds against the unavoidable effects of insurer delay. Once benefits become unreachable

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Thus, to conclude that an insurer's denial of one such claim among many is the "surest notice" that the claim will not be paid misrepresents reality. In essence, the majority's statement merely emphasizes that a preemptive lawsuit is *expressly* necessary under its new rule.

through operation of the one-year-back rule, the benefits cannot form a part of a plaintiff's claim. Thus, they cannot be a part of the plaintiff's award. Therefore, not only is the plaintiff deprived of a part of her benefits, she is also deprived of the purportedly punitive interest that should have accompanied it.

Further, a savvy insurer seeking to disburse the lowest dollar amount possible might gamble on a cost-benefit approach and use the one-year-back rule in its favor. For example, assume an insured seeks benefits that, over one year, total $100,000. If the insurer waits two years to deny the claim, the insured, although due $200,000, can only recover $100,000 in a lawsuit. A twelve percent annual interest rate will be applied to the $100,000 figure pursuant to § 3142(3), which makes the insurer's total bill approximately $112,000. Thus, the insurer handily pockets $88,000 of its insured's benefit money, less the plaintiff's attorney fees. Either way, the insured ends up with $112,000 instead of the $200,000, plus interest, that was actually owed.[7]

Lest anyone argue otherwise, the danger of such a scenario is real, not imagined. In *Hudick v Hastings Mut Ins Co*, 247 Mich App 602, 610; 637 NW2d 521 (2001), the Court of Appeals found an acute need for *Lewis*'s equitable tolling rule when, "[a]lthough defendant had all the information it needed at this point to calculate the benefits it owed to plaintiff, defendant did not process a claim for plaintiff or formally deny its liability until" a time that precluded the plaintiff from recovering some of the benefits owed. The *Hudick* panel correctly observed that the "[p]laintiff should not be

[7] This assumes that the insured can successfully engage an attorney's services. If the amount of the potential claim does not significantly exceed the cost of litigation, then, presumably, getting an attorney will be a difficult endeavor.

penalized for the time that the two insurers spent investigating the issue, which was extended largely because defendant was aware of its statutory duty but attempted to run the clock on the limitations period." *Id.* Such tactics were also forewarned in *William H Sill Mortgages, Inc v Ohio Cas Ins Co*, 412 F2d 341, 346 (CA 6, 1969) ("The insurer may not lull the insured to sleep by promises of payment or negotiations for payment or a failure to deny liability until after the time limitation has expired and then set up as a defense the failure to bring the action within the limitation fixed by the policy.").

The majority claims that the "only delay *possible* under the no-fault law is the thirty-day payment period following receipt of proof of loss by the insurer." *Ante* at 583 (emphasis added). This is incorrect. While § 3142(2) does technically require insurers to pay benefits within thirty days, insurers do not always do so. Thus, delays of more than thirty days are indeed "possible."

The ways in which equitable tolling fulfill the purposes of the no-fault act, and the unjustifiable ramifications of disallowing the remedy, have been eloquently presented in precedent. In *Richards v American Fellowship Mut Ins Co*, 84 Mich App 629, 635; 270 NW2d 670 (1978), the Court of Appeals stated:

> Applying the approach taken by the *Thomas* Court [*Tom Thomas Org, Inc v Reliance Ins Co*, 396 Mich 588; 242 NW2d 396 (1976)] to § 3145 would effectuate the legislative intent in enacting the no-fault act. Unable to profit from processing delays, insurance companies will be encouraged to promptly assess their liability and to notify the insured of their decision. At the same time, the insured will have a full year in which to bring suit.

The *Richards* Court recognized the ramifications of disallowing tolling:

> If we were to accept defendant's interpretation of the statutory provision, we would in effect be *penalizing the insured for the time the insurance company used to assess its liability*. To bar the claimant from judicial enforcement of his insurance contract rights because the insurance company has unduly delayed in denying its liability would run counter to the Legislature's intent to provide the insured with prompt and adequate compensation. [*Id.* at 634 (emphasis added).]

In *Lewis*, this Court correctly found that equitable tolling served the inherent purposes of the no-fault act by ensuring that an insurer's delay in handling a claim would not work to the insured's detriment:

> "Tolling the statute when the insured submits a claim for specific benefits would not appear to detract from the policies underlying the one-year limitation on recovery. By submitting a timely and specific claim, the insured serves the interest in preventing stale claims by allowing the insurer to assess its liability while the information supporting the claim is relatively fresh. A prompt denial of the claim would barely affect the running of the limitation period, while a lengthy investigation would simply 'freeze' the situation until the claim is eventually denied. In effect, the insured would be charged with the time spent reducing his losses to a claim for specific benefits plus the time spent deciding whether to sue after the claim is denied." [*Lewis*, *supra* at 101, quoting *Welton*, *supra* at 578-579.]

This Court also correctly recognized that without tolling, an insured will have to "file suit as a precautionary measure when the one-year deadline approache[s], regardless of the status of the claim," and that such needless litigation contravenes the no-fault act's purpose of reducing litigation. *Lewis, supra* at 102, citing *Cassidy v McGovern*, 415 Mich 483, 501; 330 NW2d 22 (1982).

Of course, equitable tolling is not "an unconditional gift to the insured." *Norfolk & W R Co v Auto Club Ins*

Ass'n, 894 F2d 838, 843 (CA 6, 1990). Astute about the need to prevent an insured from improperly benefiting from equitable tolling, the *Lewis* Court also warned that to take advantage of tolling, the insured "must seek reimbursement with reasonable diligence . . . ." *Lewis*, *supra* at 102. That condition, held the Court, would "alleviate the defendant's fear that adoption of the tolling principle will result in 'open-ended' liability in cases in which the claimant, having made a specific claim for benefits, thereafter refuses to respond to the carrier's legitimate requests for more information needed to process the claim." *Id.* at 102-103.[8]

Further, it is nothing short of illogical not to require an insurer to deny a claim before imposing a restriction on what plaintiff can recover. A plaintiff must know that a claim exists before being required to file one. Repudiating equitable tolling imposes a tremendous burden on plaintiffs, who must assert that the insurer's failure to pay is a definitive denial and, thus, a violation of the no-fault act, rather than just the result of a pending investigation. A defense motion for failure to state a claim puts a plaintiff in an unnecessarily precarious position.

These many concerns are not lost on other states that have been faced with similar problems. In *Entzion v Illinois Farmers Ins Co*, 675 NW2d 925, 929 (Minn App, 2004), the court concluded that the period of limitations on a no-fault benefits claim did not begin to run until the insurer denied benefits. In *Micha v Merchants Mut Ins Co*, 94 AD2d 835, 836; 463 NYS2d 110 (1983), the

[8] In light of the majority's renegade renunciation of equitable tolling, it is unnecessary to address the correctness of the Court of Appeals decision in *Johnson v State Farm Mut Automobile Ins Co*, 183 Mich App 752; 455 NW2d 420 (1990). Thus, I make no conclusions regarding whether the Court of Appeals correctly interpreted *Lewis*'s requirement that an insured make a "specific claim for benefits."

court determined that the period of limitations started when benefits were withheld. Both courts recognized that it would be irrational to require a plaintiff to prove that benefits were owed before an insurer actually refused to pay them. Refusing to apply equitable tolling to § 3145 requires plaintiffs to sue defensively, creating an irreconcilable conflict with the legislative goal of reducing litigation.

Interestingly, the necessity for equity of this sort has been recognized by this very majority most recently in *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411; 684 NW2d 864 (2004). In *Bryant*, this Court concluded that the "[p]laintiff's failure to comply with the applicable statute of limitations [was] the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights." *Id*. at 432. Thus, this Court held that, although the plaintiff's claims would have normally been time-barred, "[t]he equities of this case . . . compel a different result." *Id*.

If the judiciary can employ its powers to toll a period of limitations because the nature of one's claim is a source of confusion, then certainly here, where an insurer can single-handedly orchestrate a reduction in genuinely owed benefits, equity is likewise required. The majority's newfound hostility to the doctrine is vastly disturbing.[9]

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[9] The majority attempts to explain away this discrepancy by arguing that because there is no statute to assist one in characterizing a cause of action, equity was appropriate in *Bryant*. *Ante* at 591 n 65. Strangely, the *Bryant* plaintiff's situation—"confusion"—fits less within the majority's declaration of when equity should be applied ("fraud or mutual mistake," *ante* at 590), than does the statute at hand, which allows an insurer to single-handedly divest a plaintiff of deserved benefits even when a plaintiff has diligently performed all her obligations. Thus, this is far from the lofty "fundamental disagreement" between the majority and

Further, the majority's automaton-like textualist analysis takes no consideration of the realities surrounding no-fault claims and payments illustrated by amicus curiae Coalition Protecting Auto No-Fault. For instance, when an insured does not file a lawsuit within one year of receiving medical treatment, the insured's medical providers may go unpaid, merely because the insurer has not responded to the request for benefits. This risk of nonrecovery or substantially reduced payments may prove too great for providers to bear. Medical providers may resort to denying treatment to and even suing their own patients, many of whom will not be able to pay because of the high cost of medical care, and some of whom may be forced into bankruptcy because of the debt. The overflow of health-care costs will be foisted on our already overtaxed Medicaid and Medicare systems, with the taxpayers ultimately shouldering the burden. Thus, refusing to apply equitable tolling will ultimately increase overall health-care costs for everyone, denigrating yet another goal of the no-fault system: affordable premiums.

In its response to my dissent, the majority does a fine job of describing the principles of equity. Noticeably lacking, however, is any attempt to describe why equity

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myself regarding when equity should be applied that the majority proclaims. *Ante* at 590 n 65. Rather, the majority's inconsistency is a clear manifestation of its willingness to apply equity according to its own whims instead of according to the principles that govern it.

Further, it is misleading to suggest that the *Lewis* Court issued a protective blanket of equity to every plaintiff encountering a problem under MCL 500.3145(1). See *ante* at 590 n 65. The *Lewis* Court's conditions that a plaintiff must submit a specific claim for benefits and be diligent necessitate a case-by-case examination of whether a particular plaintiff can avail herself of the equitable rule. In other words, not every plaintiff will be permitted to benefit from equitable tolling. Rather, the *Lewis* Court made the remedy *potentially* available to plaintiffs, but only when they met certain conditions.

is not required in the present case.[10] The majority's chosen ignorance of the fact that its application of the statute at hand does *not* further the intent of the Legislature or the purpose of the no-fault act, and that it unjustifiably puts an insured's ability to recover benefits in an insurer's hands, is convenient for the majority, but disturbing to me.

The application of equitable tolling strikes an extremely palatable balance between the rights of insureds and insurers.[11] As I stated in *Secura*:

> The legislative purposes behind limitation provisions, preventing stale claims and easing crowded dockets, are either inapplicable or contrary to the majority's decision. First, preventing stale claims from reaching our courts is not a consideration in this case, because the defendant insurer can protect itself from stale claims by promptly responding to a policyholder's claim. Thus, whether insurers must deal with stale claims is uniquely within their own control. Next, the majority's interpretation actually encourages needless litigation. Under the majority's decision, a prudent policyholder must file suit within one year of the injury, regardless of whether the insurer is still processing the claim, or lose the claim altogether. This contravenes an

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[10] The majority's statement that there are no " 'unusual circumstance[s]' " in this case is conveniently conclusory and, again, a variation on its dodge-and-duck theme. See *ante* at 591. I invite the public to reconcile the following premises of the majority. The majority claims that its charge is to further legislative intent. But it also claims that the only method of divining that intent is through the statute's plain language. (It also assumes that this is possible with one-hundred percent "accuracy," though split decisions from this very majority belie that assumption.) And it further claims that it can, indeed, employ equity. But it fails to explain how it could ever invoke its equitable powers if it limits itself to the statute's plain language. It then turns a blind eye to the fact that its analysis does not further the well-known and consistently agreed-on legislative intent behind the no-fault act.

[11] This is evidenced by the sheer number of courts that have held likewise, cited earlier in this opinion.

> important motivation for the no-fault system, reducing litigation, see *Cassidy v McGovern*, 415 Mich 483, 501; 330 NW2d 22 (1982), and the similar judicial policy of discouraging litigation. See *Alexander v Gardner-Denver Co*, 415 US 36; 94 S Ct 1011; 39 L Ed 2d 147 (1974). Additionally, requiring a precautionary suit by the policyholder could adversely affect the negotiations between the claimant and the insurer. Negotiating parties usually attempt to maintain a cooperative atmosphere, and litigation pending between the parties would hinder that atmosphere. See *Johnson v Railway Express Agency*, 421 US 454, 468; 95 S Ct 1716; 44 L Ed 2d 295 (1975) (Marshall, J., dissenting). [*Secura*, *supra* at 391 (CAVANAGH, J., dissenting).][12]

Defendant's magniloquent predictions of the demise of our entire no-fault system barring reversal of *Lewis* are sheer melodrama. First, *Lewis* was decided nearly twenty years ago, and no-fault remains alive and well.[13] Surely if equitable tolling were destined to bring our no-fault system to its knees, the system would be six feet under by now. Second, defendant claims that the prolific number of multimillion dollar claims being wreaked on the insurance companies as a result of equitable tolling create great pressure on insurers to settle. But an insurer is in the best position to avoid the accrual of multimillion dollar claims by promptly paying or denying benefits. Further, the *Lewis* decision does not allow an insured to sleep on his rights, as evidenced by the numerous decisions in which plaintiffs who did not diligently pursue their claims were denied the benefit of equitable tolling and those in which the insurer's prompt denial prevented tolling. See, e.g.,

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[12] See also *Bridges v Allstate Ins Co*, 158 Mich App 276, 280-281; 404 NW2d 240 (1987), in which the Court noted that, although the "plaintiff filed a complaint, he wished to avoid the necessity of trying the action and felt that there was a very real possibility that his claim would be paid."

[13] I use that term as a figure of speech, not as a literal comment on the no-fault system.

Bomis v Metropolitan Life Ins Co, 970 F Supp 584, 588 (ED Mich, 1997) (rejecting the plaintiff's *Lewis* argument because the plaintiff did not act with due diligence); *Morley v Automobile Club of Michigan*, 458 Mich 459, 470; 581 NW2d 237 (1998); *Grant v AAA Michigan/Wisconsin, Inc*, 266 Mich App 597; 703 NW2d 196 (2005); *Mt Carmel Mercy Hosp v Allstate Ins Co*, 194 Mich App 580, 587-588; 487 NW2d 849 (1992); *Mousa v State Auto Ins Cos*, 185 Mich App 293, 294-295; 460 NW2d 310 (1990) (finding a formal denial of benefits when the plaintiff admitted that the insurer had orally denied the claim); *Long v Titan Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2005 (Docket No. 260113); *Detroit Medical Ctr-Sinai-Grace Hosp v Titan Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 10, 2005 (Docket No. 251447); *Inhulsen v Citizens Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 30, 2004 (Docket No. 243398); *Jevahirian v Progressive Cas Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued April 27, 1999 (Docket No. 205577) ("Notice of an injury that simply informs the insurer of the name and address of the claimant and the time, place, and nature of an injury cannot serve as the specific claim that triggers tolling because it does not inform the insurer of the expenses incurred, whether the expenses were covered losses, and whether the claimant would file a claim.").

In other words, equitable tolling has worked. As can clearly be seen, equitable tolling puts neither the insured nor the insurer in an untenable or unfair position. Rather, it protects both parties by requiring both to act promptly. When a party fails to act promptly, the law will not reward that party. With these safeguards in place, the purposes of the no-fault act are realized

instead of defeated. But with the majority's obstinate rejection of equitable tolling will come the temptation to prolong denying claims, lost benefits, a proliferation of litigation, unpaid providers, and increased costs for everyone. Such a ruling is simply unjustifiable.

III. THE LEGISLATURE HAS NOT REVISED MCL 500.3145 SINCE *LEWIS*

Despite amending the no-fault act several times since this Court's decision in *Lewis*, the Legislature has left untouched the language at issue in this case. Thus, this case is an ideal candidate for applying the long-recognized legislative reenactment rule. See, e.g., *Massachusetts Mut Life Ins Co v United States*, 288 US 269, 273; 53 S Ct 337; 77 L Ed 739 (1933). As I have previously explained,

> [u]nder the reenactment rule, "[i]f a legislature reenacts a statute without modifying a high court's practical construction of that statute, that construction is implicitly adopted." *People v Hawkins*, 468 Mich 488, 519; 668 NW2d 602 (2003) (CAVANAGH, J., dissenting), citing 28 Singer, Statutes and Statutory Construction (2000 rev), Contemporaneous Construction, § 49.09, pp 103-112. The Legislature "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it [reenacts] a statute without change . . . ." *Lorillard, a Div of Loew's Theatres, Inc v Pons*, 434 US 575, 580; 98 S Ct 866; 55 L Ed 2d 40 (1978). "The reenactment rule differs from the legislative-acquiescence doctrine in that the former canon provides 'prima facie evidence of legislative intent' by the adoption, without modification, of a statutory provision that had already received judicial interpretation." *Hawkins*, *supra* at 488, quoting Singer at 107. [*Neal v Wilkes*, 470 Mich 661, 676; 685 NW2d 648 (2004) (CAVANAGH, J., dissenting).]

I continue to find extremely persuasive the notion that a Legislature is presumed to be aware of this

Court's decisions. *Id.*; see also *Lindahl v Office of Personnel Mgt*, 470 US 768, 782; 105 S Ct 1620; 84 L Ed 2d 674, (1985). Further, if the ramifications of *Lewis* were so dramatically detrimental to the no-fault system, there is all the more reason that the Legislature would have acted with great haste to amend the statute and explicitly ban equitable tolling. But it did not. Rather, despite numerous opportunities, the Legislature has left § 3145 intact. Its failure to change the statute to reflect an intent contrary to that which we found in *Lewis* is further support that this Court correctly concluded that equitable tolling was appropriate.

IV. THE MAJORITY'S REASONING FOR FAILURE TO ADHERE TO STARE DECISIS IS FAULTY

The majority's opinion seems to rest primarily on its analytically deficient conclusion that this Court should not employ equity in this case. Most egregiously, the majority accuses the *Lewis* Court of "act[ing] outside its constitutional authority," *ante* at 583, while at the same time acknowledging this Court's constitutional authority to do equity, a*nte* at 590. The majority cites our Constitution's directive that the judiciary must "exercise its 'judicial power,' " see *ante* at 583 n 40, quoting Const 1963, art 3, § 2; art 6, § 1, but neglects to justify its conclusion that equity should not lie in the present case.

Indeed, despite its purported recognition that this Court's equitable powers are, in fact, viable, the majority insists on trivializing my application of these powers. The majority grossly mischaracterizes my analysis as playing "an omnipresent and unassailable judicial trump card," the result of my believing the statute is "unfair," a "policy decision[]," "omniscien[ce]," a "veil,"

a "policy choice," "second-guess[ing]," a "whim[]," one of "various conceptions," an "unrestricted license," "wholesale policymaking," without "basis," and a "guise." See *ante* at 588-591. These accusations are transparent attempts to suggest that a legitimate application of equity is a mere effort to install my own policy views. Not only could that not be further from the truth, but such belittling is a grave disservice to the citizens of this state.

As I have discussed, and as is thoughtfully articulated by Justice WEAVER, the *Lewis* decision was neither " 'unworkable' " nor " 'badly reasoned.' " See *ante* at 584. Rather, it was based on a centuries-old recognition of equitable tolling as an appropriate measure for avoiding injustices. It had " 'practical workability' " by requiring that both parties act promptly and by not giving either party an undue advantage over the other.[14] The decision was crafted in an effort to make undesired preemptive litigation unnecessary. There are no changes in the law or facts that justify overturning the decision. There are, contrary to the majority's assertion otherwise, reliance interests at play that will, when *Lewis* is overruled, work undue hardships on insureds and on medical providers.

Insureds routinely choose their course of action—waiting or suing—on the basis of the actions of their insurers. Relying on equitable tolling, an insured knows that he need not rush to court the second the one-year period set forth in § 3145(1) has elapsed. The undue

[14] To the extent the Court of Appeals may have misapplied the requirement that an insured must submit a specific claim for benefits in *Johnson*, *supra*, such error is easily corrected. If the Court of Appeals erred, we need not, as the majority insists, clamor to overrule the underlying case. See *ante* at 586. Rather, the usual, and much more logical, path is to overturn the aberrant Court of Appeals case if it did not adhere to our prior precedent.

hardship that will result from overturning *Lewis* is that instead of being able to engage in negotiations with an insurer, an insured must jump the gun, expend unnecessary time and resources, sue her insurer, and put herself in the awkward position of withstanding a summary disposition motion. Medical providers as well will suffer undue hardship because they will, in many instances, bear the losses that will result when an insurer does not timely deny a claim and when the insured does not run to court to file a now-necessary preemptive lawsuit. It is quite logical to assume that medical providers have been relying on the equitable tolling rule of *Lewis* by continuing to provide treatment during the period in which a claim has not yet been denied.

The majority bizarrely claims that "the impact of *Lewis* is increasingly producing a tax on the no-fault system as claimants are being permitted to seek recovery for losses incurred much more than one year prior to commencing suit." *Ante* at 586. But this fails to recognize that the benefits were already legitimately owed—thus, they can hardly be characterized as a "tax." And in a situation where an insurer deliberately engages in dilatory tactics to avoid paying benefits, the nomenclature is even more unfitting.

The *Lewis* decision was sound, had practical workability, and gave clear guidance that is being relied upon on a daily basis. Further, the decision was grounded in an equitable rule, not "judicial *defiance*" as the majority so histrionically proclaims, so the Court did not incorrectly interpret the statute. See *ante* at 585. There is simply no basis for expunging *Lewis* and ignoring the directives of the doctrine of stare decisis. The best that can be said of today's majority opinion is that it does indeed create a crystal-clear directive to Michigan's

insureds: if your claim has not been paid or formally denied within one year of your request, sue.

V. THE MAJORITY'S DECISION SHOULD NOT BE APPLIED RETROACTIVELY

For the reasons aptly set forth by Justice WEAVER, I fully agree that the majority's misguided decision should not be visited on any insured by way of retroactive application.

VI. THE MAJORITY'S TONE DISSERVES THE JUDICIARY

Some readers, like myself, might find it difficult to wade through the thick swamp of hyperbole and rhetoric that permeates the majority's opinion. With its opprobrious language,[15] the majority haughtily assumes

[15] Discrediting a long line of the past opinions written by a bench curiously not including any member of the current majority, the majority gets quite carried away in an apparent effort to convince the reader that its view is superior to any other ever proffered. Keeping in mind the above discussion of the widespread acceptance of equitable tolling and the reasons why applying tolling to § 3145(1) is necessary to fulfill the purposes of the no-fault act and to prevent an insurer from wrongfully withholding benefits from an injured plaintiff, consider these frenzied phraseologies: "under this thin veil, [the majorities] inserted their own policy views," *ante* at 573; "impermissible departure," *id.* at 578; "supplanted the will of the Legislature with its own assessment of policy and consumer expectations," *id.*; "curious incongruity," *id.* at 579; "quite broad," *id.* at 580; "vague," *id.* at 581; "dismantled the certainty," *id.*; "questionable lineage," *id.*; "judicial negation," *id.*; "abrupt departure from settled precedent," *id.*; "shrugged off the weight of binding precedent," *id.* at 582; "crafting its own amendment," *id.*; "distortion," *id.*; "unmanageability," *id.*; "purely for policy reasons," *id.*; "direct contravention of the statutory language," *id.*; "prevailing policy whims," *id.* "own perception," *id.*; "impermissibly legislated from the bench," *id.*; "speculation," *id.*; "acted outside its constitutional authority," *id.* at 583; "importing its own policy views," *id.*; "we are unable to perceive any sound policy basis," *id.*; "judicial *defiance*," *id.* at 585 (emphasis in original); "judicial usurpation," *id.*; and "defies 'practical workability,' " *id.* at 585; "wrongly decided," *id.* at 586.

that no view other than its own is worthy of the printed page. Given that equitable tolling has a long history in state and federal jurisprudence, and given the persuasive reasons why an equitable remedy is mandated to prevent manifest injustice to insureds seeking benefits under § 3145, I fail to grasp the basis for the criticisms.

Moreover, the majority's overwrought scorn is rife with sarcasm,[16] sloganeering,[17] and outright fabrication.[18] The majority's unbending devotion to strict textualism should not come at the expense of recognizing that the judiciary is not a mere robotic cog in the wheel of our three-branch system of government.[19] Rather, the judiciary has the ability—indeed, the responsibility—to do equity where equity is required.

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[16] See n 15 of this opinion.

[17] See *id*.

[18] See *id*.

[19] Indeed, as in this case, strict textualism can have consequences that we would be wise to avoid. See Zelinsky, *Travelers, reasoned textualism, & the new jurisprudence of ERISA preemption*, 21 Cardozo L R 807, 808 n 3 (1999):

> See, e.g., Ellen P. Aprill, The Law of the Word: Dictionary Shopping in the Supreme Court, 30 Ariz. St. L. J. 275, 324 (1998) (criticizing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), as an "easy, dictionary-driven, plain meaning disposition of the term . . . [which] produced a flood of litigation for the lower federal courts"; Catherine L. Fisk, The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism, 33 Harv. J. on Legis. 35, 39 (1996) ("If ever there were a case study of the failures of textualism as a method of statutory interpretation, this is it."); Peter D. Jacobson & Scott D. Pomfret, Form, Function, and Managed Care Torts: Achieving Fairness and Equity in ERISA Jurisprudence, 35 Hous. L. Rev. 985, 990 (1998) (criticizing the Supreme Court for "a mechanical approach [to ERISA preemption] that adheres to a strict 'plain language' interpretation without questioning whether the result of these interpretations can be reconciled with congressional intent").

Were that authority not historically within the judiciary's purview, such a creature as equity would not even exist.

Further, the current majority has an obvious inability to recognize that *to whatever extent* a view different from the view it holds could be considered "judicial activism," see, e.g., n 15 of this opinion, its own view can as well. In other words, accusing the *Lewis* Court of judicial activism simply because the Court reached a conclusion that this majority takes issue with does nothing to further the legitimate debate that surrounds divergent approaches. The majority opinion reeks of an unfortunately familiar tone that is, quite frankly, getting old.[20]

VII. CONCLUSION

Equitable tolling has a venerable history in federal and state jurisprudence that today's majority ill-advisedly chooses to disregard in favor of denigrating the purposes of the no-fault act. I, unlike the majority, am not content with the dismissive notion that "the Legislature has made it so." See *ante* at 583. The citizens of Michigan, and the Legislature, deserve better.

As is consistently recognized by the majority, our role is to effectuate the intent of the Legislature. Because I believe that equitable tolling has an important role in *effecting the Legislature's intent*, that *Lewis* was correctly decided, and that overturning *Lewis* will work an

[20] The authors of such phrases as those quoted in n 15 of this opinion would do well to keep in mind that despite how ardently they convince themselves of the supremacy of their position, their reasoning is not infallible. See *Halbert v Michigan*, ___ US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005); *Yellow Transportation, Inc v Michigan*, 537 US 36; 123 S Ct 371; 154 L Ed 2d 377 (2002).

unjustifiable hardship on injured insureds and the no-fault system as a whole, I respectfully dissent.

KELLY, J., concurred with CAVANAGH, J.

WEAVER, J. *(dissenting).* I respectfully dissent from the majority opinion overruling *Lewis v DAIIE,* 426 Mich 93; 393 NW2d 167 (1986), and I disagree with the majority's decision to give its opinion limited retroactive, instead of prospective, effect.

I

Had I been on the Michigan Supreme Court in 1986, I would likely have joined Justice BRICKLEY and Justice RILEY in dissenting from *Lewis*. I agree with Justice BRICKLEY's dissent in *Lewis,* and his statement that

> [s]ection 3145 is clear in its directive that a claimant cannot recover benefits for losses incurred more than one year prior to the commencement of the suit; not one year plus the period of time between making the claim and the denial of the claim as the majority holds. [*Lewis, supra,* at 105.]

But nineteen years later, I cannot join the majority's decision to overrule the longstanding precedent applying judicial tolling to this statute. In this case, there is no need to unsettle the law and disregard the doctrine of stare decisis.

Under the doctrine of stare decisis, it is necessary to follow earlier judicial decisions when the same points arise again in litigation. Garner, *A Dictionary of Modern Legal Usage* (New York: Oxford University Press, 1995), p 827. This promotes stability in the law. In determining whether to overrule a prior case, pursuant to the doctrine of stare decisis, this Court should first consider whether the earlier decision was wrongly

decided. If it was wrongly decided, the Court should then examine reliance interests: whether the prior decision defies "practical workability"; whether the prior decision has become so embedded, so fundamental to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations; whether changes in the law or facts no longer justify the prior decision; and whether the prior decision misread or misconstrued a statute. *Robinson v Detroit,* 462 Mich 439, 464-467; 613 NW2d 307 (2000).

As stated above, I agree with Justice BRICKLEY's dissent in *Lewis;* I would find that *Lewis* was wrongly decided. But after examining the reliance interest factors, I would not overrule *Lewis.* First, the *Lewis* decision does not defy "practical workability"; it has been applied for nineteen years without causing any fundamental problems with no-fault insurance. Second, the *Lewis* decision has indeed become "so embedded, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson, supra* at 466. Claimants who consulted an attorney on whether they needed to file suit after receiving no response to a filed claim would have been told, on the basis of *Lewis,* that filing the claim had preserved their rights until they received an answer from the insurance company. Changing that rule now will affect an unknown number of claimants who will lose their rights to benefits that had previously been protected. Third, there have been no changes in the law or facts since *Lewis* was issued. Finally, *Lewis* did not misread or misconstrue a statute; instead, it applied judicial tolling to the statute as an equitable matter.

In light of the doctrine of stare decisis and the purposes it serves, neither the defendant nor the ma-

jority have given sufficient reason to overrule *Lewis*. Correction for correction's sake does not make sense. The case has not been made why the Court should not adhere to the doctrine of stare decisis in this case.

If there are genuine problems with *Lewis*'s application of the judicial tolling doctrine, they can be brought to the Legislature's attention by the insurance industry.

II

Further, I disagree with the majority's decision to give its decision limited retroactive effect. Because its decision overrules nineteen years of precedent and because claimants may have acted in reliance on *Lewis*, the majority's decision should be applied prospectively.

A

A judicial decision can be applied with full retroactivity, with limited retroactivity, or prospectively. *Monat v State Farm Ins Co*, 469 Mich 679, 702; 677 NW2d 843 (2004) (CAVANAGH, J., dissenting).

When a decision is given full retroactive effect, the parties in that case are bound by the decision, and the parties in other cases then pending, as well as any potential claimants who would have filed suits in the future, are bound by it as well. See *Tebo v Havlik,* 418 Mich 350, 363-364; 343 NW2d 181 (1984) (opinion by BRICKLEY, J.).

The majority has decided to give its ruling *limited* retroactive effect. This means that its ruling will apply "only in cases commenced after the overruling decision and in pending cases where the issue had been raised and preserved." *Stein v Southeastern Michigan Family Planning Project, Inc,* 432 Mich 198, 201; 438 NW2d 76 (1989). Accordingly, for any cases filed before today's

decision, that is, any cases that have been brought in reliance on our ruling in *Lewis*, the parties will not be bound by today's decision unless the issue has been raised and preserved. However, the parties to an unknown number of pending claims will be bound by the majority's decision where the claimant relied on *Lewis*'s ruling.

The most flexible approach, which would be the least harmful application of the majority's decision, would be to apply the ruling prospectively. Prospective application would apply this ruling only to cases filed after today's decision, and would not bind the parties in this case to today's decision. *Tebo, supra* at 364. See Comment, *Michigan's civil retroactivity jurisprudence: A proposed framework*, 2002 MSU-DCL L R 933 (2002).

B

As the majority has noted, the general rule is that judicial decisions are to be given full retroactive effect. *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986). But this Court has used a more flexible application of its rulings in situations where applying the ruling with complete retroactivity would result in an injustice to a certain class of litigants. *Gladych v New Family Homes, Inc*, 468 Mich 594, 606; 664 NW2d 705 (2003). In fact, this Court noted in *Hyde* that "[w]e often have limited the application of decisions which have overruled prior law or reconstrued statutes." *Hyde, supra* at 240.

Today, the majority has both overruled prior law and reconstrued a statute. By overruling *Lewis*, the majority has overruled the law regarding the tolling of the one-year-back limitations period that has been in place in the state of Michigan for the past nineteen years.

Further, the majority's decision today rests largely on the reinterpretation of MCL 500.3145(1). Under these circumstances, the majority certainly has the discretion to apply this ruling prospectively, and should do so out of fairness to those who have acted in reliance on the nearly two decades of precedent that preceded this ruling.

Because today's decision overrules settled precedent, it should be applied prospectively. This Court issued its decision in *Lewis* more than nineteen years ago. Therefore, the law in the state of Michigan over that period has been that the one-year-back time limitation of MCL 500.3145(1) for claimants to recover no-fault personal protection insurance benefits was tolled from the time that the claim was filed until the time when the insurer formally denied liability. Furthermore, from the time of our decision in *Lewis* until the present case, this Court has neither issued a ruling nor "foreshadowed" that the interpretation of this tolling of the one-year-back limitations period would be changed. Under these circumstances, prospective application of today's decision is appropriate.

Under the majority's rule, any claimant who postponed his or her decision to file a suit against an insurance company in reliance on *Lewis* is now barred from recovering benefits from more than one year before the time that suit is filed if the defendant insurance company raised and preserved the issue at trial. Hence, any insurance company that raised this issue at trial in the hopes that this Court would overrule *Lewis* will now be rewarded at the expense of the claimants who acted in complete accord with the law. This situation creates precisely the type of injustice that this Court intended to prevent by creating flexibil-

ity in the application of its decisions. Unfortunately the majority's decision today disregards this precedent and will cause injustice.

III

For these reasons, I respectfully dissent from the majority's decision.

PEOPLE v PERKINS

Docket No. 126727. Argued March 9, 2005 (Calendar No. 7). Decided July 29, 2005.

David M. Perkins was convicted following a bench trial in the Wayne Circuit Court, Vera Massey Jones, J., of possession of a firearm by a person convicted of a felony (felon in possession) and possession of a firearm during the commission of a felony. The defendant appealed. The Court of Appeals, MARKEY, P.J., and WILDER and METER, JJ., affirmed, holding that under MCL 750.224f(2), the prosecution must prove that a defendant's right to possess a firearm has not been restored only if the defendant produces some evidence that the right has been restored. The Court of Appeals also concluded that larceny from the person, of which the defendant was previously convicted, is a specified felony within the meaning of MCL 750.224f, the felon-in-possession statute. 262 Mich App 267 (2004). The Supreme Court granted the defendant's application for leave to appeal. 471 Mich 914 (2004).

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

Larceny from the person is a "specified felony" for purposes of MCL 750.224f(6)(*i*) because the crime carries a substantial risk that physical force may be used against another. The Court of Appeals did not err in determining that the defendant's prior conviction of larceny from the person was a "specified felony" for purposes of the felon-in-possession charge. MCL 750.224f(2)(b) provides that a person convicted of a specified felony may not possess a firearm until that person's right to possess has been restored. Because restoration is a condition to a person convicted of a specified felony being able to possess a firearm, under MCL 776.20, a defendant bears the burden of producing evidence to establish that his or her right to possess a firearm has been restored. Because the defendant failed to produce evidence that his firearm rights were restored, the prosecution was not required to prove the lack of restoration.

Justice KELLY, concurring in part and dissenting in part, agreed with the majority that larceny from the person is a "specified

felony" under the statute because the crime carries a substantial risk that force will be used or threatened in its commission. That part of the Court of Appeals opinion should be affirmed. Justice KELLY would hold, however, that a showing of no restoration of the right to possess a firearm by a person who was convicted of a specified felony is an element of the offense of felon in possession, and the prosecution failed to meet its burden of proving that element. The Legislature did not create an exception or proviso in the statute, so MCL 776.20 does not apply. Instead, the plain language of MCL 750.224f(2) places the burden of proof of lack of restoration of the right to possess a firearm on the prosecution. The majority's interpretation violates the rule of lenity that criminal statutes are construed in favor of the defendant. Moreover, applying the majority's interpretation retroactively violates due process. That part of the Court of Appeals opinion holding that the prosecution must prove no restoration of the right to possess a firearm only if the defendant produces some evidence of restoration should be reversed, and the defendant's convictions and sentences should be vacated.

Affirmed.

Justice CAVANAGH, dissenting, stated that larceny from the person is not a "specified felony" as defined by the statute because there is not a substantial risk of force or threat of force when that crime is committed. The judgment of the Court of Appeals should be reversed.

1. CRIMINAL LAW — POSSESSION OF A FIREARM BY PERSON CONVICTED OF SPECIFIED FELONY — SPECIFIED FELONIES.

The felony of larceny from the person carries a substantial risk that physical force may be used against another and is a "specified felony" for purposes of the felon-in-possession statute (MCL 750.224f [2], [6] [*i*], 750.357).

2. CRIMINAL LAW — POSSESSION OF A FIREARM BY PERSON CONVICTED OF SPECIFIED FELONY — BURDEN OF PROOF.

A defendant charged with possession of a firearm by a person convicted of a specified felony has the burden of producing evidence to establish that the defendant's right to possess a firearm has been restored; only if the defendant meets this burden of production is the prosecution required to introduce evidence to prove lack of restoration (MCL 750.224f[2][b], 776.20).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym L. Worthy*, Prosecuting Attor-

ney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Frank J Bernacki*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Peter Jon Van Hoek* and *Dawn Van Hoek*) for the defendant.

PER CURIAM. We granted leave in this case to consider two issues involving MCL 750.224f, which sets forth restrictions concerning the possession[1] of firearms by persons having been convicted of a felony. The first is whether larceny from the person is a "specified felony" for the purposes of MCL 750.224f(6)(*i*), thus subjecting defendant to more stringent requirements in order to regain his right to possess a firearm. We conclude that larceny from the person involves a substantial risk that force will be used during its commission and, therefore, hold that it is a specified felony.

The second issue is whether the prosecution is always required to show that a person convicted of a specified felony has not had his or her right to possess a firearm restored pursuant to MCL 750.224(2)(b), or whether the prosecution's burden to disprove restoration only arises if the defendant first introduces evidence that the defendant's right to possess a firearm has been restored. We conclude, on the basis of MCL 776.20 and *People v Henderson*, 391 Mich 612, 616; 218 NW2d 2 (1974), that the defendant has the burden of producing evidence to establish that his or her right to possess a firearm has been restored. Once the defendant meets this burden of production, the prosecution bears the burden of persuasion beyond a reasonable

[1] Although we mention only possession in this opinion, MCL 750.224f does not pertain only to the possession of firearms, but also to the use, transportation, sale, purchase, carrying, shipping, receiving, or distribution of firearms.

doubt. In this case, defendant failed to produce evidence that his firearm rights were restored, and the prosecution thus was not required to prove the lack of restoration. Accordingly, we affirm the judgment of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

In 1977, defendant David M. Perkins was convicted of the felony offense of larceny from the person in violation of MCL 750.357. In 2001, Perkins was involved in an altercation where he pointed a gun at another person, and, in the subsequent struggle, the gun discharged. As a result, Perkins was charged with, among other things,[2] being a felon in possession of a firearm (felon in possession) in violation of MCL 750.224f(2). This statute makes it a crime for a person who has been convicted of a "specified felony"—one that either involves a substantial risk of, or contains as an element the threatened, attempted, or actual use of, physical force against a person or property—to possess a firearm until that person has had the right to possess a firearm restored pursuant to MCL 28.424 and fulfilled certain other requirements.

The trial court, after a bench trial, concluded that the 1977 conviction for larceny from the person was a specified felony and, thus, MCL 750.224f(2) could apply to Perkins. Moreover, the court construed the statute as requiring the prosecution to prove that Perkins's right to possess a firearm had not been restored only if Perkins first affirmatively produced evidence that his right to possess had been restored by a proper concealed

[2] Defendant was also charged with felonious assault in violation of MCL 750.82, and possession of a firearm while committing or attempting to commit a felony in violation of MCL 750.227b. These charges are not at issue in this appeal.

weapons licensing board. Therefore, the trial court convicted Perkins of the offense because he had not produced any such evidence, thus relieving the prosecution of the burden of proving that Perkins's right to possession had not been restored.

The Court of Appeals affirmed.[3] It concluded that larceny from the person constitutes a specified felony within the meaning of MCL 750.224f, and that a defendant must present evidence of a claimed restoration of the right to possess a firearm before the prosecution's burden of proving a lack of restoration arises.

We granted defendant's application for leave to appeal.[4]

II. STANDARD OF REVIEW

This case involves issues of statutory construction. These are issues of law that we review de novo. *People v Koonce,* 466 Mich 515, 518; 648 NW2d 153 (2002). When interpreting statutes, our goal is to give effect to the intent of the Legislature by reviewing the plain language of the statute. *Id.*

III. LARCENY FROM THE PERSON IS A "SPECIFIED FELONY"

MCL 750.224f[5] places felons in two different categories. The first category consists of persons convicted of

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[3] *People v Perkins*, 262 Mich App 267; 686 NW2d 237 (2004).

[4] 471 Mich 914 (2004).

[5] This statute provides, in part:

> (1) Except as provided in subsection (2), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist:
>
> (a) The person has paid all fines imposed for the violation.

a "felony." These persons regain their right to possess a firearm three years after paying all fines imposed for their violations, serving all jail time imposed, and successfully completing all conditions of parole or probation. MCL 750.224f(1). The second category consists of persons convicted of a "specified felony." These persons must wait five years after completing the same requirements and, moreover, must have their right to possess a firearm restored. MCL 750.224f(2).

The term "specified felony" is defined in MCL 750.224f(6), which provides:

> As used in subsection (2), "specified felony" means a felony in which 1 or more of the following circumstances exist:
>
> (*i*) An element of that felony is the use, attempted use, or threatened use of physical force against the person or

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(b) The person has served all terms of imprisonment imposed for the violation.

(c) The person has successfully completed all conditions of probation or parole imposed for the violation.

(2) A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until all of the following circumstances exist:

(a) The expiration of 5 years after all of the following circumstances exist:

(*i*) The person has paid all fines imposed for the violation.

(*ii*) The person has served all terms of imprisonment imposed for the violation.

(*iii*) The person has successfully completed all conditions of probation or parole imposed for the violation.

(b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored pursuant to section 4 of Act No. 372 of the Public Acts of 1927, being section 28.424 of the Michigan Compiled Laws.

> property of another, or that *by its nature*, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
>
> (*ii*) An element of that felony is the unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance.
>
> (*iii*) An element of that felony is the unlawful possession or distribution of a firearm.
>
> (*iv*) An element of that felony is the unlawful use of an explosive.
>
> (*v*) The felony is burglary of an occupied dwelling, or breaking and entering an occupied dwelling, or arson. [Emphasis added.]

The prosecution in this case has neither alleged that an element of larceny from the person is "the use, attempted use, or threatened use of physical force against the person or property of another," MCL 750.224f(6)(*i*), nor that any of the criteria in subsections *ii* through *v* apply in this case. Therefore, the inquiry is whether larceny from the person is a crime that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." We hold that it does.

The crime of larceny from the person consists of a larceny effectuated by "stealing from the person of another."[6] The defendant acknowledges that there is a risk of force inherent in the crime of larceny from the person because of the potential for the victim to notice the taking of his or her personal property and use force to prevent it.[7] However, he claims that such a risk is not

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[6] MCL 750.357.

[7] At oral argument, defense counsel stated, "I certainly don't dispute that there's a risk in any larceny from a person because of the require-

substantial. We disagree.

"Substantial" is defined as "of ample or considerable amount, quantity, size, etc." *Random House Webster's College Dictionary* (1995). Therefore, the issue is whether larceny from the person by its nature involves a substantial or considerable risk that physical force will be used. We believe that it does. In order to commit a larceny from the person, the defendant must steal something from a person in that person's presence. That is, the victim must be present when the defendant steals something from the victim. Unless the victim submits to the theft or does not notice the theft, physical force will almost certainly be used in response.[8] As the Court of Appeals explained:

> [T]he offense of larceny from a person is separated from other larceny offenses because it is committed in the immediate presence of another person. The "Legislature

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ment that the larceny has to occur either from the person or near the person, there is a risk. . . . As I said, there is always a risk, and nobody could deny there is always a risk in larceny from a person that violence may occur."

[8] Justice CAVANAGH posits that "every felony" involves a risk of force. *Post* at 665. However, Justice CAVANAGH fails fully to appreciate that not all felonies require the defendant to steal something from the victim's presence. Because a defendant must steal something from the victim's presence in order to commit a larceny from the person, a larceny from the person does not just pose *a* risk of force, it poses a *substantial* risk of force.

Justice CAVANAGH also contends that, if detected, a perpetrator could "choose to avoid confrontation if it becomes apparent that force or the threat of force must be used to complete the intended act." *Post* at 665. However, if the perpetrator chooses to abandon the attempt to steal the property from the victim once detected, the perpetrator has not committed a larceny from the person. In order to commit a larceny from the person, the perpetrator would, in all likelihood, have to use force or the threat of force to steal the property from the victim. Therefore, a larceny from the person involves more than a "mere *potential*" of force or threat of force; *post* at 665, rather, it involves a "substantial" risk of force or threat of force.

> decided that larceny from a person presents a social problem separate and apart from simple larceny." Specifically, "the invasion of the person or immediate presence of the victim." Because a person whose property is stolen from his presence may take steps to retain possession, and the offender may react violently, we conclude that the offense of larceny from a person, "*by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.*" We therefore hold that larceny from a person is a specified felony within the meaning of MCL 750.224f. [*Perkins, supra* at 272 (citations omitted; emphasis in the original).]

That the Legislature has recognized that larceny from the person involves a substantial risk of physical force is demonstrated by the different punishments that it has chosen to impose for larceny[9] and larceny from the person. If a defendant[10] steals property from another outside the person's presence and the property is worth less than $1,000, the defendant is only guilty of a misdemeanor. MCL 750.356(4)(a).[11] If the property is worth less than $200, the defendant cannot be imprisoned for more than ninety-three days. MCL 750.356(5).[12] On the other hand, if the same defendant steals the same property directly from the person, the defendant can be imprisoned for ten years. A defendant who steals property from a person outside the person's

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[9] A larceny is committed when one steals the property of another outside the person's presence. MCL 750.356.

[10] All of the following hypothetical examples involve a defendant who does not have any prior larceny convictions.

[11] A defendant who steals property from another outside the person's presence is only guilty of a felony if the property is worth $1,000 or more. MCL 750.356(2)(a) and (3)(a).

[12] If the property is worth $200 or more, but less than $1,000, the defendant cannot be imprisoned for more than one year. MCL 750.356(4)(a).

presence can only face a ten-year sentence if the property is worth $20,000 or more. MCL 750.356(2)(a). That the Legislature has chosen to subject a defendant who steals property from a person in that person's presence to a ten-year sentence, regardless of the value of the property, and has chosen to subject a defendant who steals property worth less than $200 from a person outside that person's presence to a ninety-three-day sentence demonstrates that the Legislature recognized the substantial risk of force that is involved when one steals something from somebody's person, a risk that is absent when one steals something outside the person's presence.[13]

Therefore, we hold that larceny from the person is a "specified felony" under MCL 750.224f(6)(*i*).

IV. THE DEFENDANT BEARS THE BURDEN OF PRODUCING EVIDENCE THAT THE DEFENDANT'S FIREARM RIGHTS HAVE BEEN RESTORED

Subsection 2 of the felon-in-possession statute prohibits a person convicted of a specified felony from possessing a firearm "until" certain conditions are satisfied. MCL 750.224f(2). One of the conditions set forth in the statute is that the defendant's right to possess a firearm must have been legally restored.

MCL 750.224f(2) provides:

> A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state *until all of the following circumstances exist*:

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[13] Although it is not necessary to our analysis, we note that the federal courts have held that larceny from the person is a "crime of violence" for the purpose of the federal sentencing guidelines, which define a crime of violence as a crime that "involves conduct that presents a serious potential risk of physical injury to another." USSG 4B1.2(a)(2); *United States v Payne,* 163 F3d 371, 375 (CA 6, 1998).

(a) The expiration of 5 years after all of the following circumstances exist:

(*i*) The person has paid all fines imposed for the violation.

(*ii*) The person has served all terms of imprisonment imposed for the violation.

(*iii*) The person has successfully completed all conditions of probation or parole imposed for the violation.

(b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored pursuant to section 4 of Act No. 372 of the Public Acts of 1927, being section 28.424 of the Michigan Compiled Laws. [Emphasis added.]

Thus, the statute provides that a person convicted of a specified felony may not possess a firearm "until" all the listed circumstances exist. Specifically, the felon may not possess a firearm "until" (1) five years have expired from the payment of all fines, the service of all terms of imprisonment, and the successful completion of all conditions of probation or parole, and (2) the person's right to possess a firearm has been restored. In this case, as noted in our discussion of the first issue, the prosecution established that the defendant was convicted of a specified felony and that he possessed a firearm.

The question remains, however, whether the prosecution must prove that the defendant's possession of the firearm occurred before the restoration of firearm rights where, as here, the defendant produced no evidence that his firearm rights had been restored. In answering this question, we must consider MCL 776.20, which states:

In any prosecution for the violation of any acts of the state relative to use, licensing and possession of pistols or firearms, the burden of establishing any exception, excuse,

> proviso or exemption contained in any such act shall be upon the defendant but this does not shift the burden of proof for the violation.

It appears that the Legislature enacted this statute in response to *People v Schrader*, 10 Mich App 211, 217; 159 NW2d 147 (1968). In *People v Jiminez*, 27 Mich App 633, 635; 183 NW2d 853 (1970), the Court of Appeals stated:

> Prior to 1968, we would have given serious consideration to such an objection. *People v Schrader* (1968), 10 Mich App 211. However, in that year, the legislature took notice of our decisions holding that it was the burden of the prosecutor to prove that the defendant did not come within a statutory exception. The legislature responded by enacting a law [MCL 776.20] which held that, in trials for carrying concealed weapons, the burden is on the defendant to show that he comes within one of the exemptions.[14]

The broad language used in MCL 776.20 plainly extends to the felon-in-possession statute, MCL 750.224f, because it is a statute regarding the use, licensing, and possession of firearms. We must therefore give effect to the plain language of MCL 776.20 requiring the defendant to establish "any" exception, excuse, proviso, or exemption contained in any statute "relative to use, licensing and possession" of firearms.

In applying the text of MCL 776.20, we adhere to this

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[14] We disagree with Justice KELLY's assertion that MCL 776.20 cannot alter what the prosecution has to prove in order to obtain a conviction under MCL 750.224f. *Post* at 653. The Legislature has the authority to change the law if it wishes, and this is what it did by enacting MCL 776.20. After its enactment, MCL 776.20 was controlling. Moreover, contrary to Justice KELLY's statements, MCL 776.20 never altered MCL 750.224f because it predated it. This fact also undercuts Justice KELLY's rule of lenity and due process arguments because, when enacted, MCL 750.224f had to be read as fitting into the legal context already created by MCL 776.20.

Court's interpretation in *Henderson*. In *Henderson*, this Court considered the effect of MCL 776.20 in a prosecution for carrying a pistol in a motor vehicle in violation of MCL 750.227. The issue was whether the prosecution or the defendant bore the burden of establishing whether the defendant had a license to carry a pistol. After considering the text of MCL 776.20, this Court concluded that the defendant bore the burden of *producing* evidence regarding licensure, while the prosecution bore the ultimate burden of persuasion.[15] Specifically, the *Henderson* Court stated:

> Accordingly, we hold that upon a showing that a defendant has carried a pistol in a vehicle operated or occupied by him, [a] prima facie case of violation of the statute has been made out. Upon the establishment of such a prima facie case, *the defendant has the burden of injecting the issue of license by offering some proof–not necessarily by official record—that he has been so licensed.* The people thereupon are obliged to establish the contrary beyond a reasonable doubt. [*Henderson*, *supra* at 616 (emphasis added).]

The interpretation set forth in *Henderson* accords with the well-established principle that "[c]ourts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." *Koontz v Ameritech Services*, *Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). The *Henderson* Court gave effect to the entirety of MCL 776.20. By recognizing that the defendant bore the burden of producing or going forward with evidence that he was licensed, the *Henderson*

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[15] Justice KELLY asserts that *Henderson* "cannot be correct" because it would mean that there are only two, not three, elements to the crime of carrying a concealed weapon in a vehicle. *Post* at 656. We are puzzled by this argument because we know of no requirement for a minimum, or a maximum, number of elements.

Court gave effect to the statutory phrase "the burden of establishing any exception, excuse, proviso or exemption contained in any such act shall be upon the defendant . . . ." And by concluding that the prosecution bore the ultimate burden of persuasion beyond a reasonable doubt, the *Henderson* Court avoided rendering nugatory the phrase "but this does not shift the burden of proof for the violation."[16]

We thus adhere to the framework established in *Henderson*. Like the firearms offense considered in *Henderson*, the offense of felon in possession falls within the strictures of MCL 776.20 requiring the defendant to establish "any exception, excuse, proviso or exemption . . . ." We may consult dictionary definitions of terms that are not defined in a statute. *Koontz*, *supra* at 312. The dictionary definition of the term "proviso" is instructive. A "proviso" is "an article or clause that introduces a condition: stipulation." *Webster's Seventh New Collegiate Dictionary* (1967). MCL 750.224f(2) contains a clause that introduces conditions that must be met before a person convicted of a specified felony may possess a firearm. Specifically, the five-year period from the specified events described in the statute must have expired, and the felon's firearm rights must have been restored. Until those conditions are satisfied, the felon may not possess a firearm.

We conclude that the felon-in-possession statute contains a proviso. Thus, we are bound to follow the plain language of MCL 776.20 and the analytic approach established in *Henderson*.

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[16] While it is not necessary to our analysis, we note that the majority of courts in other states that have considered this issue has similarly allocated at least the burden of production regarding the lack of license to the defendant. See Anno: *Burden of proof as to lack of license in criminal prosecution for carrying or possession of weapon without license*, 69 ALR3d 1054.

Defendant here produced no evidence to establish that his right to possess a firearm had been restored. Because defendant failed to meet his burden of production, the prosecution was not required to prove the lack of restoration of firearm rights beyond a reasonable doubt. MCL 776.20; *Henderson*, *supra* at 616.

V. CONCLUSION

We conclude that larceny from the person is a crime that carries a substantial risk that physical force will be used or threatened against another. Therefore, we agree with the Court of Appeals that it qualifies as a specified felony under MCL 750.224f(6)(*i*).

Also, a defendant bears the burden of producing evidence to establish that his or her right to possess a firearm has been restored, in light of MCL 776.20 and this Court's decision in *Henderson*. Because defendant failed to meet his burden of production in this case, the prosecution was not required to prove the lack of restoration of firearm rights beyond a reasonable doubt. Accordingly, we affirm the judgment of the Court of Appeals.

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

KELLY, J. (*concurring in part and dissenting in part*). We granted leave to appeal in this case to address two questions: (1) whether larceny from a person is a "specified felony" for the purposes 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. 471 Mich 914 (2004).

With regard to the first question, I believe that larceny from a person is a specified felony. Therefore, I

concur in the result of the majority opinion on this issue. With respect to the second question, I believe that the lack of restoration of the right to possess a firearm is an element of the offense of felon in possession (possession of a firearm by someone convicted of a felony). Accordingly, I would hold that, to secure a conviction, the prosecution must show the lack of restoration of that right. MCL 750.224f. Consequently, I dissent from the portion of the majority opinion dealing with that issue.

I would affirm in part the decision of the Court of Appeals, reverse it in part, and vacate defendant's convictions and sentences.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

Defendant was arrested after a dispute involving a firearm. He was charged with felonious assault,[1] felon in possession,[2] and possession of a firearm when committing or attempting to commit a felony (felony-firearm).[3]

The court acquitted him of the assault charge, concluding that, at the time of the offense, he was too intoxicated to formulate the intent necessary for the crime. Defendant stipulated that he had been convicted in 1977 of larceny from a person. MCL 750.357. The court convicted him of the two firearm charges. It ruled that defendant's admissions of the 1977 felony conviction and of possessing a firearm provided sufficient evidence to convict him of the offense of felon in possession.

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[1] MCL 750.82.

[2] MCL 750.224f.

[3] MCL 750.227b.

On appeal, the Court of Appeals affirmed[4] the trial court's rulings stating: "The prosecutor must prove that the defendant's right to possess a firearm has not been restored only if the defendant produces some evidence that his right has been restored." *Id.* at 271. It also concluded that larceny from a person constitutes a specified felony within the meaning of MCL 750.224f. It reasoned:

> Because a person whose property is stolen from his presence may take steps to retain possession, and the offender may react violently, we conclude that the offense of larceny from a person, "*by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense*." [*Id*. at 272, quoting MCL 750.224f(6)(*i*) (emphasis in original).]

We granted leave to appeal.

II. FELONIES AND SPECIFIED FELONIES

Both questions before this Court involve issues of statutory construction. Hence, we review them de novo. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004). The first question is whether larceny from a person is a specified felony under the felon-in-possession statute. MCL 750.224f.

The statute divides felonies into two types, "felonies" and "specified felonies." A person convicted of a "felony" can legally possess a firearm three years after (a) completing all terms of imprisonment imposed for the violation, (b) paying all fines imposed for the violation, and (c) completing all conditions of probation or parole. MCL 750.224f(1).

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[4] *People v Perkins*, 262 Mich App 267; 686 NW2d 237 (2004).

A person convicted of a "specified felony" must satisfy the same requirements and must obtain restoration of the right to possess a firearm pursuant to MCL 28.424. Also, the person must wait five years after completion of the statutory requirements, as compared to three years for other felonies.

The Legislature defines "specified felony" in MCL 750.224f(6). It provides:

> As used in subsection (2), "specified felony" means a felony in which 1 or more of the following circumstances exist:
>
> (*i*) An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, or that *by its nature*, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
>
> (*ii*) An element of that felony is the unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance.
>
> (*iii*) An element of that felony is the unlawful possession or distribution of a firearm.
>
> (*iv*) An element of that felony is the unlawful use of an explosive.
>
> (*v*) The felony is burglary of an occupied dwelling, or breaking and entering an occupied dwelling, or arson. [Emphasis added.]

All parties agree that subsections *ii* through *v* do not apply to this case. Therefore, to constitute a specified felony, defendant's 1977 conviction of larceny from a person must fall within the definition in subsection *i*.

The use, attempted use, and threatened use of force are not elements of larceny from a person. In fact, the absence of force and the absence of the threat of force are what distinguish larceny from a person from rob-

bery. *People v Randolph*, 466 Mich 532, 544; 648 NW2d 164 (2002).

But subsection *i* includes more crimes than just those in which force is an element. It includes crimes that, by their nature, involve a substantial risk of the use of force.

III. A SUBSTANTIAL RISK OF FORCE

In this case, defense counsel conceded at oral argument that larceny from a person involves a risk that force will be used. However, he asserted that the risk is not "substantial."

"Substantial" is defined as "of ample or considerable amount, quantity, size, etc." *Random House Webster's College Dictionary* (2001). The question becomes whether, during the commission of a larceny from a person, there is an "ample or considerable amount" of risk that force will be used.

The statute prohibiting larceny from a person provides:

> Any person who shall commit the offense of larceny by stealing *from the person* of another shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years. [MCL 750.357 (emphasis added).]

Hence, larceny from a person requires direct contact with the victim. The perpetrator must take personal property from the victim while it is in the victim's possession. This increases the risk that force will be used. A perpetrator is obliged to use force or threaten the use of force to obtain the property unless the victim willingly submits to or remains ignorant of the theft.[5]

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[5] Justice CAVANAGH argues that the perpetrator could abort the attempt to obtain the property when it becomes apparent that he may need to use

Larceny from a person quickly evolves into robbery when force is employed to complete the theft.

Physical force may be used during the commission of many felonies, especially if the perpetrator is caught in the act. However, the risk that force will be used during a larceny from a person is considerably greater than the risk of force in many other felonies. This is because the crime, by its nature, is often confrontational and always involves the presence of the victim. Its perpetration requires either direct contact with or the actual presence of the victim. Also, the risk of detection is heightened. With an ample risk of confrontation and detection comes an ample risk of the use or threatened use of force to complete the crime.[6] Therefore, larceny from a person involves a "substantial" risk of the use or threat of physical force.

Additionally, the very structure of the larceny statute, when compared with the larceny-from-a-person statute, supports a conclusion that the Legislature recognized that larceny from a person involves a substantial risk that force will be used. The general larceny statute[7] allocates punishment according to the value of the property taken. For example, if the property is valued at from $200 to $1,000, the thief is guilty of a

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or threaten force to obtain the property. But if the perpetrator aborts the attempt to obtain the property, larceny from a person will not be committed. I center my analysis on what may occur if the perpetrator does not abort the attempt. Under those circumstances, I believe that the risk of force is "substantial."

[6] Justice CAVANAGH notes that almost every felony runs some risk of the use of force. But his analysis does not consider the fact that larceny from a person requires contact with or the presence of the victim every time the crime is committed. This distinguishes it from many felonies that can be committed without the victim being in harm's way.

[7] MCL 750.356.

misdemeanor punishable by as much as one year in jail, a $2,000 fine, or both. MCL 750.356(4). But if it has a value of from $1,000 to $20,000, the crime is a felony punishable by as much as five years' imprisonment, a $10,000 fine, or both. MCL 750.356(3).

This contrasts with larceny from a person, which abandons a gradation of punishment. The defendant is subject to a possible ten years in prison without regard to the value of the property stolen. MCL 750.357.

The only difference between the crimes of larceny and larceny from a person is the presence of the victim. Without question, the possibility of harm to the victim is greater if the property is taken from his person. Consequently, it appears that the threat to the victim was of greater concern to the Legislature than the loss of the property, and hence, it provided a greater penalty for larceny from a person.

The magnitude of the difference in penalties demonstrates just how seriously the Legislature viewed the risk of force against the victim of a larceny from a person. If the value of the property taken in a normal larceny is less than $200, the defendant is subject to no more than ninety-three days in jail. But, if the defendant takes that same property directly from a person, he is guilty of a felony and subject to potentially ten years in prison. MCL 750.356(5); MCL 750.357.

The only logical reason for the great difference in penalties is that a significant danger exists that force will be used, injuring the victim of a larceny from a person. Therefore, the Legislature viewed that crime as involving a substantial risk that physical force will be employed against another. This qualifies it as a specified felony under MCL 750.224f(6)(*i*).

IV. RESTORATION OF RIGHTS IS AN ELEMENT OF MCL 750.224f(2)

A. THE LANGUAGE AND STRUCTURE OF MCL 750.224f(2)

Section 2 of the felon-in-possession statute indicates the circumstances under which a person convicted of a specified felony may possess a firearm. MCL 750.224f(2). One of the requirements contained in that statute is that the defendant must have had his right to possess a firearm legally restored.

But in this case, the prosecution argues that it need not show that restoration has not occurred in order to establish the elements of the crime. Rather, it asserts that it is defendant who bears that burden. Neither the language nor the structure of the statute supports the prosecution's contention.[8]

MCL 750.224f(2) provides:

> A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state *until all of the following circumstances exist*:
>
> (a) The expiration of 5 years after all of the following circumstances exist:
>
> (*i*) The person has paid all fines imposed for the violation.

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[8] I would hold that the prosecution must show the lack of restoration contingent on its failure to show that (1) five years have not passed since all fines were paid, (2) five years have not passed since all jail time was served, or (3) five years have not passed since the defendant successfully completed all conditions of probation or parole. The prosecution would have the option of carrying its burden on only one of the four subparts of MCL 750.224f(2). Once it proves one of the four, it need not go further. Therefore, I believe that the Legislature intended the prosecution to choose which element of MCL 750.224f(2) to address. But the contingent nature of the element should not change on whom the burdens of production and persuasion lie.

(*ii*) The person has served all terms of imprisonment imposed for the violation.

(*iii*) The person has successfully completed all conditions of probation or parole imposed for the violation.

(b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored pursuant to section 4 of Act No. 372 of the Public Acts of 1927, being section 28.424 of the Michigan Compiled Laws. [Emphasis added.]

In interpreting MCL 750.224f(2), our goal is to give effect to the Legislature's intent. *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002). We start with the language of the statute itself. The language of MCL 750.224f(2) demonstrates a clear intent to include among the prosecution's proofs a showing that the right to possess a firearm was not restored to the defendant.

B. CREATION OF AN EXCEPTION BY USE OF THE TERM "UNLESS"

The Legislature has demonstrated that it knows how to create an exception, and it created one in subsection 4 of the very statute in question. MCL 750.224f(4) provides:

This section does not apply to a conviction that has been expunged or set aside, or for which the person has been pardoned, *unless* the expunction, order, or pardon expressly provides that the person shall not possess a firearm. [Emphasis added.]

By using the term "unless," it demonstrated its intent to create an exception.[9] "Unless" is an exclusionary term. By contrast, in subsection 2 of the felon-in-

[9] The Legislature has repeatedly used the term "unless" to create an exception in the Penal Code. Examples are: MCL 750.14, MCL 750.42b(2), MCL 750.50(2)(g), MCL 750.51, MCL 750.61, MCL 750.115(2), MCL 750.141, MCL 750.144, MCL 750.147a(1), MCL 750.197(3), and MCL 750.216.

possession statute, the Legislature chose not to use an exclusionary term. Instead, it used the phrase "until all."

Looking at the definition of "until" helps demonstrate that "until all" is an inclusive phrase. The definition is "1. up to the time that or when; till. 2. before . . . 3. onward to or till . . . ." *Random House Webster's College Dictionary* (2001). Applying this definition to the statute, the defendant is guilty of the offense of felon in possession only if he (1) was convicted of a specified offense and (2) possessed a firearm "before" (a) the passage of five years from the time he paid all pertinent fines, or he served his term, or he successfully completed all conditions of probation or parole, or (b) his right to possess a firearm was not restored. MCL 750.224f(2).

Therefore, to prove the crime, the prosecution must demonstrate that the possession occurred "before" one of the specified events. If the prosecution fails to prove this, it has not met the burden created by the Legislature.

The result would be quite different had the Legislature chosen to use an exclusionary term like "unless." "Unless" is defined as "1. except under the circumstances that . . . 2. except; but; save[.]" *Random House Webster's College Dictionary* (2001).

Substituting this word into the statute would change the statute's meaning, so that the prosecution would need to prove only that the defendant (1) had been convicted of a specified offense and (2) possessed a firearm. The defendant would be left to produce evidence that, more than five years before, he had (1) paid all pertinent fines, (2) served his term, (3) successfully completed all conditions of probation and parole, and that (4) he currently had the right to possess the firearm.

Hence, the difference in the burden of production on the prosecution and on the defense is enormous depending on whether "until" introduces an element or an exception. Accordingly, we should assume that the decision to use "until" rather than "unless" was carefully made.

We presuppose that the words the Legislature uses have a purpose. And we should not speculate that it inadvertently used one word or phrase when it intended another. The chosen wording is presumed intentional. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931).

When writing this statute, the Legislature demonstrated a clear knowledge of how to create an exception, but it chose not to do so. Its use of the term "until" is a strong indication that it intended the restoration of rights to be a contingent element of the offense.

Because the Legislature chose to use the term "until," the prosecution bears the burden of production for MCL 750.224f(2). Here the prosecution failed to present any evidence that defendant's right to possess a firearm had not been restored. And it made no effort to show that any of the three other factual circumstances listed in MCL 750.224f(2) had not occurred. Hence, it did not satisfy its burden, and defendant's convictions were in error.

C. MCL 776.20

The majority asserts that MCL 776.20 controls this case and holds that it requires that defendant bear the burden of production regarding the restoration of the right to possess a firearm. MCL 776.20 provides:

> In any prosecution for the violation of any acts of the state relative to use, licensing and possession of pistols or

> firearms, the burden of establishing any exception, excuse, proviso or exemption contained in any such act shall be upon the defendant but this does not shift the burden of proof for the violation.

MCL 776.20 comes into play only after the prosecution proves all the elements of a crime. Therefore, for the majority's argument to have merit, I would have to accept the conclusion that MCL 750.224f(2)(b) is an exception. As discussed above, this conclusion is implausible given the language and structure chosen by the Legislature.

I find MCL 776.20 inapplicable to this case. I believe that, if the Legislature had intended MCL 776.20 to apply, it specifically would have used a term contained in that statute. Alternatively, it would have used its often repeated term "until," or a similarly clear expression, to create an exception or a proviso.

The words "exception,[10] excuse,[11] proviso[12] or exemption[13]" in MCL 776.20 apply to situations where all the elements of a crime have been established. Once the prosecution has satisfied all the elements, it is for the defendant to produce evidence showing the existence of a circumstance excusing him from culpability.[14]

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[10] "Except" means "to exclude; leave out." *Random House Webster's College Dictionary* (2001).

[11] "Excuse" means "to release from an obligation or duty." *Random House Webster's College Dictionary* (2001).

[12] A "proviso" is "a clause, as in a statute or contract, by which a condition is introduced" or "a stipulation or condition." *Random House Webster's College Dictionary* (2001).

[13] "Exempt" means "to free from an obligation or liability to which others are subject; release." *Random House Webster's College Dictionary* (2001).

[14] Some may argue that the definition of "proviso" could apply to any clause. But I believe that the Legislature intended it to apply only to clauses relieving a defendant of liability. This is indicated by its place-

An example of a situation in which MCL 776.20 would apply can be seen in MCL 750.224f(4): "This section does not apply to a conviction that has been expunged or set aside, or for which the person has been pardoned . . . ." This subsection creates an exception to the felon-in-possession crime. Under MCL 776.20, the defendant would have the burden of producing evidence to prove the exception.[15]

In MCL 776.20, the Legislature demonstrated its ability to use the terms "exception," "excuse," "exception," and "proviso." But in 750.224f(2), it used none of them. It could have stated in MCL 750.224f(2):

> A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state *providing the following circumstances do not exist*.

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ment in a list with "exception," "excuse," and "exemption." The doctrine of *noscitur a sociis* requires that this Court interpret terms in context with the other words around them. *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420-422; 662 NW2d 710 (2003). When words are grouped in a list, they must be given related meaning. *Third Nat'l Bank in Nashville v Impac, Ltd, Inc*, 432 US 312, 322; 97 S Ct 2307; 53 L Ed 2d 368 (1977). Interpretive aids, such as the doctrine of *noscitur a sociis*, are meant to aid us in arriving at the meaning intended by the Legislature. By using a term in a list, the Legislature gave this Court a legitimate means of finding its intent. The main goal in interpreting any statute is to ascertain and give effect to the Legislature's intent. *People v Tombs*, 472 Mich 446, 451; 697 NW2d 494 (2005). By interpreting the word "proviso" in the context it was used, I have chosen to give effect to the Legislature's demonstrated intent.

[15] Some may claim that my analysis renders sections of MCL 776.20 nugatory. But this is not true. I simply find the statute inapplicable to this case. It would fully apply to other statutes actually containing an exception, excuse, proviso, or exemption. MCL 750.224f(4) provides an example of when I would apply MCL 776.20. A defendant would bear the burden of proving that his crime had been expunged, set aside, or pardoned. Just because I disagree with the application of MCL 776.20 to this case does not mean that my reading renders it nugatory.

Or:

> A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state, *except when all of the following circumstances exist.*

Or:

> A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state, *but the person is excused when the following circumstances exist.*

Instead of any of these or other wordings, the Legislature chose to use "until all." I believe this is a strong indication that it intended that MCL 776.20 should not apply to MCL 750.224f(2).

In interpreting statutes, we are reluctant to assume that the Legislature wrote what it did by accident or error. But this is what the majority presumes in its holding today. I support giving effect to the Legislature's chosen phrasing rather than changing it to fit within MCL 776.20.[16]

The existence of MCL 776.20 does not alter what the prosecution has to prove in order to obtain a conviction for felon in possession. But reading MCL 750.224f(2)(b) as a proviso does shift the burden of production from

[16] I believe that the majority has misunderstood my argument in n 14 of its opinion, *ante* at 637. Of course I know that the Legislature can change the law. My point is that the Legislature intentionally drafted MCL 750.224f(2) so that MCL 776.20 would not apply to it. The Legislature enacted MCL 750.224f(2) after it enacted MCL 776.20. Hence, it knew when it wrote MCL 750.224f(2) that MCL 776.20 requires the defendant to shoulder the burden of production in matters involving a proviso. Accordingly, if it had wanted to make a proviso in MCL 750.224f(2), it knew it had to write the statute to clearly contain a proviso. Since it did not do that, we must conclude that it did not intend a proviso.

what the Legislature intended, because it turns what is an element of the crime into a proviso.

D. *PEOPLE v PEGENAU*

The prosecution relies on *People v Pegenau*[17] to support its argument. This reliance is misplaced. In *Pegenau*, the defendant was charged with unlawful possession of Xanax and Valium pursuant to MCL 333.7403(1).[18] *People v Pegenau*, 447 Mich 278, 281; 523 NW2d 325 (1994). The only question at trial was whether the defendant had a valid prescription, which would exclude him from prosecution under the language of MCL 333.7403 and MCL 333.7531.[19] *Pegenau*, *supra* at 282. This Court held that the burden of proof regarding the existence of a valid prescription was on the defendant.

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[17] *People v Pegenau*, 447 Mich 278; 523 NW2d 325 (1994).

[18] MCL 333.7403(1) provides:

> A person shall not knowingly or intentionally possess a controlled substance, a controlled substance analogue, or a prescription form unless the controlled substance, controlled substance analogue, or prescription form was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.

[19] MCL 333.7531 provides:

> (1) It is not necessary for this state to negate any exemption or exception in this article in a complaint, information, indictment, or other pleading or in a trial, hearing, or other proceeding under this article. The burden of proof of an exemption or exception is upon the person claiming it.
>
> (2) In the absence of proof that a person is the authorized holder of an appropriate license or order form issued under this article, the person is presumed not to be the holder of the license or order form. The burden of proof is upon the person to rebut the presumption.

Pegenau is distinguishable from the present case because MCL 333.7403 expressly uses a term creating an exception. In fact, MCL 333.7403 uses the term "unless." As discussed above, "unless" is defined as "1. except under the circumstances that . . . 2. except; but; save[.]" *Random House Webster's College Dictionary* (2001). Because an exception is specifically created, the defendant bears the burden of production under MCL 333.7531.

In contrast, MCL 750.224f(2) does not provide an exception or exemption to felon-in-possession prosecutions. The Legislature did not use a term that would create an exception. It used the inclusive phrase "until all." Therefore, the subsections are elements of the crime rather than exceptions, and MCL 776.20 does not apply.

Pegenau is inapplicable and is in clear contrast to this case. Therefore, I find it of no support to the prosecution's argument.

E. *PEOPLE v HENDERSON*

The majority finds *People v Henderson*[20] persuasive on the issue whether restoration of the right to possess a firearm is an element of felon in possession. I believe that this decision does not aid the majority's position.[21] Moreover, I find that *Henderson* was wrongly decided.

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(3) A liability is not imposed by this article or an authorized state, county, or local officer, engaged in the lawful performance of the officer's duties.

[20] 391 Mich 612; 218 NW2d 2 (1974).

[21] I also find *Henderson* simply inapplicable to this case because it does not analyze the core question before us. That question is what language in a statute constitutes an exception, excuse, proviso, or exemption. *Henderson* becomes relevant only after a determination is made that an exception, excuse, proviso, or exemption exists.

Henderson dealt with MCL 750.227, which, at that time, provided:

> Any person who shall carry a dagger, dirk, stiletto or other dangerous weapon except hunting knives adapted and carried as such, concealed on or about his person, or whether concealed or otherwise in any vehicle operated or occupied by him, except in his dwelling house or place of business or on other land possessed by him; and any person who shall carry a pistol concealed on or about his person, or, whether concealed or otherwise, in any vehicle operated or occupied by him, except in his dwelling house or place of business or on other land possessed by him, without a license to so carry said pistol as provided by law, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than five years, or by fine of not more than two thousand five hundred dollars.

The *Henderson* Court concluded that, as regards the facts of that case, the only elements of the crime were: (1) the defendant was carrying a pistol and (2) he was in a vehicle operated or occupied by him. It ruled that the language "without a license to so carry said pistol" did not add an element to the offense. *People v Henderson*, 391 Mich 612, 616; 218 NW2d 2 (1974).

This conclusion cannot be correct. If only two elements existed, the sole defenses available to a defendant would be (1) that he did not carry a pistol or (2) that he was not in a vehicle with it. Whether the defendant was licensed to carry that pistol would not matter. He would be guilty of the crime, even though licensed, because he (1) carried a pistol (2) in a vehicle. It is obvious that there is a third key element. It is found in the statute's language "without a license."[22]

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[22] Contrary to the majority's contention, I do not suggest that there are a minimum number of elements that must be contained in a criminal statute. Rather, I am pointing out that this statute has three elements. The *Henderson* Court recognized only two of them.

My interpretation is strengthened by the fact that, in writing MCL 750.227, the Legislature did not use any of the terms listed in MCL 776.20. The clause "without a license" is not prefaced by anything signaling or otherwise phrased to signal that it constitutes an exception, excuse, proviso, or exemption.

Contrast this with the language "except in his dwelling house or place of business or on other land possessed by him" that is also contained in the statute. The Legislature knew how to create an exception, excuse, proviso, or exemption when it wrote MCL 750.227. And, in fact, it did so in that statute by explicitly using the term "except." But it did not use any of those terms with respect to the lack of a license. Again, the Legislature's choice of wording should not be presumed accidental. *Redford Twp*, *supra* at 456.

To rule as it did, the *Henderson* Court had to read words into the statute. Specifically, it had to read in some form of exception, excuse, proviso, or exemption before the language "without a license." But this violates the well-established rule of statutory construction that a court cannot read into a statute what is not there. *AFSCME v Detroit*, 468 Mich 388, 412; 662 NW2d 695 (2003).[23]

Therefore, the *Henderson* Court failed to construe the language actually chosen by the Legislature. Instead, it added language to change the burden of production. The majority today falls into the same trap. And in doing so, it violates its own repeatedly stated rule of statutory construction.

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[23] This is a principle often repeated by this majority. See *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004), *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003), *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003), *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 101; 643 NW2d 553 (2002), and *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

F. THE MAJORITY'S PHILOSOPHICAL CONTRADICTIONS

The justices of the majority have departed from their own rules of statutory construction in construing MCL 750.224f(2). During this very court term, most of the same justices stated:

> Fundamental canons of statutory interpretation require us to discern and give effect to the Legislature's intent as expressed by the language of its statutes. If such language is unambiguous, as most such [sic] language is, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. [*Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 281; 696 NW2d 646 (2005) (citations and quotation marks omitted).]

There is no suggestion that the majority finds the language in MCL 750.224f(2) ambiguous. Hence, it violates its own rules of statutory interpretation when it relies on decisions in sister states to interpret the intent of the Michigan Legislature. Under the majority's judicial philosophy, reference to outside material is of no value in the face of a clear text.

Moreover, the citation of the annotation at 69 ALR3d 1054 adds nothing to the majority's analysis of the statute in this case. The decisions cited in the annotation are based on widely divergent statutory language in other states. Because that language is so different from the language of MCL 750.224f(2), conclusions in the annotation are of no assistance in determining what the Michigan Legislature intended when enacting our statute.

Beyond this, at least some of the cases cited in the annotation demonstrate that a legislature can create an easily recognizable exception or proviso when it desires to do so. For example, the Pennsylvania statute pro-

vides that no person shall carry a firearm in public " '*unless* . . . such person is licensed to carry a firearm[.]' " *Commonwealth v Bigelow,* 250 Pa Super 330, 332; 378 A2d 961 (1977), quoting 18 Pa Consol Stat 6108 (emphasis added). Clearly the Michigan Legislature could have done what the Pennsylvania legislature did: it explicitly created an exemption.[24]

Furthermore, even under the analysis offered by the majority, *Henderson* was wrongly decided. One thing the majority and I agree about in the instant case is that an exception, excuse, proviso, or exemption has to be clearly indicated by the language of the statute. In the statute before us, MCL 750.224f(2), the majority argues that the word "until" introduces a proviso.

In contrast, the statute involved in *Henderson* contains nothing preceding the language "without a license" that could be argued to introduce an exemption, excuse, proviso, or exemption.[25] Therefore, I believe that, under the majority's analysis, *Henderson* must be found to have been wrongly decided. In addition, its reliance on *Henderson* contradicts the majority's analysis discussing exceptions, excuses, provisos, and exemptions. In the end, *Henderson* offers nothing supportive of the majority's construction of MCL 750.224f(2).

Again, the Legislature knows how to use the terms "exception," "excuse," "proviso," or "exemption." And it knows how to create exceptions by the use of the term "unless," as it has repeatedly done throughout the Penal Code. But the Legislature chose not to use *any* of

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[24] As noted above, the Legislature used the same "unless" language to create an exception in MCL 750.224f(4).

[25] "Without" does not qualify. "Unless the defendant possesses" would qualify. As with the statute at issue in this case, the Legislature could have phrased the critical language as an exemption, but it chose not to do so.

those terms in either MCL 750.224f(2) or MCL 750.227, the statute analyzed in *Henderson*. I would not turn a blind eye to those choices. Instead, I would enforce the statutes as the Legislature wrote them. In this case, it requires finding that the restoration of the right to possess a firearm is an element of the offense of felon in possession.

G. THE BURDEN PLACED ON THE PROSECUTION

The prosecution asserts that, if it must initially go forward with evidence that defendant's right to possess a firearm has not been restored, its burden of proof will be rendered too difficult. It argues that, to make this showing, it would have to obtain certificates showing no restoration of defendant's right to possess firearms from all eighty-three counties in Michigan.

I believe that this is a wildly exaggerated approach to the situation. Normally, to satisfy MCL 750.224f(2), the prosecution would have to show simply that five years had not passed since the defendant served his term or completed probation or paid his fines. Only if none of those situations existed would it become necessary to address whether the right to carry a firearm had been restored. And then, in almost every case, the prosecution could show that the defendant resided in one or two counties while eligible to have the right restored and that those counties had not restored the right.

My reading of the statute requires more proofs from the prosecution then it would prefer. But the fact that it may find difficulty in proving a crime does not provide a reason for this Court to rewrite the law to change the Legislature's intent. I am satisfied that the language of the statute demonstrates that a showing of no restora-

tion of the right to possess a firearm is an element of the crime. Hence, the burdens of production and persuasion are on the prosecution.

H. THE RULE OF LENITY

A consistent textualist would have to admit that no language in MCL 750.224f(2) or MCL 750.227 creates an explicit exception, excuse, proviso, or exemption. At most, those statutes could be read to infer an exception or proviso by adding words to them. By finding an exception and a proviso, the majority violates its textualist philosophy. Its holding today seems to require that any time words can be added to a statute to form an exception or proviso, those words should be added. Surely, this does not give effect to the text of the statute as written. Rather, it reads into the statute what the Legislature did not include and perhaps chose not to include. Not only is this inconsistent with the majority's "plain language" textualist approach, it also violates the rule of lenity.

Courts have long held that any ambiguity regarding the scope of criminal statutes must be resolved in favor of lenity. *Huddleston v United States*, 415 US 814, 830-831, 94 S Ct 1262; 39 L Ed 2d 782 (1974), quoting *Rewis v United States*, 401 US 808, 812; 91 S Ct 1056; 28 L Ed 2d 493 (1971). This is part of the time-honored rule that penal statutes are construed in favor of the defendant. As Chief Justice Marshall of United States Supreme Court stated in 1820:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to

> define a crime, and ordain its punishment. [*United States v Wiltberger*, 18 US (5 Wheat) 76, 95; 5 L Ed 37 (1820).]

I believe that a court may go beyond the text of a statute when it is ambiguous or when serious questions arise regarding the reasonable meaning of its language. But when weighing the words of a criminal statute, the court must place on the scales the rule of lenity. This rule requires that the statute be construed strictly in favor of the defendant.

Here, the majority disregards the language contained in MCL 776.20 and effectively finds that, if certain words are added to form an exception or proviso, the statute should be read that way. This interpretation violates the rule of lenity. Far from reading the statute in favor of defendant, it requires that the statute be read to disfavor him.

I believe that my interpretation of the statute best gives effect to the Legislature's intent. And it best adheres to the long-established tradition of applying the rule of lenity to criminal statutes. The majority's construction violates the spirit of the rule of lenity. And it turns a hardened eye on the "tenderness of the law for the rights of individuals . . . ." *Wiltberger, supra* at 95.

Instead of following this longstanding rule, the majority focuses on the potential burden placed on the prosecution. I continue to adhere to the rule of lenity. Therefore, I would hold that the prosecution bears the burden of production regardless of whether it might, at times, find that burden difficult.

I. THE DUE PROCESS PROBLEM

This Court has ruled that exemptions and provisos in criminal statutes must be defined with specificity.

> Exemptions and provisos within a criminal statute must be defined with the same specificity as the prohibitive language of the statute.
>
> This court is not able, within the bounds of due process, to "interpret" a criminal statute which contains an ambiguous exemption such that it results in conviction of the defendant charged in the specific case. That is not the "fair warning" demanded by the Constitution. [*People v Dempster*, 396 Mich 700, 715; 242 NW2d 381 (1976) (citation omitted).]

Therefore, when a "clarifying gloss" is placed on a statute by a court, it can apply only to future violations. It cannot apply retroactively. This includes cases that clarify when an exemption or proviso exists. *Id*. at 715-717.

This case constitutes the first instance when the "clarifying gloss" in question has been placed on MCL 750.224f(2). Therefore, at the least, the majority's interpretation of the statute cannot apply retroactively. Because the majority finds for the first time that the statute contains a proviso, defendant did not have constitutional fair warning of what he would have to prove. Accordingly, his conviction cannot stand. *Dempster*, *supra* at 717-718.

J. MY CONCLUSION REGARDING THE FELON-IN-POSSESSION STATUTE

The felon-in-possession statute indicates clearly that the prosecution has the burden of showing that five years have not passed (1) since the defendant paid all fines, or (2) since the defendant served his term of imprisonment, or (3) since the defendant successfully completed all conditions of probation or parole, or of showing (4) that the defendant's right to possess a firearm has not been restored. In this case, the prosecution concedes that it presented no evidence showing

that one of the four occurrences did not take place. Therefore, it failed to satisfy its burden. Accordingly, I would reverse the decision of the Court of Appeals in part and vacate defendant's convictions and sentences.

V. CONCLUSION

The risk that force will be used during a larceny from a person is considerably greater than the risk of force in many other felonies. This is because the crime, by its nature, is often confrontational and always involves the presence of the victim. Therefore, I concur with the majority that larceny from a person is a specified felony.

But I dissent from the majority's holding on the second issue. The felon-in-possession statute indicates clearly that the prosecution has the burden of production and persuasion on all the elements of the offense. This includes the lack of restoration of the right to possess a firearm.

I would affirm in part the decision of the Court of Appeals, reverse it in part, and vacate defendant's convictions and sentences.

CAVANAGH, J. (*dissenting*). I disagree with the majority's position that the crime of larceny from the person is a specified felony pursuant to MCL 750.224f(6). Because I believe that larceny from the person is not a specified felony under MCL 750.224f(6), I do not reach the issue whether the lack of restoration of firearm rights is an element of MCL 750.224f(2). Accordingly, I respectfully dissent.

The Legislature has defined a "specified felony" as including a felony in which the following circumstance exists:

> An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. [MCL 750.224f(6)(*i*).][1]

Larceny from the person is defined as follows: "Any person who shall commit the offense of larceny by stealing from the person of another shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years." MCL 750.357. Larceny from the person differs from robbery because larceny from the person is committed without the use of force or the threat of force. "[R]obbery is a larceny aggravated by the fact that the taking is from the person, or in his presence, accomplished with force or the threat of force." *People v Randolph*, 466 Mich 532, 544; 648 NW2d 164 (2002). By its very nature, larceny from the person involves the *absence* of force or threat of force.

While I agree with the majority that there is a risk of force or threat of force when larceny from the person is committed, this is essentially the case with *every* felony. Indeed, one can conceive of a risk of force in almost every situation in which a felony is committed. However, I do not believe that the mere *potential* for force or threat of force, or the mere *potential* that a perpetrator *may* become confrontational if detected, means larceny from the person presents a "*substantial* risk" of force or threat of force. A perpetrator could just as likely choose to avoid confrontation if it becomes apparent that force or the threat of force must be used to complete the

[1] Other subsections of the statute specifying additional circumstances that also define a specified felony are not applicable in this case.

intended act. Therefore, because there is not a "*substantial risk*" of force or threat of force when larceny from the person is committed, I respectfully dissent.

GLASS v GOECKEL

Docket No. 126409. Argued March 8, 2005 (Calendar No. 4). Decided July 29, 2005. Rehearing denied 474 Mich 1201.

Joan M. Glass brought an action in the Alcona Circuit Court seeking an injunction against Richard A. and Kathleen D. Goeckel, owners of property that abuts Lake Huron. The defendants contended that the plaintiff was trespassing when she walked on the beach in front of their home. The plaintiff argued that she had a right to walk below the ordinary high water mark. The trial court, John F. Kowalski, J., granted summary disposition for the plaintiff. The Court of Appeals, O'CONNELL, P.J., and WILDER and MURRAY, JJ., reversed, holding that the land below the ordinary high water mark belongs to the state, but the riparian owner has exclusive use of the previously submerged lands below the ordinary high water mark, and neither the plaintiff nor any other member of the public has a right to traverse the land between the statutory high water mark and the water's edge. 262 Mich App 29 (2004). The Supreme Court granted leave to appeal. 471 Mich 904 (2004).

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

The public trust doctrine protects the plaintiff's right to walk along the shores of the Great Lakes. The state lacks the power to diminish the public rights it holds in trust when it conveys littoral property to private parties. Such land is conveyed subject to the public rights in the Great Lakes and their shores up to the ordinary high water mark. The ordinary high water mark is the point on the bank or the shore up to which the presence and action of the water is so continuous as to leave a distinct mark by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. The defendants cannot prevent the plaintiff from enjoying the rights preserved by the public trust doctrine. The plaintiff, and other members of the public, are not required to walk only on currently submerged lands, but may walk in the area below the ordinary high water mark. The judgment of the Court of Appeals must be reversed and the matter must be remanded to the trial court for proceedings consistent with this opinion.

1. The public trust doctrine from the common law of the sea applies to the Great Lakes. The state, as sovereign, serves as the trustee of the public's rights to use the Great Lakes for various public purposes and cannot relinquish this duty. Although the state retains the authority to convey lakefront property to private parties, it conveys such property subject to the public rights preserved under the public trust doctrine.

2. The Great Lakes Submerged Lands Act, MCL 324.32501 *et seq*., does not establish the limits of the public trust doctrine. Rather, the act establishes the scope of the regulatory authority that the Legislature exercises pursuant to the public trust doctrine. The common law and prior decisions, however, have adopted the ordinary high water mark as the boundary of the public trust doctrine. The protections of the public trust doctrine extend to the ordinary high water mark.

3. Walking the beach below the ordinary high water mark is inherent in the exercise of traditionally protected public rights and falls within the scope of the public trust. This activity remains subject to regulation, as is any use of the public trust.

4. The Court of Appeals erred in granting the defendants an exclusive right of use down to the water's edge, because littoral property remains subject to the public trust and the defendants hold title according to the terms of their deed.

Justice YOUNG, concurring in part and dissenting in part, agrees with the majority's determination that the Great Lakes Submerged Lands Act does not establish a public right to walk the shores of the Great Lakes below the "ordinary high water mark" as defined in that act. The act plainly evinces a legislative intent only to regulate the use of land adjacent to the Great Lakes rather than to establish the scope of public and private property rights in such land.

He dissents from the remainder of the majority opinion. This was a thoroughly briefed and argued case in which the parties and the justices of this Court assert conflicting interpretations of Michigan's vague public trust jurisprudence. While the opinions of both the majority and Justice MARKMAN are honest and erudite constructions of this abstruse body of lakefront property law, Justice MARKMAN'S opinion is more consistent with the fundamental principles embodied in our public trust jurisprudence and with the physical realities of the Great Lakes. He joins parts I-III and V of Justice MARKMAN'S opinion. The majority concludes that the "ordinary high water mark" defines the boundaries of the public trust doctrine. But this term was originally adopted from cases applying the public trust doctrine to *tidal* waters and, in truth, is

applicable only to tidal waters, with their regularly recurring periods of high and low tides. For nontidal waters such as the Great Lakes, the only true "water mark" is the water's edge itself, which is readily identified as that portion of the lakeshore over which the lake is presently ebbing and flowing. It is only within this area of the lake bed, including the wet sand or earth, that the public may walk. The public may do so simply because the littoral landowner has no property rights in the lake bed superior to those of the public.

Thus, the majority errs by recognizing a public right to walk on littoral property—a "right" no Michigan court has ever before recognized—up a point on the shore that neither the majority nor the public can identify with any precision. The more practical rule, and the rule that comports more faithfully with established property rights and with the longstanding practices of Michigan beach walkers and littoral owner rights, is to recognize the public's right of passage over that portion of the shoreline over which the lake is presently ebbing and flowing.

Justice MARKMAN, concurring in part and dissenting in part, stated that he would not alter the longstanding law of Michigan that holds that the public's right to use littoral property under the public trust doctrine is limited to the use of lands covered by the Great Lakes, including its wet sands.

(1) He would not alter the law of littoral property rights in Michigan—a law in existence for most of this state's history and a law that has created an harmonious relationship between the public and Great Lakes property owners in the context of millions of interactions occurring between them each year—on the basis of the isolated and aberrational dispute in this case.

(2) He would not alter the law of littoral property rights in Michigan by adopting piecemeal the laws of Wisconsin, since there is no realm of the law in which there is a greater need to maintain stability and continuity than with regard to private property rights.

(3) He would not alter the law of littoral property rights in Michigan by adopting a new test where such test is vague and fails to provide guidance to the public and property owners in identifying where their rights begin and end. He believes that such test will lead inevitably to more litigation in an area of the law that has been largely free from such litigation for the past century and a half, and that such test will subject littoral property rights increasingly to the regulatory determinations of state administrative agencies.

(4) He would not alter the law of littoral property rights in Michigan where current law allows the public and property owners to ascertain their rights by simple observation, and new law would require these same parties to utilize "aerial photographs . . . a government survey map . . . and stereo [three-dimensional] photographs" in order to ascertain their rights, thereby encouraging the erection of fences.

(5) He would not alter the law of littoral property rights in Michigan where such law has served for most of this state's history both to protect private property rights and the rights of the public to engage in reasonable use of the Great Lakes, including beach-walking.

Accordingly, he would affirm in part and reverse in part the decision of the Court of Appeals and remand to the trial court to apply the principles set forth in his opinion.

Reversed and remanded to the trial court.

WATERS AND WATERCOURSES — GREAT LAKES — BEACHES — PUBLIC TRUST DOCTRINE.

A private owner of property in Michigan abutting any of the Great Lakes has full rights of ownership in the littoral property, subject to public rights in the lakes and their shores up to the ordinary high water mark; the landowner cannot prevent a member of the public from enjoying the rights preserved by the public trust doctrine, including the right to walk below the ordinary high water mark; the ordinary high water mark is the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.

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Amici Curiae:

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Frank J. Kelley and *Kelley Cawthorne* for Representatives Brian Palmer, Daniel Acciavatti, Fran Amos, Richard Ball, Rick Baxter, Darwin Booher, Jack Brandenburg, Tom Casperson, Leon Drolet, Edward Gaffney, John Garfield, Robert Gosselin, Kevin Green, Dave Hildenbrand, Jack Hoogendyk, Joe Hune, Rick Jones, Roger Kahn, Philip LaJoy, David Law, Jim Marleau, Tom Meyer, Leslie Mortimer, Neal Nitz, John Pastor, Phil Pavlov, Tom Pearce, John Proos IV, David Robertson, Tonya Schuitmaker, Rick Shaffer, Fulton Sheen, John Stahl, John Stakoe, Glenn Steil, Shelley Taub, Barb Vander Veen, and Lorence Wenke, and Senator Jim Barcia.

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CORRIGAN, J. The issue presented in this case is whether the public has a right to walk along the shores of the Great Lakes where a private landowner ostensibly holds title to the water's edge. To resolve this issue we must consider two component questions: (1) how the public trust doctrine affects private littoral[1] title; and (2) whether the public trust encompasses walking among the public rights protected by the public trust doctrine.

Despite the competing legal theory offered by Justice MARKMAN, our Court unanimously agrees that plaintiff does not interfere with defendants' property rights when she walks within the area of the public trust. Yet we decline to insist, as do Justices MARKMAN and YOUNG, that submersion[2] at a given moment defines the bound-

[1] Modern usage distinguishes between "littoral" and "riparian," with the former applying to seas and their coasts and the latter applying to rivers and streams. Black's Law Dictionary (7th ed). Our case law has not always precisely distinguished between the two terms. Consistent with our recognition that the common law of the sea applies to our Great Lakes, see *People v Silberwood*, 110 Mich 103, 108; 67 NW 1087 (1896), citing *Illinois Central R Co v Illinois*, 146 US 387, 437; 13 S Ct 110; 36 L Ed 1018 (1892), we will describe defendants' property as littoral property. Although we have attempted to retain consistency in terminology throughout our discussion, we will at times employ the term "riparian" when the facts or the language previously employed so dictate. For example, a *littoral* owner of property on the Great Lakes holds *riparian* rights as a consequence of owning waterfront property. See *Hilt v Weber*, 252 Mich 198, 225; 233 NW 159 (1930).

[2] We note that, in the view of our colleagues, "submerged land" includes not only land that lies beneath visible water, but wet sands that are "infused with water." See *post* at 744.

ary of the public trust. Similarly, we cannot leave uncorrected the Court of Appeals award to littoral landowners of a "right of exclusive use" down to the water's edge, which upset the balance between private title and public rights along our Great Lakes and disrupted a previously quiet status quo.

Plaintiff Joan Glass asserts that she has the right to walk along Lake Huron. Littoral landowners defendants Richard and Kathleen Goeckel maintain that plaintiff trespasses on their private land when she walks the shoreline. Plaintiff argues that the public trust doctrine, which is a legal principle as old as the common law itself, and the Great Lakes Submerged Lands Act (GLSLA), MCL 324.32501 *et seq.*,[3] protect her right to walk along the shore of Lake Huron unimpeded by the private title of littoral landowners. Plaintiff contends that the public trust doctrine and the GLSLA preserve public rights in the Great Lakes and their shores that limit any private property rights enjoyed by defendants.

Although we find plaintiff's reliance on the GLSLA misplaced, we conclude that the public trust doctrine does protect her right to walk along the shores of the Great Lakes. American law has long recognized that large bodies of navigable water, such as the oceans, are natural resources and thoroughfares that belong to the public. In our common-law tradition, the state, as sovereign, acts as trustee of public rights in these natural resources. Consequently, the state lacks the power to diminish those rights when conveying littoral property to private parties. This "public trust doctrine," as the United States Supreme Court stated in *Illinois*

[3] The Great Lakes Submerged Lands Act, formerly MCL 322.701 *et seq*., is now part of Michigan's Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*.

Central R Co v Illinois, 146 US 387, 435; 13 S Ct 110; 36 L Ed 1018 (1892) (*Illinois Central I*), and as recognized by our Court in *Nedtweg v Wallace*, 237 Mich 14, 16-23; 208 NW 51 (1926), applies not only to the oceans, but also to the Great Lakes.

Pursuant to this longstanding doctrine, when the state (or entities that predated our state's admission to the Union) conveyed littoral property to private parties, that property remained subject to the public trust. In this case, the property now owned by defendants was originally conveyed *subject to specific public trust rights in Lake Huron and its shores up to the ordinary high water mark*. The ordinary high water mark lies, as described by Wisconsin, another Great Lakes state, where " 'the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.' " *State v Trudeau*, 139 Wis 2d 91, 102; 408 NW2d 337 (1987) (citation omitted).[4] Consequently, although defendants retain full rights of ownership in their littoral property, they hold these rights subject to the public trust.

We hold, therefore, that defendants cannot prevent plaintiff from enjoying the rights preserved by the public trust doctrine. Because walking along the lakeshore is inherent in the exercise of traditionally protected public rights of fishing, hunting, and navigation, our public trust doctrine permits pedestrian use of our Great Lakes, up to and including the land below the

[4] We refer to a similarly situated sister state not for the entirety of its public trust doctrine, but for a credible definition of a term long employed in our jurisprudence. Despite Justice MARKMAN's protestation over upsetting settled rules, see, e.g., *post* at 735, we have recourse to this persuasive definition because, as noted by Justice YOUNG, this area of law has been characterized by critical terms receiving less than precise definition. See *post* at 704.

ordinary high water mark. Therefore, plaintiff, like any member of the public, enjoys the right to walk along the shore of Lake Huron on land lakeward of the ordinary high water mark. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

Defendants own property on the shore of Lake Huron, and their deed defines one boundary as "the meander line of Lake Huron."[5] Plaintiff owns property located across the highway from defendants' lakefront home. This case originally arose as a dispute over an express easement. Plaintiff's deed provides for a fifteen-foot easement across defendants' property "for ingress and egress to Lake Huron," and she asserts that she and her family members have used the easement consistently since 1967 to gain access to the lake. The parties have since resolved their dispute about plaintiff's use of that easement.

This present appeal concerns a different issue: plaintiff's right *as a member of the public* to walk along the shoreline of Lake Huron, irrespective of defendants' private title. During the proceedings below, plaintiff sought to enjoin defendants from interfering with her walking along the shoreline. Defendants sought summary disposition under MCR 2.116(C)(8) and (9), for failure to state a claim upon which relief may be

[5] We note that the parties do not contest the terms of the deed by which defendants own their property. We take as given that defendants hold title to their property according to the terms of their deed. The record does not reflect any argument over the meaning of the term "meander line" in this context. The issue before us is not how far defendants' private littoral title extends, but how the public trust affects that title.

granted and for failure to state a defense. Defendants argued that, as a matter of law, plaintiff could not walk on defendants' property between the ordinary high water mark and the lake without defendants' permission.

The trial court granted plaintiff summary disposition under MCR 2.116(I)(2). Although the court concluded that no clear precedent controls resolution of the issue, it held that plaintiff had the right to walk "lakewards of the natural ordinary high water mark" as defined by the GLSLA.

The Court of Appeals reversed the trial court's order in a published opinion. 262 Mich App 29; 683 NW2d 719 (2004). It stated "[t]hat the state of Michigan holds in trust the *submerged lands* beneath the Great Lakes within its borders for the free and uninterrupted navigation of the public . . . ." *Id*. at 42. The Court held that, apart from navigational issues, the state holds title to previously submerged land, subject to the exclusive use of the riparian owner up to the water's edge. *Id*. at 43. Thus, under the Court of Appeals analysis, neither plaintiff nor any other member of the public has a right to traverse the land between the statutory ordinary high water mark and the literal water's edge.

We subsequently granted leave to appeal. 471 Mich 904 (2004).

STANDARD OF REVIEW

We review de novo the grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In a motion under MCR 2.116(C)(8), "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden, supra* at 119. As we stated in *Nasser v Auto Club Ins Ass'n,* 435 Mich 33, 47; 457

NW2d 637 (1990), "a motion for summary disposition under MCR 2.116(C)(9) is tested solely by reference to the parties' pleadings."

ANALYSIS

I. THE HISTORY OF THE PUBLIC TRUST DOCTRINE

Throughout the history of American law as descended from English common law, our courts have recognized that the sovereign must preserve and protect navigable waters for its people. This obligation traces back to the Roman Emperor Justinian, whose *Institutes* provided, "Now the things which are, by natural law, common to all are these: the air, running water, the sea, and therefore the seashores. Thus, no one is barred access to the seashore . . . ." Justinian, *Institutes*, book II, title I, § 1, as translated in Thomas, *The Institutes of Justinian, Text, Translation and Commentary* (Amsterdam: North-Holland Publishing Company, 1975), p 65; see also 9 Powell, Real Property, § 65.03(2), p 65-39 n 2, quoting a different translation. The law of the sea, as developed through English common law, incorporated the understanding that

> both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, *jus privatum,* in such lands . . . belongs to the King as the sovereign; and the dominion thereof, *jus publicum,* is vested in him as the representative of the

> nation and for the public benefit. [*Shively v Bowlby*, 152 US 1, 11; 14 S Ct 548; 38 L Ed 331 (1894).]

This rule—that the sovereign must sedulously guard the public's interest in the seas for navigation and fishing—passed from English courts to the American colonies, to the Northwest Territory, and, ultimately, to Michigan. See *Nedtweg*, *supra* at 17; accord *Phillips Petroleum Co v Mississippi*, 484 US 469, 473-474; 108 S Ct 791; 98 L Ed 2d 877 (1988), quoting *Shively*, *supra* at 57.

Michigan's courts recognized that the principles that guaranteed public rights in the seas apply with equal force to the Great Lakes. Thus, we have held that the common law of the sea applies to the Great Lakes. See *Hilt v Weber*, 252 Mich 198, 213, 217; 233 NW 159 (1930); *People v Silberwood*, 110 Mich 103, 108; 67 NW 1087 (1896). In particular, we have held that the public trust doctrine from the common law of the sea applies to the Great Lakes.[6] See *Nedtweg*, *supra* at 16-23; *Silberwood*, *supra* at 108; *State v Venice of America Land Co*, 160 Mich 680, 702; 125 NW 770 (1910); accord *Illinois Central I*, *supra* at 437.

Accordingly, under longstanding principles of Michigan's common law, the state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public.[7]

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[6] In this decision, we consider the public trust doctrine only as it has applied to the Great Lakes and do not consider how it has applied to inland bodies of water.

[7] Although not implicated in this case, we note that the Great Lakes and the lands beneath them remain subject to the federal navigational servitude. This servitude preserves for the federal government control of all navigable waters "for the purpose of regulating and improving navigation . . . ." *Gibson v United States*, 166 US 269, 271-272; 17 S Ct 578; 41 L Ed 996 (1897). "[A]lthough the title to the shore and submerged soil is in the various States and individual owners under them, it is

The state serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure. See *Nedtweg*, *supra* at 16; *Venice of America Land Co*, *supra* at 702; *State v Lake St Clair Fishing & Shooting Club*, 127 Mich 580, 586; 87 NW 117 (1901); *Lincoln v Davis*, 53 Mich 375, 388; 19 NW 103 (1884).

The state, as sovereign, cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources. As we stated in *Nedtweg, supra* at 17:

> The State may not, by grant, surrender such public rights any more than it can abdicate the police power or other essential power of government. But this does not mean that the State must, at all times, remain the proprietor of, as well as the sovereign over, the soil underlying navigable waters. . . . The State of Michigan has an undoubted right to make use of its proprietary ownership of the land in question, [subject only to the paramount right of] the public [to] enjoy the benefit of the trust.

Therefore, although the state retains the authority to convey lakefront property to private parties, it necessarily conveys such property *subject to the public trust*.

At common law, our courts articulated a distinction between *jus privatum* and *jus publicum* to capture this principle: the alienation of littoral property to private parties leaves intact public rights in the lake and its submerged land. See *Nedtweg*, *supra* at 20; *McMorran Milling Co v C H Little Co*, 201 Mich 301, 313; 167 NW 990 (1918); *Sterling v Jackson*, 69 Mich 488, 506-507; 37 NW 845 (1888) (CAMPBELL, J., dissenting); see also *Collins v Gerhardt*, 237 Mich 38, 55; 211 NW 115 (1926)

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always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution." *Id*. at 272. Apart from this servitude, the federal government has relinquished to the state any remaining ownership rights in the Great Lakes. See 43 USC 1311.

(FELLOWS, J., concurring) (recognizing the "different character" of the rights held by the federal government as proprietor and as trustee in an inland navigable stream); *Lorman v Benson*, 8 Mich 18, 27-28 (1860) (reciting the common-law distinction between *jus publicum* and *jus privatum* in a case involving ownership of a riverbed).[8]

Jus publicum refers to public rights in navigable waters and the land covered by those waters;[9] *jus privatum,* in contrast, refers to private property rights held subject to the public trust.[10] As the United States Supreme Court explained in *Shively, supra* at 13:

> In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below the ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant or by prescription or usage; and that this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum,* of navigation and fishing. [Citations omitted.]

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[8] Indeed, other states also recognize the distinction between private title and public rights. See, e.g., *State v Longshore*, 141 Wash 2d 414, 427; 5 P3d 1256 (2000) ("The state's ownership of tidelands and shorelands is comprised of two distinct aspects—the *jus privatum* and the *jus publicum*."); *Smith v State*, 153 AD2d 737, 739-740; 545 NYS2d 203 (1989) ("This doctrine grows out of the common-law concept of the *jus publicum,* the public right of navigation and fishery which supersedes a private right of *jus privatum*.") (citations omitted); *Bell v Town of Wells*, 557 A2d 168, 172-173 (Me, 1989) (stating that the different types of title in the same shore property "remain in force" to this day); see also *R W Docks & Slips v State*, 244 Wis 2d 497, 509-510; 628 NW2d 781 (2001) (applying the public trust doctrine as adopted in its state constitution).

[9] See Black's Law Dictionary (7th ed), defining "*jus publicum*" as "[t]he right, title, or dominion of public ownership; esp., the government's right to own real property in trust for the public benefit."

[10] See *id.,* defining "*jus privatum*" as "[t]he right, title, or dominion of private ownership."

Thus, when a private party acquires littoral property from the sovereign, it acquires only the *jus privatum*. Our courts have continued to recognize this distinction between private title and public rights when they have applied the public trust doctrine. Public rights in certain types of access to the waters and lands beneath them remain under the protection of the state. Under the public trust doctrine, the sovereign never had the power to eliminate those rights, so any subsequent conveyances of littoral property remain subject to those public rights. See *Nedtweg*, *supra* at 17; see also *People ex rel Director of Conservation v Broedell*, 365 Mich 201, 205; 112 NW2d 517 (1961). Consequently, littoral landowners have always taken title subject to the limitation of public rights preserved under the public trust doctrine.

II. THE SCOPE OF THE PUBLIC TRUST DOCTRINE

Having established that the public trust doctrine is alive and well in Michigan, we are required in this appeal to examine the *scope* of the doctrine in Michigan: whether it extends up to the ordinary high water mark or whether, as defendants argue, it applies only to land that is *actually* below the waters of the Great Lakes at any particular moment.

A. THE GREAT LAKES SUBMERGED LANDS ACT

Plaintiff argues that the Legislature defined the scope of the public trust doctrine and established the outer limits of the doctrine in the GLSLA, thus supplanting our case law. This act, according to plaintiff, manifests a legislative intent to claim all land lakeward of the ordinary high water mark. Thus, plaintiff claims that the public trust extends to all land below the ordinary high water mark as defined in the act, which states that "the ordinary high-water mark shall be at the following elevations above sea level, international

Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet." MCL 324.32502.

We find plaintiff's reliance on the GLSLA to be misplaced. First, the act does not show a legislative intent to take title to all land lakeward of the ordinary high water mark. MCL 324.32502 provides:

> The lands covered and affected by this part are all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes, belonging to the state or held in trust by it, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition. The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakeward of the natural ordinary high-water mark, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. For purposes of this part, the ordinary high-water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet.

The first sentence of this section states that the act applies only to "unpatented lake bottomlands" and "unpatented made lands." The fourth sentence, however, defines "land" or "lands" in the act as including not only the bottomlands and made lands described in the first sentence, but also "patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakeward of the natural ordinary high-water mark . . . ."[11] Thus, the act covers both publicly owned land (the lake bottomlands and made lands described in the first sentence) and privately owned land that was once owned by the state (patented land below the ordinary high water mark). In other words, the act reiterates the state's authority as trustee of the inalienable *jus publicum*, which extends over both publicly and privately owned lands. The act makes no claims to alter the delineation of the *jus privatum* of individual landowners.

Moreover, the act never purports to establish the boundaries of the public trust. Rather, the GLSLA establishes the scope of the regulatory authority that the Legislature exercises, pursuant to the public trust doctrine. Indeed, most sections of the act merely regulate the use of land below the ordinary high water mark.[12]

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[11] A land patent is "[a]n instrument by which the government conveys a grant of public land to a private person." Black's Law Dictionary (7th ed), p 1147.

[12] Section 32503 provides that the Department of Environmental Quality (DEQ) may enter into agreements regarding land use or alienate unpatented land to the extent that doing so will not impair "the public trust in the waters . . . ." MCL 324.32503. Section 32504 governs applications for deeds or leases to unpatented lands. MCL 324.32504. Section 32504a concerns the restoration and maintenance of lighthouses. MCL 324.32504a. Section 32505 covers unpatented lake bottomlands and unpatented made lands, again providing that such lands may be conveyed as long as the public trust "will not be impaired or substantially injured." MCL 324.32505. Sections 32506 through 32509 concern the valuation of

The only section of the act that purports to deal with property rights is § 32511, MCL 324.32511:

> A riparian owner may apply to the department for a certificate suitable for recording indicating the location of his or her lakeward boundary or indicating that the land involved has accreted to his or her property as a result of natural accretions or placement of a lawful, permanent structure. The application shall be accompanied by a fee of $200.00 and proof of upland ownership.

As shown previously, a vital distinction in public trust law exists between private title (*jus privatum*) and those public rights that limit that title (*jus publicum*). Section 32511 only establishes a mechanism for landowners to certify the boundary of their private property (*jus privatum*). The boundary of the public trust (*jus publicum*)—distinct from a boundary on private littoral title—remains a separate question, a question that the act does not answer.

Finally, plaintiff also relies on the following language in § 32502 to argue that the GLSLA establishes the scope of the public trust doctrine:

> This part [the GLSLA] shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over

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unpatented lands and various administrative matters (with § 32509 delegating authority to promulgate rules to the DEQ). MCL 324.32506 through 324.32509. Section 32510 establishes that a violation of the act is a misdemeanor punishable by imprisonment or a fine. MCL 324.32510. Prohibited acts are defined in § 32512, MCL 324.32512, with § 32512a, MCL 324.32512a, specifically focusing on the removal of vegetation. Sections 32513 and 32514 return to administrative matters, such as applications for permits and public notice of hearing. MCL 324.32513 and 324.32514. Section 32515, MCL 324.32515, deals with enlargement of waterways, and § 32516, MCL 324.32516, returns again to the removal of vegetation.

> patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition.[13]

Again, plaintiff's reliance on this section is misplaced. This sentence states that the act will be construed to protect the public interest. But that rule of construction begs the question and cannot resolve whether the public has an interest in a littoral property in the first place. It provides no reason to expand the public trust beyond the limits established at common law. Thus, we must look elsewhere to determine the precise scope of the public trust to which § 32502 refers.[14]

B. THE PUBLIC TRUST DOCTRINE AS APPLIED TO THE GREAT LAKES

Because the GLSLA does not define the scope of the public trust doctrine in Michigan, we must turn again to our common law.

In applying the public trust doctrine to the oceans, courts have traditionally held that rights protected by this doctrine extend from the waters themselves and the lands beneath them to a point on the shore called

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[13] MCL 324.32502.

[14] The Legislature has recognized the public trust in other contexts as well. As early as 1913, the Legislature had made provision for the disposition and preservation of the public trust by entrusting trust lands and waters to the care of the predecessor of the DEQ. See 1913 PA 326, 1915 CL 606 *et seq*.; see also *Nedtweg*, *supra* at 18, 20 (upholding the constitutionality of the act because any authorized uses would yield to the "rights of the public"). In addition, the Legislature has conveyed small fractions of the lakes and shoreline to private parties, though only after ensuring that such conveyances did not disturb the public trust. See, e.g., 1954 PA 41; 1959 PA 31; 1959 PA 84.

the "ordinary high water mark." See, e.g., *Shively, supra* at 13; *Hardin v Jordan*, 140 US 371, 381; 11 S Ct 808; 35 L Ed 428 (1891); see also Hargrave's Law Tracts, 11, 12, quoted in *Shively, supra* at 12 (" 'The shore is that ground that is between the ordinary high water and low water mark [and this ground belongs to the sovereign.]' "). The United States Supreme Court described this common-law concept of the "high water mark" in *Borax Consolidated, Ltd v Los Angeles,* 296 US 10, 22-23; 56 S Ct 23; 80 L Ed 9 (1935):

> The tideland extends to the high water mark. This does not mean . . . a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides. By the civil law, the shore extends as far as the highest waves reach in winter. But by the common law, the shore "is confined to the flux and reflux of the sea at ordinary tides." It is the land "between ordinary high and low-water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails." [Citations omitted.]

An "ordinary high water mark" therefore has an intuitive meaning when applied to tidal waters. Because of lunar influence, ocean waves ebb and flow, thus reaching one point on the shore at low tide and reaching a more landward point at high tide. The latter constitutes the high water mark on a tidal shore. The land between this mark and the low water mark is submerged on a regular basis, and so remains subject to the public trust doctrine as "submerged land." See, e.g., *Illinois Central R Co v Chicago*, 176 US 646, 660; 20 S Ct 509; 44 L Ed 622 (1900) (*Illinois Central II*) ("But it is equally well settled that, in the absence of any local statute or usage, a grant of lands by the State does not pass title to *submerged lands below [the] high water mark . . . .*"). (Citations omitted; emphasis added.)

Michigan's courts have adopted the ordinary high water mark as the landward boundary of the public trust. For example, in an eminent domain case concerning property on a bay of Lake Michigan, we held that public rights end at the ordinary high water mark. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 198-199; 521 NW2d 499 (1994).[15] Thus, we awarded damages for destruction of the plaintiff's property above the ordinary high water mark that resulted from construction by the state (which occurred undisputedly in the water and within the public trust). *Id*. Similarly, in an earlier case where the state asserted its control under the public trust doctrine over a portion of littoral property, the Court also employed the high water mark as the boundary of the public trust. *Venice of America Land Co*, *supra* at 701-702.

Our Court has previously suggested that Michigan law leaves some ambiguity regarding whether the high or low water mark serves as the boundary of the public trust. See *Broedell*, *supra* at 205-206. But the established distinction in public trust jurisprudence between public rights (*jus publicum*) and private title (*jus privatum*) resolves this apparent ambiguity. Cases that seem to suggest, at first blush, that the public trust ends at the low water mark actually considered the boundary of the littoral owner's private property (*jus privatum*) rather than the boundary of the public trust (*jus publicum*).[16] Because the public trust doctrine

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[15] This decision relied not simply on a "navigational servitude" unique to that case, but rooted that "navigational servitude" in the public trust doctrine. See *id*. at 194 n 22, citing *Collins*, *supra* at 45-46; *Venice of America Land Co*, *supra*; *Nedtweg*, *supra* at 16-17.

[16] See *La Porte v Menacon*, 220 Mich 684; 190 NW 655 (1922) (resolving a dispute between private landowners over a deed term and bounding property at the low water mark); *Lake St Clair Fishing & Shooting Club*, *supra* at 587, 594-595 (setting the boundary of private title at the low

preserves public rights separate from a landowner's fee title, the boundary of the public trust need not equate with the boundary of a landowner's littoral title. Rather, a landowner's littoral title might extend past the boundary of the public trust.[17] Our case law no-

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water mark, while simultaneously endorsing *Shively* and *Illinois Central I* and *II*); *Silberwood*, *supra* at 107 (reciting the holdings of other jurisdictions that a riparian owner's fee ends at the low water mark); *Lincoln*, *supra* at 384 (considering the boundaries of a grant made by the federal government, rather than the boundary on what the government retained). In *Collins*, *supra* at 60 (FELLOWS, J., concurring), our Court differed and used the *high* water mark as the boundary to private title, but that case involved property on an *inland stream*.

In *People v Warner*, 116 Mich 228, 239; 74 NW 705 (1898), the Court appeared to place a single boundary between the riparian owner's title and state control, stating that "[t]he adjoining proprietor's fee stops [at the high or low water mark], and there that of the State begins." Yet this boundary marks "the limit of private ownership." *Id*. This recalls the fact that the state might hold proprietary title or, separate from that title, title as trustee to preserve the waters and lands beneath them on behalf of the public. The Court proceeded to distinguish the state's interest in the waters from the interest of the public in navigation, fish, and fowl. *Id*. Thus, in context, the *Warner* Court recognized a boundary on a riparian title, a title that remained subject to the public trust. But the Court did not equate that boundary with the limit of the public trust.

[17] Although in the context of an inland stream case, Justice FELLOWS noted the possibility of different boundaries on the public trust and riparian ownership in his concurring opinion in *Collins*, *supra* at 52, quoting *Bickel v Polk*, 5 Del 325, 326 (Del Super, 1851):

> "The right of fishing in all public streams where the tide ebbs and flows, is a common right, and the owner of land adjoining tide water, though his title runs to low water mark, has not an exclusive right of fishing; the public have the right to take fish below high water mark, though upon soil belonging to the individual, and would not be trespassers in so doing; but if they take the fish above high water mark, or carry them above high water mark and land them on private property, this would be a trespass . . . . In all navigable rivers, where the tide ebbs and flows, the people have of common right the privilege of fishing, and of navigation, between high and low water mark; though it be over private soil."

where suggests that private title necessarily ends where public rights begin. To the contrary, the distinction we have drawn between private title and public rights demonstrates that the *jus privatum* and the *jus publicum* may overlap.

Nor does this recognition of the potential for overlap represent a novel invention. While not binding on Michigan, other courts have similarly accommodated the same practical challenge of fixing boundaries on shifting waters: they acknowledged the possibility of public rights coextensive with private title. See, e.g., *State v Korrer*, 127 Minn 60, 76; 148 NW 617 (1914) (Even if a riparian owner holds title to the ordinary low water mark, his title is absolute only to the ordinary high water mark and the intervening shore space between high and low water mark remains subject to the rights of the public.); see also *North Shore, Inc v Wakefield*, 530 NW2d 297, 301 (ND, 1995) (stating that neither the state nor the riparian owner held absolute interests between high and low water mark); *Shaffer v Baylor's Lake Ass'n, Inc*, 392 Pa 493, 496; 141 A2d 583 (1958) (subjecting private title held to low water mark to public rights up to high water mark); *Flisrand v Madson*, 35 SD 457, 470-472; 152 NW 796 (1915) (same as *Korrer*, *supra*); *Bess v Humboldt Co*, 3 Cal App 4th 1544, 1549; 5 Cal Rptr 2d 399 (1992) (noting that it is "well established" that riparian title to the low water mark remained subject to the public trust between high and low water marks).

In the instant case, the Court of Appeals relied extensively on *Hilt* to set a boundary on where defendants' property ended and where plaintiff's rights (as a member of the public) began. But our concern in *Hilt* was the boundary of a littoral landowner's *private*

title,[18] rather than the boundary of the public trust. See *Hilt*, *supra* at 206 (noting that the government conveyed title "to the water's edge"). Indeed, the *Hilt* Court endorsed the *Nedtweg* Court's discussion of the public trust and decided the issue of the boundary on private littoral title within the context of the public trust doctrine. See *id*. at 203, 224-225, 227.[19] Consequently, the Court of Appeals erred by granting defendants an exclusive right of use down to the water's edge, because littoral property remains subject to the public trust and because defendants hold title according to the terms of their deed.

Our public trust doctrine employs a term, "the ordinary high water mark," from the common law of the sea and applies it to our Great Lakes. While this term has an obvious meaning when applied to *tidal* waters with regularly recurring high and low tides, its application to *nontidal* waters like the Great Lakes is less apparent. See, e.g., *Lincoln*, *supra* at 385 (noting, amidst a discussion of the extent of private littoral title, some imperfection in an analogy between the Great Lakes and the oceans). In the Great Lakes, water levels change because of precipitation, barometric pressure, and other forces that lack the regularity of lunar tides,

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[18] Moreover, the particular issue in *Hilt* was the boundary of private title on *relicted/accreted* land, which is not at issue in the present case.

[19] The *Hilt* Court concluded by stating how the public trust doctrine affected a riparian owner's private title:

> While the upland owner, in a general way, has full and exclusive use of the relicted land, his enjoyment of its use, especially his freedom to develop and sell it, is clouded by the lack of fee title, the necessity of resorting to equity or to action for damages instead of ejectment to expel a squatter, and the overhanging threat of the State's claim of right to occupy it for State purposes. The State, except for the paramount trust purposes, could make no use of the land . . . . [*Id*. at 227.]

which themselves exert a less noticeable influence on the Great Lakes than on the oceans. Applying a term from the common law of the sea, despite the obvious difference between the oceans and the Great Lakes, has led to some apparent discontinuity in the terminology employed in our case law. Notwithstanding some prior imprecision in its use, a term such as "ordinary high water mark" attempts to encapsulate the fact that water levels in the Great Lakes fluctuate. This fluctuation results in temporary exposure of land that may then remain exposed above where water currently lies. This land, although not immediately and presently submerged, falls within the ambit of the public trust because the lake has not permanently receded from that point and may yet again exert its influence up to that point. See *Nedtweg*, *supra* at 37 (setting apart from the public trust that land which is permanently exposed by the "recession of water" and so "rendered suitable for human occupation"). Thus, the ordinary high water mark still has meaning as applied to the Great Lakes and marks the boundary of land, even if not instantaneously submerged, included within the public trust. Our sister state, Wisconsin, defines the ordinary high water mark as

> the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark. [*Diana Shooting Club v Husting*, 156 Wis 261, 272; 145 NW 816 (1914) (citation omitted).]

Although *Diana Shooting Club* involved a river, Wisconsin has applied this definition not only to inland waters, but also to the Great Lakes. See *R W Docks & Slips*, *supra* at 508-510; *Trudeau*, *supra* at 102.[20] This definition has long served a state with which we share a border and that also has an extensive Great Lakes shoreline.

Although we do not import our sister state's public trust doctrine where this Court has already spoken, we are persuaded to adopt this definition to clarify a term long used but little defined in our jurisprudence. Indeed, Wisconsin's definition of ordinary high water mark is not far removed from meanings previously recognized in Michigan. See MCL 324.30101(i);[21] 1999

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[20] While an average member of the public may not require this degree of precision, *Trudeau* illustrates how a factual dispute over the location of the ordinary high water mark may be resolved. In that case, the parties presented evidence via expert witnesses. *Id*. at 108. For example, the state's expert testified that he "analyzed several aerial photographs . . . , the government survey maps, the site's present configuration, and stereo [three-dimensional] photographs . . . ." *Id*. Numerous resources exist to provide guidance to professionals. See, e.g., Simpson, *River & Lake Boundaries: Surveying Water Boundaries—A Manual* (Kingman, AZ: Plat Key Publishing, 1994); Cole, *Water Boundaries* (New York: J Wiley & Sons, 1997). Not surprisingly, this Court requires a survey based on proper monuments to establish an actual property line. *Hurd v Hines*, 346 Mich 70, 78-79; 77 NW2d 341 (1956). The same requirement would apply for a boundary set by one of our Great Lakes.

[21] Enacted after the GLSLA employed a standard based on International Great Lakes Datum for the Great Lakes, MCL 324.30101(i), which contains definitions previously found in the former Inland Lakes and Streams Act, in relevant part provides:

> "Ordinary-high water mark" means the line between upland and bottomland that persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the surface of the soil, and the vegetation.

AC, R 281.301(j); *Peterman*, *supra* at 198 n 29 (noting a statutory definition regarding inland waters, now enacted as MCL 324.30101[i], when considering the ordinary high water mark on Lake Michigan). This definition also parallels that employed by the federal government. See, e.g., 33 CFR 328.3(e).[22] Thus, we clarify the meaning of "ordinary high water mark" consistently with a definition that has served another Great Lakes state for some hundred years and is in accord with the term's limited development in our own state.

The concepts behind the term "ordinary high water mark" have remained constant since the state first entered the Union up to the present: boundaries on water are dynamic and water levels in the Great Lakes fluctuate.[23] In light of this, the aforementioned factors

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[22] 33 CFR 328.3(e) provides:

> The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

[23] As our Court has consistently recognized, water boundaries necessarily defy static definition. See *Hilt*, *supra* at 219. For example, the common law recognized riparian rights to accretion and reliction. This meant that riparian landowners gained private title to land adjacent to their property that gradually became permanently exposed through erosion or a change in water level. See *Peterman*, *supra* at 192-193. The recognition of these riparian rights shows that our courts have refused to fix a line that defies natural processes. Also, the concept of a "moveable freehold" to accommodate the effects of accretion and reliction on the bounds of littoral title shows our acknowledgement of the shifting nature of water boundaries. See *id.*, *Klais v Danowski*, 373 Mich 262, 275-276; 129 NW2d 414 (1964), and *Broedell*, *supra* at 206, all quoting *Hilt*, *supra* at 219.

will serve to identify the ordinary high water mark, but the precise location of the ordinary high water mark at any given site on the shores of our Great Lakes remains a question of fact.

III. THE PUBLIC TRUST INCLUDES WALKING WITHIN ITS BOUNDARIES

We have established thus far that the private title of littoral landowners remains subject to the public trust beneath the ordinary high water mark. But plaintiff, as a member of the public, may walk below the ordinary high water mark only if that practice receives the protection of the public trust doctrine. We hold that walking along the shore, subject to regulation (as is any exercise of public rights in the public trust) falls within the scope of the public trust.

To reiterate, the public trust doctrine serves to protect resources—here the waters of the Great Lakes and their submerged lands—shared in common by the public. See pp 678-679 of this opinion; see also *Venice of America Land Co*, *supra* at 702 (noting that "the State of Michigan holds these lands in trust for the use and benefit of its people"). As trustee, the state must preserve and protect specific public rights below the ordinary high water mark and may permit only those private uses that do not interfere with these traditional notions of the public trust. See *Obrecht v Nat'l Gypsum Co*, 361 Mich 399, 412-413; 105 NW2d 143 (1960). Yet its status as trustee does not permit the state, through any of its branches of government, to secure to itself property rights held by littoral owners. See *Hilt*, *supra* at 224 ("The state must be honest.").[24]

[24] For example, in *Hilt*, *supra* at 225, we noted several riparian rights held by landowners whose property abuts water. These riparian rights include the "[u]se of the water for general purposes, as bathing, domestic

We first note that neither party contests that walking falls within public rights traditionally protected under our public trust doctrine. Rather, they dispute where, not whether, plaintiff may walk: below the literal water's edge or below the ordinary high water mark. While the parties' agreement on this point cannot determine the scope of public rights, this agreement does indicate the existence of a common sense assumption: walking along the lakeshore is inherent in the exercise of traditionally protected public rights.

Our courts have traditionally articulated rights protected by the public trust doctrine as fishing, hunting, and navigation for commerce or pleasure. See *Nedtweg*, *supra* at 16; *Venice of America Land Co*, *supra* at 702; *Lake St Clair Fishing & Shooting Club*, *supra* at 586; *Lincoln*, *supra* at 388.[25]

In order to engage in these activities specifically protected by the public trust doctrine, the public must have a right of passage over land below the ordinary high water mark. Indeed, other courts have recognized a "right of passage" as protected with their public trust. See *Town of Orange v Resnick*, 94 Conn 573, 578; 109 A 864 (1920) (listing as public rights "fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge and . . . passing and repassing"); *Arnold v*

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use, etc. [,] . . . wharf[ing] out to navigability [,] . . . [a]ccess to navigable waters [, and] . . . [t]he right to accretions." (Citations omitted.) Moreover, "[r]iparian rights are property, for the taking or destruction of which by the State compensation must be made, unless the use has a real and substantial relation to a paramount trust purpose." *Id*.; see also *Peterman*, *supra* at 191. Thus, we have long recognized the value of riparian rights, but those rights remain ever subject to the "paramount" public trust.

[25] Indeed, we have even noted that the public might cut ice or, in the context of inland waters, might float logs downriver. See *Lake St Clair Fishing & Shooting Club*, *supra* at 587; *Grand Rapids Booming Co v Jarvis*, 30 Mich 308, 319 (1874).

Mundy, 6 NJL 1, 12 (1821) (reserving to the public the use of waters for "purposes of passing and repassing, navigation, fishing, fowling, [and] sustenance").

We can protect traditional public rights under our public trust doctrine only by simultaneously safeguarding activities inherent in the exercise of those rights. See, e.g., *Attorney General, ex rel Director of Conservation v Taggart*, 306 Mich 432, 435, 443; 11 NW2d 193 (1943) (permitting wading in a stream pursuant to the public trust doctrine). Walking the lakeshore below the ordinary high water mark is just such an activity, because gaining access to the Great Lakes to hunt, fish, or boat required walking to reach the water.[26] Consequently, the public has always held a right of passage in and along the lakes.

Even before our state joined the Union, the Northwest Ordinance of 1787, art IV, protected our Great Lakes in trust: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free . . . ." See Northwest Ordinance of 1787, art IV. Given that we must protect the Great Lakes as "common highways," see *id*., we acknowledge that our public trust doctrine permits pedestrian use–in and of itself–of our Great Lakes, up to and including the land below the ordinary high water mark.

Yet in *Hilt*, *supra* at 226, our Court noted the rule stated by the Wisconsin Supreme Court in *Doemel v Jantz*, 180 Wis 225; 193 NW 393 (1923): "[T]he public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner . . . ." When read in context, this quotation does

[26] This does not imply a right of lateral access in the public, i.e., a right to traverse the land of littoral owners to reach the lands and waters held in trust. See, e.g., *Collins*, *supra* at 49.

not represent a rejection of walking as impermissible within our public trust. As correctly described by Justice MARKMAN, the *Hilt* Court cited this passage as part of its discussion regarding the Michigan Supreme Court's correction of an earlier departure from the common law.[27] See *post* at 745-747. But rather than adopting that rule from *Doemel*, the *Hilt* Court listed this rule, among others, to refute the notion that the state held "substantially absolute title" in the lakes and the lands beneath them. *Hilt, supra* at 224. Instead, "the State has title in its sovereign capacity," *id.*, pursuant to the public trust doctrine. Consequently, "the right of the State to use the bed of the lake, except for the trust purposes, is subordinate to that of the riparian owner." *Id*. at 226, citing *Town of Orange*, *supra* at 578. In light of this exception for the public trust, littoral owners' rights supersede public rights in the same property (by virtue of their ownership) only to the extent that littoral owners' rights do not contravene the public trust. See *id*. When the *Hilt* Court recognized the greater rights of littoral property owners, it did not alter the public trust or preclude the public from walking within it.

We must conclude with two caveats. By no means does our public trust doctrine permit *every* use of the trust lands and waters. Rather, this doctrine protects only limited public rights, and it does not create an unlimited public right to access private land below the ordinary high water mark. See *Ryan v Brown*, 18 Mich 196, 209 (1869). The public trust doctrine cannot serve

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[27] The *Kavanaugh* cases departed from the common law by fixing the meander line as the boundary on private littoral title and by fixing the legal status of land below that line, regardless of subsequent physical changes. See *Hilt*, *supra* at 213; see also *Kavanaugh v Rabior*, 222 Mich 68; 192 NW 623 (1923); *Kavanaugh v Baird*, 241 Mich 240; 217 NW 2 (1928).

to justify trespass on private property. Finally, any exercise of these traditional public rights remains subject to criminal or civil regulation by the Legislature.

IV. RESPONSE TO OUR COLLEAGUES

Our Court unanimously agrees that defendants cannot prevent plaintiff from walking along the shore of Lake Huron within the area of the public trust. Despite the separate theory that undergirds the analysis, Justices MARKMAN and YOUNG agree with the majority that plaintiff may walk along Lake Huron in the area of the public trust.

Moreover, the majority and our colleagues agree on several other points. We agree that the public trust doctrine, descended at common law, applies to our Great Lakes. See *Hilt*, *supra* at 202 ("[T]his Court has consistently held that the State has title in fee in trust for the public to submerged beds of the Great Lakes within its boundaries."). We further agree that the public trust doctrine requires the state as trustee to preserve public rights in the lakes and lands submerged beneath them. See *Nedtweg*, *supra* at 16. Finally, we agree that plaintiff retains the same right to walk along the Great Lakes she has always held. *Post* at 745. That our colleagues disagree with the other members of this Court over the particulars of how far those public rights extend ought not overshadow our fundamental agreement: plaintiff does not interfere with defendants' property rights when she walks within the public trust.

Despite the sound and fury of Justice MARKMAN's concurring and dissenting opinion,[28] we do not radically

[28] For example, Justice MARKMAN predicts the appearance of fences along the shore. Yet to the extent that landowners may do as they see fit

depart from our precedents or destabilize property rights by upholding and applying our common law. While our colleagues in dissent claim to maintain the status quo, they do not do so. Rather, the majority retains and clarifies the status quo. The trial court correctly permitted plaintiff to walk lakeward of the ordinary high water mark. The Court of Appeals also correctly recognized the importance of the public trust doctrine, though we reverse its requirement that plaintiff walk only where water currently lies.

Yet our colleagues in dissent would repeat this error by continuing to grant an exclusive right of possession to littoral landowners. Indeed, they would compound this error by granting littoral landowners all property down to where unsubmerged land ends, which they locate at the water's edge,[29] regardless of the terms of

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on their own property, they could always erect a fence. While we share Justice MARKMAN's desire to preserve any "long coexist[ence] in reasonable harmony," *post* at 710 n 2, we find peculiar his implication that resolving an actual instance of disharmony between these parties or correcting the lower court's departure from our common law equates with this Court's endorsement of (or even comment on) property owners using fences. Were we to adopt our colleagues' approach, littoral landowners could place fences as far down as the water's edge.

[29] Numerous states bound their public trust, not at an instantaneously defined "water's edge," but at their high water mark. See, e.g., *Barboro v Boyle*, 119 Ark 377, 385; 178 SW 378 (1915) (high water mark for a lake); *Simons v French*, 25 Conn 346, 352-353 (1856) (high water mark on tidal waters); *Day v Day*, 22 Md 530, 537 (1865) (high water mark on tidally influenced rivers and streams); *State v Florida Natural Properties, Inc*, 338 So 2d 13, 19 (Fla, 1976) (ordinary high water mark); *Freeland v Pennsylvania R Co*, 197 Pa 529, 539; 47 A 745 (1901) (ordinary high water mark); *Allen v Allen*, 19 RI 114, 115; 32 A 166 (1895) (high water mark); *State v Hardee*, 259 SC 535, 541-542; 193 SE2d 497 (1972) (high water mark on tidally influenced stream).

Indeed, references in other states to "water's edge" often tie that term to either a high or low water mark. See, e.g., *Concord Mfg Co v Robertson*, 66 NH 1, 19-21; 25 A 718 (1889); *Lamprey v State*, 52 Minn 181, 198; 53

landowners' deeds.[30] We would not so casually set aside the countless deeds that order property rights for the length of our state shoreline. We would not give away to littoral landowners the absolute title to public trust land preserved for the people. Such a departure would represent a grave disturbance to the property rights of littoral landowners and of the public.

Notwithstanding Justice MARKMAN's characterization of this case as "aberrational," *post* at 711, 712, and 755, we have not invented the dispute presented to us. Nor do we have the luxury of forsaking public rights; our Court is one of the "sworn guardians of Michigan's duty and responsibility as trustee of the [Great Lakes]." See *Obrecht*, *supra* at 412. For the reasons described earlier in the opinion, we conclude that public rights may overlap with private title. Consequently, we refuse to enshrine–for the first time in our history–a solitary boundary between them. In this way, we preserve littoral title as landowners have always held it, and we preserve public rights always held by the state as trustee.

In dissent, our colleagues resist acknowledging the boundary of the public trust as the ordinary high water mark. To reach this conclusion, Justice MARKMAN relies on cases concerning the boundary of *private title*, rather than the boundary of the public trust. See, e.g., *Silber-*

NW 1139 (1893); *Hazen v Perkins*, 92 Vt 414, 419-421; 105 A 249 (1918); Mont Code, § 70-16-201; ND Cent Code, § 47-01-15.

[30] In the absence of a review of the myriad deeds by which landowners hold title to property on the Great Lakes, Justice MARKMAN assumes that their deeds will describe, in some manner, the "water's edge." Yet, as he acknowledges, that water's edge may shift. This could result in water reaching above the low water mark, even though a deed could convey title to the low water mark. See, e.g., *La Porte v Menacon,* 220 Mich 684, 687; 190 NW 655 (1922) (enforcing a deed that extended private title to the "shore," meaning the "water's edge at its lowest mark").

wood; *Lake St Clair Hunting & Fishing*; *Hilt*.[31] He refuses to accept our Court's holding–in a case involving Lake Michigan–that " 'the limit of the public's right is the ordinary high water mark . . . .' " *Peterman*, *supra* at 198 (citation omitted).[32] Although he criticizes the majority for vagueness with regard to the definition of that term,[33] we clarify the meaning of that term in a

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[31] Justice MARKMAN makes frequent reference to colonial cases, particularly relying on Massachusetts. But as that state's high court has made clear, at common law the state owned to the mean high water line subject to public rights in navigation and fishing. See *Opinion of the Justices to the House of Representatives*, 365 Mass 681, 684-685; 313 NE2d 561 (1974). What the court described as the colonial ordinance of 1641 to 1647 changed the common law to allow private title to the low water mark, but even that extended title remained subject to public rights. *Id*. Unlike Massachusetts, no colonial ordinance altered the common-law concepts in Michigan.

[32] In seeming contradiction to his reading of *Peterman*, Justice MARKMAN does accept that "the 'ordinary high water mark' is simply the outside edge of property that may . . . be regulated to preserve future navigational interests at times of high water . . . ." *Post* at 729. He also goes so far as to suggest that our Court has equated the high and low water marks, see *post* at 748, but the *Warner* Court on which he relies did not address that issue. *Warner, supra* at 239 ("If the absence of tides upon the Lakes, or their trifling effect if they can be said to exist, practically makes high and low water mark identical for the purpose of determining boundaries (a point we do not pass upon), the limit of private ownership is thereby marked.").

Additionally, our precedent stands in contradiction to Justice YOUNG's intuition that the ordinary high water mark has no application in Michigan. See, e.g., *Peterman, supra* at 198-199 (calculating damages, at least in part, on the basis of the location of the ordinary high water mark). In contrast, the "wet sand" standard supported by Justice YOUNG appears for the first time in our state in this case. We have serious reservations about adopting the view that he joins Justice MARKMAN in advancing. See *post* at 744-745.

[33] In apparent tension with his claim that the majority fails to rely on Michigan common law, Justice MARKMAN purports to offer an authoritative definition for ordinary high water mark that derives from a federal case and a 1997 dictionary. See *post* at 738-739.

way that allows for the fact-specific inquiry necessary to account for the range of physical forces and variety of landforms along our shoreline.[34] We decline to draw, merely for a charade of clarity, a universal line along the Great Lakes without any factual development of the point in the instant case or legal argument on an issue of significance to our state's jurisprudence.

Nor does our colleagues' "water's edge" concept provide superior clarity. Although the term might intuitively appear to mean where the water meets land, Justice MARKMAN expands the term to include sand dampened by water. See, e.g., *post* at 744 ("Because by definition such sands are infused with water, the wet sands fall within the definition of 'submerged lands.' "). Our colleagues' conception of "water's edge" neglects to account for (1) geography where sand is absent; (2) sudden changes in water levels such as storm surges; (3) what degree of dampness suffices: that identified by touch, sight, or a scientific review that could identify the presence of a single water molecule; and (4) the source of the water, where dampness may arise because of contact with a liquid, such as rain, other than water from the Great Lakes. Also, the instant-by-instant determination of a property boundary affords little certainty to littoral landowners. Given these serious difficulties in applying our colleagues' "water's edge" rule *and* the absence of support in our case law, we refuse to shift the boundary on the public trust away from the ordinary high water mark.

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[34] We are unpersuaded that Justice MARKMAN's recitation of natural forces demonstrates a difficulty in ascertaining the ordinary high water mark, because those same forces operate to shift the "water's edge." See *post* at 740-743. If anything, the results of this scientific expedition show the complexity of arriving at a water-tight definition, rather than prove that the "water's edge" concept escapes similar difficulties.

As trustee, the state has an obligation to protect the public trust. The state cannot take what it already owns. Because private littoral title remains subject to the public trust, no taking occurs when the state protects and retains that which it could not alienate: public rights held pursuant to the public trust doctrine.[35] Certainly, the loss of littoral property or riparian rights could result from an unconstitutional taking. See, e.g., *Peterman*, *supra* at 198, 208 (compensating the plaintiffs for losses above the ordinary high water mark); see also *Bott v Natural Resources Comm,* 415 Mich 45, 80; 327 NW2d 838 (1982); *Hilt*, *supra* at 225. Yet, here, defendants have not lost any property rights. Rather, they retain their property subject to the public trust, just as all property that abuts the Great Lakes in Michigan remains subject to the public trust, pursuant to our common law.

Justice MARKMAN also criticizes the majority for leaving unanswered many questions, several of which require the adoption of the legal framework that he proposed. Yet this case raises none of the questions that Justice MARKMAN poses. In general, we reserve the judgment of this Court for "actual cases and controversies" and do not "declare principles or rules of law that have no practical legal effect in the case before us . . . ." *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002). Accordingly, we decline to rule on issues that are not before us.

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[35] The United States Supreme Court has held that the issue before us is a matter of state property law. See *Phillips Petroleum Co v Mississippi*, 484 US 469, 475; 108 S Ct 791; 98 L Ed 2d 877 (1988) ("[T]he individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."); see also *Shively*, *supra* at 40 ("[T]he title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution.").

V. CONCLUSION

We conclude that plaintiff, as a member of the public, may walk the shores of the Great Lakes below the ordinary high water mark. Under longstanding common-law principles, defendants hold private title to their littoral property according to the terms of their deed and subject to the public trust. We therefore reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

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

YOUNG, J. (*concurring in part and dissenting in part*). This case poses a deceptively simple question: where, if anywhere, can a member of the public walk on the private beach of one of our Great Lakes without trespassing on a lakefront (littoral) owner's property?

Although the question is simple, the answer, as amply demonstrated by the more than one hundred pages of the rival opinions filed in this case, is muddled by an abstruse body of precedent that has been less than precise in defining critical terms and issues. This was a well-briefed and argued case that has resulted in a vigorous debate within the Court. The opinions of the majority and Justice MARKMAN present compelling, principled, but *competing* constructions of an ambiguous body of Michigan law and that of other jurisdictions concerning Great Lakes property rights. In the final analysis, I believe that answer offered by Justice MARKMAN is more firmly anchored than that of the majority in the admittedly obscure property law of the Great Lakes.

I concur in the majority's determination that the Great Lakes Submerged Lands Act (GLSLA), MCL 324.32501 *et seq.,* does not create a right to walk the shores of our Great Lakes. The Act plainly evinces the Legislature's intent to regulate the use of land below what the International Great Lakes Datum identifies as the "ordinary high water mark," rather than to define new public rights or limit established property rights.[1]

However, I join Justice MARKMAN's opinion with respect to the other issues presented by this appeal. Like Justice MARKMAN, I believe the majority errs by recognizing a right that we have never before recognized—the right to "walk" the private beaches of our Great Lakes—and by granting public access to private shore land up to an ill-defined and utterly chimerical "ordinary high water mark" as described in the majority opinion.[2]

To be sure, the majority's opinion constitutes a concerted and honest effort to give coherence to a very vague body of precedent. However admirable the majority's effort, I remain convinced that the "ordinary high water mark" concept on which the majority relies applies only to tidal waters, with their regularly recurring high and low tides.[3] The only

[1] See *ante* at 681-685.

[2] See *ante* at 685-694. The majority concedes that: "Applying a term [ordinary high water mark] from the common law of the sea, despite the obvious difference between the oceans and the Great Lakes, has lead to some apparent discontinuity in the terminology employed in our case law." *Ante* at 691. Precisely so. In effort to employ a term that does not adequately reflect the physical realities of our Great Lakes, the majority has borrowed definitions variously from statutes and Wisconsin cases in a struggle to make this tidal term fit where it does not, and in so doing, has immeasurably expanded the scope of the public trust.

[3] See *post* at 730-734.

"water mark" that one can find on the Great Lakes is the water's edge—viz., the wet portion of the shore over which the lake is presently ebbing and flowing. I believe it is only in this area of wet shoreline that the public may walk. They may do so, not because of a recognized "right to walk" the otherwise private beaches of our Great Lakes, for no such "right" has ever been recognized previously to be a part of Michigan's public trust doctrine.[4] Nor, in my view, is the public's opportunity to walk the shoreline a product of an overlap between private and public property titles as the majority asserts. Rather, I believe that the littoral landowner has no property claim to assert over submerged land—land over which the waters of a Great Lake is presently ebbing and flowing and which constitutes the lake bed. This area is the outer boundary of the public trust that is owned by and maintained for the People of Michigan.

The difficulty of the majority's rule and the soundness of Justice MARKMAN's approach is evident when one actually tries to apply their different standards to the shore. In the attached photograph,[5] an area of darker, wet sand forms the outer boundary of the lake bed. The water is presently acting on this portion of the beach, as evidenced by the fact that the land is waterlogged. Under Justice MARKMAN's view and my own, it is only in this area that the public may walk, and it may do so because the land is *presently* subject to reinundation and is part of the lake bed. Thus, in the photograph,

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[4] Until today, Michigan cases have only recognized the right of the public to use the public trust for navigation, hunting, fishing, and fowling. See, e.g., *Hilt v Weber,* 252 Mich 198, 224; 233 NW 159 (1930); *Collins v Gerhardt,* 237 Mich 38, 46; 211 NW 115 (1926); *State v Lake St Clair Fishing & Shooting Club,* 127 Mich 580, 586; 87 NW 117 (1901).

[5] Photograph by David Hansen, Minnesota Agricultural Experiment Station, University of Minnesota. Reproduced with permission.

my view, not only has Justice MARKMAN analyzed the applicable common law decisions with greater accuracy but, in contrast with the majority opinion, he has articulated a rule that is both faithful to the physical realities of our Great Lakes and consonant with the available confused precedent that we have all valiantly struggled to decipher.[10]

For these reasons, I concur in part II(A) of the majority opinion but join parts I-III and V of Justice MARKMAN's opinion in respectfully dissenting from the remainder of the majority opinion.

MARKMAN, J. (*concurring in part* and *dissenting*). Because I would not alter the longstanding status quo in our state concerning the competing rights of the public and lakefront property owners, I respectfully dissent. In concluding that the "public trust doctrine" permits members of the public to use unsubmerged lakefront property up to the "ordinary high water mark," the majority creates new legal rules in Michigan out of whole cloth by adopting Wisconsin law in piecemeal fashion and discarding Michigan rules that have defined the relationship between the public and lakefront property owners for virtually the entirety of our state's history.[1] Equally troubling, the majority replaces clear and well-understood rules—rules that have produced reasonable harmony over the decades in

[10] If we must transform the term "ordinary high water mark" in order to use it, I believe that we ought at least define and apply it in a way that reflects the physical nature of our non-tidal Great Lakes and that does least damage to heretofore stable lakefront property rights in the State.

[1] Although, quite remarkably, the majority purports that it "retains and clarifies the status quo," *ante* at 699, there is not a scintilla of support for the proposition that Wisconsin law has ever been the law of Michigan, not a single Michigan case referencing the majority's new test, and not a paragraph of argument in any of the briefs of plaintiffs, defendants, or amici identifying Wisconsin law as the law of Michigan.

Michigan— with obscure rules. One of the few things that is clear about the majority's opinion is that it will lead inevitably to more litigation— more litigation in an area of the law that, mercifully, has been largely free from such litigation for the past century and a half in our state. In the place of the reasonable harmony that has developed between the public and littoral property owners, there will be litigation. In the place of open beaches, there almost certainly will be a proliferation of fences erected by property owners determined to protect their now uncertain rights.[2] In the place of rules that have *both* upheld the property rights of lakefront landowners and provided an environment in which reasonable public use of lakefront property, including beach-walking, could routinely take place, the majority introduces new rules that will create tensions between the public and lakefront property owners. In the place of a boundary that can be determined by simple observation, the majority's new rules would require property owners and the public to bring "aerial photographs," a "government survey map[]" and "stereo [three-dimensional] photographs," *ante* at 692 n 20, in order to determine where their rights begin and end. In the place of rules in which property rights have been clearly defined by law, the majority expands the "public trust"

[2] The majority fails to recognize why its new rules are a prescription for fences. It is, of course, true that a lakefront property owner "could always erect a fence," as the majority observes. *Ante* at 699 n 28. However, fences have not heretofore generally been thought necessary. Under current law, which I would not alter, members of the public and lakefront property owners have long coexisted in reasonable harmony. It is the majority's actions today in departing from our precedents and creating new and vague law that will almost certainly transform this relationship and cause at least some property owners to believe that they must erect fences in order to protect boundaries that now have been called into question and that apparently will be subject to definition by the Department of Natural Resources.

in an uncertain fashion, in accordance with rules and regulations to be issued at some future time by the administrative agencies of state government. In the place of the clear rule of law in which property rights have been respected in a consistent fashion for more than a century and a half, there will be political dispute and negotiation.

This is the *first* such dispute to come before this Court in our history. Rather than recognizing the harmony that has been produced by the present rules in the course of the millions of interactions that occur each year between the public and property owners along the Great Lakes, the majority instead creates new rules on the basis of an isolated and aberrational dispute between the present parties.

The majority departs from the longstanding status quo in our state, despite the following: (1) there is no realm of the law in which there is a greater need to maintain stability and continuity than with regard to property rights; (2) the parties in this case have all asserted that they favor a maintenance of the status quo;[3] (3) there is no evidence that the status quo has not

[3] Plaintiff argues that use of the term " 'water's edge' [in *Hilt v Weber*, 252 Mich 198; 233 NW 159 (1930)] is consistent with the nomenclature of many other state and federal cases using 'water's edge' to mean 'high water mark.' " Plaintiff's brief at 24. See, also, amicus brief of the Tip of the Mitt Watershed Council at 18; amicus brief of the Michigan Senate Democratic Caucus at 2; amicus brief of the Michigan Land Use Institute at 10; and amici brief of the Michigan Departments of Environmental Quality and Natural Resources at 11. Defendants argue that the status quo gives the littoral owner "exclusive use of the beachfront to the water's edge as it exists from time to time." Defendants' brief at 13. See, also, amici brief of the Michigan Chamber of Commerce, National Federation of Independent Business Legal Foundation, Michigan Bankers Association, and Michigan Hotel, Motel & Resort Association at 11 ("The relevant Michigan authorities thus compel the conclusion that the public trust applies only to submerged lands when they are actually submerged"); amici brief of the Save our Shoreline and the Great Lakes

reasonably balanced the interests of property owners and the public in Michigan for more than a century and a half; and (4) there is no evidence that the present dispute is anything other than an isolated and aberrational dispute, not one upon which to predicate the reversal of a century-and-a-half-old conception of private property rights.

This Court has recognized the importance of maintaining the security of private property by "declar[ing] that stare decisis is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance." *Bott v Natural Resources Comm,* 415 Mich 45, 77-78; 327 NW2d 838 (1982). In *Bott,* we noted that "[j]udicial 'rules of property' create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital." *Id.* at 78. Therefore, such rules should be closely respected and overturned only for "the very best of reasons." See, e.g., *Dolby v State Hwy Comm'r*, 283 Mich 609, 615; 278 NW 694 (1938); *Lewis v Sheldon*, 103 Mich 102, 103; 61 NW 269 (1894).

The public's right to use property abutting the Great Lakes under the public trust doctrine has traditionally been limited to "submerged lands," i.e., those lands covered by the Great Lakes, including their wet sands. The "water's edge" is that point at which wet sands give way to dry sands, thus marking the limit of the public's rights under the public trust doctrine. This has been

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Coalition, Inc at 9 ("[t]hat the water's edge was the boundary between public and [littoral] ownership was first suggested in [*La Plaisance*]"); amici brief of the legislators at 4 (arguing that numerous Michigan cases establish that littoral owners "have *title* to their property to the water's edge, free of any public trust interest in the submerged lands of the Great Lakes"); and amicus brief of the Defenders of Property Rights at 12 (noting that in the past sixty-four years, this Court has rejected any attempt to expand public rights to areas landward of the water's edge).

the rule in our state since this Court's decision in *Hilt v Weber*, 252 Mich 198; 233 NW 159 (1930), a case that for seventy-five years has defined the limits of the public's rights of use of littoral property.[4] Indeed, except for the seven-year period immediately preceding *Hilt*, this water's edge principle is consistent with Michigan case law dating back over 160 years and probably even earlier. Lakefront property owners, including businesses,[5] have invested in reliance on present rules concerning the relationship between the public and lakefront property owners. This reliance on longstanding rules should have given the majority considerable pause before it altered the status quo and redefined the public trust doctrine.

This is not the first time this Court has upset settled rules of property on the Great Lakes, but the lessons of the first time do not seem to have been well-learned by the majority. Before the 1920s, property owners be-

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[4] As noted by the majority, "[o]ur case law has not always precisely distinguished" between the terms "littoral" and "riparian." *Ante* at 672 n 1. The former applies to oceans, seas, the Great Lakes, and their coasts, while the latter applies to rivers and streams. Black's Law Dictionary (7th ed). Unfortunately, the misuse of these terms appears at times to have led this Court to misapply aspects of the public trust doctrine as they relate to rivers and streams as if those aspects also related to the Great Lakes. See, e.g., *Peterman v Dep't of Natural Resources*, 446 Mich 177, 195; 521 NW2d 499 (1994). I will use the term "littoral" when discussing property abutting the Great Lakes.

[5] In particular, the consequences of the majority's new rules are uncertain for those in the tourism industry in Michigan who have invested in reliance on the rule set forth in *Hilt.* The majority, in using the "ordinary high water mark" as "defined" under Wisconsin law, has opened to public use unsubmerged lands up to a wholly unspecified point landward of the water and this change would seem to have implications for the ability of at least some Great Lakes tourists to enjoy the type of tranquil retreat offered by private beaches within Michigan. See, generally, the amici brief of the Michigan Chamber of Commerce, National Federation of Independent Business Legal Foundation, Michigan Bankers Association, and Michigan Hotel, Motel & Resort Association.

lieved that their title extended to the water's edge. Steinberg, *God's terminus: Boundaries, nature, and property on the Michigan shore*, 37 Am J Legal Hist 65, 72 (1993). However, in the *Kavanaugh* cases,[6] this Court abruptly overruled eighty years of then-existing case law and held that a littoral owner's title extended only to the "meander line," a survey line used by the federal government to determine the amount of property available for sale in the Michigan Territory.[7] While this Court recognized at the time that this decision was "against the overwhelming weight of authority,"[8] unlike the majority's decision today, it was at least arguably grounded in dictum from a prior Michigan decision.[9] Nevertheless, by deviating from an established rule of property rights in favor of establishing a boundary at an imaginary line that property owners could not easily identify, the *Kavanaugh* cases threw Michigan's lakeshores into disarray. For example, renters of property between the meander line and the water's edge withheld their rent and in fact were advised to do so by the director of the Department of Conservation. *Id.* at 77-78. Further, littoral owners found that third parties were building on property between the meander line and the water's edge, thus effectively blocking their access to the lake. Other littoral owners were forced to hire surveyors in order to determine with any certainty what property they actually owned. The chaos caused

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[6] *Kavanaugh v Rabior*, 222 Mich 68; 192 NW 623 (1923), and *Kavanaugh v Baird*, 241 Mich 240; 217 NW 2 (1928).

[7] *Hilt*, *supra* at 204-205.

[8] *Baird*, *supra* at 252.

[9] In *Ainsworth v Munoskong Hunting & Fishing Club,* 159 Mich 61, 64; 123 NW 802 (1909), we stated that "[littoral] owners along the Great Lakes own only to the meander line . . . ." Later, however, in *Hilt, supra* at 207, we noted that in *Ainsworth*, the meander line and water's edge were the same on the bay in question.

by the departure from the traditional rule in the *Kavanaugh* cases was so dramatic that just seven years later this Court corrected its error and reestablished the rules of property as they had existed on the Great Lakes for at least the prior eighty years. *Hilt, supra* at 227.

The majority today revamps the public trust doctrine on the basis of *Wisconsin* law— or at least on the portions of it that the majority finds to their liking— and, in so doing, announces new rules of law regarding lands subject to the public trust doctrine. Because I believe that the public's rights under the doctrine have always been limited to the use of submerged lands, which includes the wet sands, I do not believe that the Court of Appeals erred in holding that the public may not walk on unsubmerged lands. However, I do believe the Court of Appeals erred in holding that the state's title begins at the "ordinary high water mark." Therefore, I would affirm in part and reverse in part the decision of the Court of Appeals and remand to the trial court to apply the principles set forth in this opinion.

I. MISUNDERSTANDING THE "ORDINARY HIGH WATER MARK"

The majority concludes that the "ordinary high water mark" is the landward boundary of the public trust doctrine.[10] While the majority does not necessarily disagree that the water's edge serves as the boundary of

[10] The majority also creates a new rhetorical formulation for the test determining whether a use is permitted by the public trust doctrine, although I fail to see any significant distinction between a use that is "inherent in the exercise of traditionally protected public rights," *ante* at 695, and a use that bears "a real and substantial relation to a paramount trust purpose." *Hilt, supra* at 225. I agree with the majority that beach-walking is a permissible public trust use. Walking in submerged

the littoral owner's title, it would expand the public's legal right to use property up to the utterly indiscernible " 'point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.' " *Ante* at 691 (citation omitted). The majority further adds that this newly described "ordinary high water mark," one never before seen in Michigan, includes unsubmerged lands that are the product of "fluctuation" in the level of the lake that "results in temporary exposure of land that may then remain exposed above where water currently lies." *Id*. I disagree. The majority replaces a workable and easily identifiable boundary with one whose exact location is anyone's guess and it has done so on the basis of the *Wisconsin* public trust doctrine, or at least that part of Wisconsin's doctrine that supports the majority's new rule.[11] Instead, I believe that the public's entitlement to use property under the public trust doctrine of Michigan is limited to submerged lands, i.e., the Great Lakes and their wet sands.

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lands is an activity that bears a "necessary and substantial relation" to other water-borne recreational activities protected by the doctrine, e.g., boating, swimming, and fishing.

[11] Curiously, the majority adopts Wisconsin law in this area, despite the fact that Wisconsin's 820 miles of Great Lakes shoreline is dwarfed by the 3,288 miles of shoreline in this state. <http://www.michigan.gov/deq/0,1607,7-135-3313_3677-15959--,00.html> (accessed June 24, 2005). Nonetheless, the critical point is not whether it is the law of a state with a longer or shorter shoreline than Michigan's that has been adopted by the majority. Rather, it is why *any* new law has been adopted when current law has proven workable for many decades of our state— clearly setting forth the rights of the public and the property owner, minimizing litigation, and simultaneously protecting private property rights while allowing reasonable public use of the Great Lakes, including beach-walking.

The majority's creation of this new rule is rooted in its misunderstanding of the importance of the "ordinary high water mark" for the purpose of defining the boundary of the public trust on the nontidal Great Lakes. The public trust doctrine in the United States is derived from the English common law, which extended to tidal land below the ordinary high water mark. *Borax Consolidated, Ltd v Los Angeles*, 296 US 10, 23; 56 S Ct 23; 80 L Ed 9 (1935). The rights protected by the English common law included use of tidal lands up to the ordinary high water mark for "navigation and commerce . . . and for the purposes of fishing . . . ." *Shively v Bowlby*, 152 US 1, 11; 14 S Ct 548; 38 L Ed 331 (1894).

Following the American Revolution, the title held for the public trust by the King passed to the states, subject only to those rights surrendered by the states to the federal government. *Id.* at 14-15. While each state is required to protect the uses permitted by the public trust doctrine, *Illinois Central R Co v Illinois,* 146 US 387, 453; 13 S Ct 110; 36 L Ed 1018 (1892) *(Illinois Central I)*, the scope of property subject to that trust is governed by "the local laws of the several States . . . ."[12] *Shively, supra* at 40. Thus, it cannot be said that the

[12] The majority also notes that in *Illinois Central R Co v Chicago*, 176 US 646, 660; 20 S Ct 509; 44 L Ed 622 (1900) (*Illinois Central II*), the United States Supreme Court found that "a grant of lands by the State does not pass title to submerged lands below high-water mark . . . ." However, as stated in *Shively,* the scope of lands subject to the public trust is determined by state law. In determining the scope of the trust doctrine in *Illinois Central II*, the United States Supreme Court looked to "the law of the State of Illinois, as laid down by the Supreme Court . . . ." *Id.* at 659. In finding that Illinois's title went to the high water mark, the point emphasized by the majority, the United States Supreme Court cited Illinois case law directly. *Id.* at 660, citing *Seaman v Smith*, 24 Ill 521 (1860), *People ex rel Attorney General v Kirk*, 162 Ill 138, 146; 45 NE 830 (1896), and *Revell v People*, 177 Ill 468, 479; 52 NE 1052 (1898). Because *Illinois Central II* applied Illinois law, its holding regarding the scope of

American public trust doctrine uniformly extends to the "ordinary high water mark." *Id.* While a majority of the original thirteen colonies followed the English common-law rule, *Shively* noted that four of the original colonies held that the littoral owner holds title to the "low water mark," subject only to the public's right to use the water for navigation and fishing when it is above that point. *Id.* at 18-25.[13] For example, in *Commonwealth v Alger*, 61 Mass 53, 70 (1851), the Supreme Court of Massachusetts held, under the "local laws" of that state,[14] a littoral owner's title extends to the low water mark. However, the littoral owner's title is limited because "whilst [lands above the low water mark] are covered with the sea, all other persons have the right to use them for the ordinary purposes of navigation." *Id.* at 74-75. In other words, the public's rights under the public trust doctrine are limited to the use of property that is *currently* submerged. Thus, the public trust doctrine as defined in the "low water mark" colonies restricts the public's right of use to either land below

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lands subject to the public trust doctrine is not binding on this Court. Rather, the common law as developed in *this* state determines the scope of lands subject to the doctrine.

[13] Those states are: Massachusetts, *Shively, supra* at 18-19 (littoral owner takes title in fee to the low water mark "subject to the public rights of navigation and fishery"); New Hampshire, *id.* at 20 ("a right in the shore has been recognized to belong to the owner of the adjoining upland"); Pennsylvania, *id.* at 23 ("the owner of lands bounded by navigable water has the title in the soil between high and low water mark, subject to the public right of navigation"); and Virginia, *id.* at 24-25 ("the owner of land bounded by tide waters has the title to ordinary low water mark, and the right to build wharves, provided they do not obstruct navigation").

[14] As noted by the majority, *ante* at 701 n 31, Massachusetts adopted the low water mark by colonial ordinance. *Alger*, *supra* at 66. Thus, while obviously not directly applicable to the public trust doctrine in Michigan, *Alger* does make clear that the "ordinary high water mark" has not been as universally accepted as the majority apparently believes.

the low water mark or to such land as is currently covered by the waters of the ocean.[15]

Likewise, the "local laws" of Michigan did not adopt the English definition of public trust lands, but rather restricted the public's rights under the public trust doctrine to the use of submerged lands. In *La Plaisance Bay Harbor Co v Monroe City Council*, Walker Chancery Rep 155 (1843), the issue of public ownership of the Great Lakes was addressed for the first time by a Michigan court. In *La Plaisance*, the Court of Chancery addressed the state's right to improve navigation in Lake Erie. The Legislature had authorized the city of Monroe to build a canal connecting the River Raisin to the lake. The harbor company brought suit to enjoin the project, claiming that the canal would divert so much water from the river that its downriver warehouses would be rendered inaccessible by boat. However, the court held that the harbor company did not have a right to the flow of water in the river in its natural bed because "[t]he public owns the bed of this class of rivers, and is not limited in its right to an easement, or right of way only." *Id.* at 168. The court also noted that "with regard to our large lakes, or such parts of them as lie within the limits of the state[,] [t]he proprietor of the adjacent shore has no property whatever in the *land covered by the water of the lake*." *Id.* (emphasis added). Moreover, it should be noted that before *La Plaisance*, and before statehood, Michigan was part of the Northwest Territory, which was ceded to the United States by Virginia in 1784. Under Virginia law, a littoral owner held title to soil in tidewaters to the low water mark. *Shively*, *supra* at 24-25.

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[15] In light of the majority's reliance on Wisconsin law, it is interesting to note that the Wisconsin Supreme Court similarly held that the public's right to use submerged lands up to the high water mark is only applicable when the waters actually extend to such mark. *Doemel v Jantz*, 180 Wis 225, 236; 193 NW 393 (1923).

The understanding that the public's interest under the public trust doctrine is limited to the submerged lands of the Great Lakes was also expressed by Justice CHAMPLIN in his concurring opinion in *Lincoln v Davis*, 53 Mich 375; 19 NW 103 (1884). In *Lincoln*, a fisherman had placed stakes in Thunder Bay, off an island, in order to set some fishing nets. The island's owner removed the stakes, claiming that he had the exclusive right to fish in the waters off his island. The *Lincoln* majority, while not discussing the boundary between littoral property and public trust property, held that the owner had no right to interfere with the fisherman's stakes. Justice CHAMPLIN noted that "when [Michigan] was admitted into the Union this political jurisdiction devolved upon the State, and the title to the *soil under the navigable waters* of the Great Lakes became vested in the State as sovereign to the same extent and for the same reasons that the title of the bed of the sea was vested in the king." *Id.* at 384 (emphasis added). However, the state's title only extends to the "*low-water mark*." *Id.* at 384-385 (emphasis added). In fact, according to Justice CHAMPLIN, "The paramount rights of the public to be preserved are those of navigation and fishing, and this is best accomplished by limiting the grants of lands bordering on the Great Lakes to [the] low-water mark." *Id.* at 385-386.

The United States Supreme Court defined the scope of the public trust doctrine as applied to the submerged lands of the Great Lakes in *Illinois Central I, supra* at 437. In *Illinois Central I*, the Illinois legislature had granted the railroad title to one thousand acres of submerged land on Lake Michigan. Four years later, the Illinois legislature repealed this act and sought to quiet title to submerged lands. The Supreme Court held that "the State holds the title to the *lands under the navigable waters of Lake Michigan* . . . and that title neces-

sarily carries with it control over the waters above them whenever the lands are subjected to use." *Id.* at 452 (emphasis added). Because the state's public-trust title is a function of its sovereignty, the lands covered by the doctrine cannot be alienated, except when such alienation promotes the public use of them and the public use of the lands and waters remaining is not harmed. *Id.* at 452-453.

Just four years later, in *People v Silberwood*, 110 Mich 103, 107; 67 NW 1087 (1896), this Court seized upon the *Illinois Central I* explanation of the public trust doctrine to support its holding that the boundary between public trust lands and littoral lands is the low water mark. In *Silberwood,* the defendant was convicted of cutting submarine vegetation on Lake Erie. The defendant claimed that the owners of land lying adjacent to Lake Erie, including his employer who ordered removal of the vegetation, owned the land to the center of that Great Lake, subject to the rights of navigation. The Court, quoting *La Plaisance*, held that a littoral owner does not have any title in land covered by the Great Lakes. *Id.* at 106. The Court then noted that the *Illinois Central I* decision

> is in harmony with the doctrine laid down in the early case of *La Plaisance Bay Harbor Co.* v. *Council of City of Monroe*, which I do not think has ever been overruled in this State so far as it affects the rights of shore owners on the borders of the Great Lakes. This doctrine, too, is in harmony with the decisions in all of the States bordering on these great seas. [*Id.* at 108-109.]

Further, the Court noted that decisions of other Great Lakes states were in line with both *La Plaisance* and *Illinois Central I*:

> The decisions in New York (*Champlain, etc., R. Co.* v. *Valentine*, 19 Barb. 484 [NY Sup (1853)]), in Pennsylvania

(*Fulmer* v. *Williams*, 122 Pa. St. 191 [15 A 726 (1888)]), and in Ohio (*Sloan* v. *Biemiller*, 34 Ohio St. 492 [1878]), all hold that the fee of the [littoral] owner ceases at the low-water mark. [*Id.* at 107.]

This Court reaffirmed the principle that the public trust doctrine applies only to submerged lands in *People v Warner*, 116 Mich 228; 74 NW 705 (1898). At issue in *Warner* was ownership of a marshy island that was previously submerged under Saginaw Bay. The defendant claimed ownership of the marshy island as an accretion to his adjacent island. In placing the boundary at the water's edge, the Court stated:

> The depth of water upon *submerged land* is not important in determining the ownership. If the absence of tides upon the Lakes, or their trifling effect if they can be said to exist, practically makes high and low water mark identical for the purpose of determining boundaries (a point we do not pass upon), the limit of private ownership is thereby marked. The adjoining proprietor's fee stops there, and there that of the State begins, whether the water be deep or shallow, and although it be grown up to aquatic plants, and although it be unfit for navigation. The right of navigation is not the only interest that the public, as contradistinguished from the State, has in these waters. It has also the right to pursue and take fish and wild fowl, which abound in such places; and the act cited has attempted to extend this right over the lands belonging to the State adjoining that portion of the water known to be adapted to their sustenance and increase. [*Id.* at 239 (emphasis added).][16]

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[16] The majority claims that when read "in context," *Warner* does not recognize "a single boundary between the riparian owner's title and state control . . . ." *Ante* at 688 n 16. Specifically, the "context" relied upon by the majority is *Warner's* distinction between the state's and the public's interests in submerged lands. However, there is no context under which *Warner* can reasonably be read to support the majority's new rule of law. The passage cited by the majority comes directly after this Court's holding that the state holds title to all submerged lands, regardless of navigability. In justifying the state's title to lands "unfit for navigation,"

The Court found that a connection between the marshy island and the defendant's island, which existed during times of low water, raised an issue of material fact. If the connection was evidence that land washed up against the defendant's island and that eventually caused the marshy island to rise from the water, then the defendant held title to such land by accretion. However, if the island arose from the water first and only then began to extend towards the defendant's island, then title belonged to the state. In any case, the Court held that summary disposition was inappropriate and remanded the case for a new trial.

One of the most thorough opinions addressing the public trust doctrine was Justice HOOKER's concurring opinion in *State v Lake St Clair Fishing & Shooting Club*, 127 Mich 580; 87 NW 117 (1901).[17] Justice HOOKER began his analysis by noting that the "title that Michigan took when it was admitted to the Union in 1836 is not limited to water sufficiently deep to float craft, but extends to the point where it joins the ground of the [littoral] owner, 'whether the water be deep or shallow, and although it be grown up to aquatic plants

Warner notes that the public has interests in those submerged lands above and beyond a navigational interest, i.e., "the right to pursue and take fish and wild fowl . . . ." Further, in an opinion replete with novel concepts of law, perhaps the most creative statement by the majority is that somehow the phrase "[t]he adjoining proprietor's fee *stops there* [i.e., where the water is], and *there* that of the State *begins*" does not represent a single boundary. If the state's title *begins* at the point where the adjoining proprietor's title *ends*, there can only be one boundary and, therefore, there cannot be an overlapping of titles as suggested by the majority. Accordingly, and despite the majority's claims to the contrary, this Court has explicitly "enshrined" a solitary boundary between littoral lands and public trust lands for at least 107 years.

[17] Justice HOOKER's analysis of the public trust doctrine was subsequently cited with approval by the unanimous opinion of this Court in *State v Venice of America Land Co*, 160 Mich 680, 702; 125 NW 770 (1910).

and unfit for navigation.' " *Id.* at 586, quoting *Warner, supra* at 239. Likewise, the title of the abutting littoral owner extends to the shoreline. *Fishing & Shooting Club, supra* at 587. Thus, "when the water in the lakes stands at *low-water mark,* . . . the title [is] in the State, and all land between low-water mark and the meander line belongs to the abutting proprietor . . . ." *Id.* at 590 (emphasis added).

The common-law limitation of the scope of the public trust doctrine was reaffirmed by this Court in *Hilt*. In overruling the short-lived *Kavanaugh* cases, we held that "the purchaser from the government of public land on the Great Lakes took title to the water's edge." *Hilt, supra* at 206. We also noted that the waters of our Great Lakes commonly change the landscape surrounding them, by erosion or deposits made by the water, in a gradual and imperceptible manner. *Id.* at 219. In order to account for this constant change, the title of a littoral owner "follows the shore line under what has been graphically called 'a movable freehold.' " *Id.* (citation omitted). The title to land above the water's edge is " 'independent of the law governing the title in the soil covered by the water.' " *Id.,* quoting *Shively, supra* at 35.[18]

To summarize, under the common law as it has developed in Michigan, when the water is at a low point, the state holds title to the submerged land, including the wet sands, while title to unsubmerged land is in the littoral owner. *Warner, supra*; *Fishing & Shooting Club, supra.* As the water level rises, the public gains the right to use the entire surface of the lake up to the

[18] *Hilt* also noted that to hold otherwise would effectively cut the littoral owner off from the water, thereby destroying the very characteristic that defines property as "littoral"— its contact with the water. *Hilt, supra* at 219.

water's edge—the point at which wet sands give way to dry sands—for public trust purposes. *Hilt, supra*; *Warner, supra*. Likewise, the littoral owner's title follows the rise and fall of the waters.[19] *Id.* Accordingly, the boundary of the littoral owner's title is the most landward of either the "low water mark" or the current location of the water itself.[20] The state's public trust

[19] The majority misstates my position as "granting littoral landowners all property down to where unsubmerged land ends, which [I] locate[] at the water's edge, regardless of the terms of landowners' deeds." *Ante* at 699-700. There is no basis for this statement. The characteristic that defines property as "littoral" is its contact with the water. *Hilt, supra* at 219. In other words, a property owner whose deed does not extend to the water's edge is not a littoral owner and, therefore, would have no more rights in unsubmerged property than any other member of the public. Obviously, a property owner is only a littoral owner if the deed gives title to the water's edge, however the "water's edge" may be described. For example, in the instant case, defendants' deed states that the "meander line of Lake Huron" forms part of the boundary of their property. As we held in *Farabaugh v Rhode*, 305 Mich 234, 242; 9 NW2d 562 (1943), "the meander line of Lake Michigan is a line of description and not one of boundary and that one owning to such meander line owns to the water's edge subject to accretion and reliction unless a contrary intention is expressed in the conveyance." There is no evidence of a contrary intention in this case and, therefore, defendants hold title to the water's edge.

[20] The majority notes that this Court has identified "some ambiguity regarding whether the high or low water mark serves as the boundary of the public trust." *Ante* at 687, citing *People, ex rel Director of Conservation v Broedell*, 365 Mich 201, 205-206; 112 NW2d 517 (1961). *Broedell* cited two cases with "language seemingly favorable to the high-water-mark theory." *Id.* at 206. One of those cases, *Collins v Gerhardt,* 237 Mich 38; 211 NW 115 (1926), defined the public trust doctrine as it applies to *rivers*. The other case, *Venice of America Land Co*, *supra* at 702, discussed the location of a certain island at the time of statehood. If the island was completely submerged at statehood and only afterwards arose out of Lake St. Clair, then the island belonged to the state. See, e.g., *Warner, supra*. The Court noted that, during periods of high water, the island at issue was completely submerged. According to the Court, Lake St. Clair experienced one such period of high water in 1837-1838. Therefore, because the island was submerged land at the time of statehood and only arose out of the water afterwards, title to such property was in the state.

title, then, "begins [where the water is], whether the water be deep or shallow . . . ." *Warner, supra* at 239.[21]

In rejecting this understanding, the majority's opinion virtually ignores 162 years of case law, and instead simply announces that "Michigan's courts have adopted the ordinary high water mark as the landward boundary of the public trust" doctrine. *Ante* at 638. Thus, according to the majority, unsubmerged land up to the "high water mark" remains subject to the trust. To support its assertion, the majority cites with approval this Court's holding in *Peterman v Dep't of Natural Resources*, 446 Mich 177, 198-199; 521 NW2d 499 (1994). In doing so, the majority fails to acknowledge that *Peterman* did not address the public's right to use property under the public trust doctrine at all,[22] but rather addressed the *state's* right to improve navigation under the navigational servitude.[23] We began our

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Id. Further, *Venice of America Land Co* expressly adopted Justice HOOKER's concurring opinion from *Fishing & Shooting Club*. As argued earlier, Justice HOOKER found that the boundary between a littoral owner's property and property held by the state in trust is the low water mark, at least at times of low water.

[21] The majority has interpreted the "water's edge" principle as creating a "universal line along the Great Lakes . . . ." *Ante* at 0. However, the water's edge is not a "universal line," but rather a dynamic boundary that moves as the waters of the Great Lakes move.

[22] Even if *Peterman* did apply in the public trust context— which it does not— an examination of its holding indicates a definition of the public trust doctrine far more in line with "low water mark" cases such as *Alger* than with the "high water mark" cases cited by the majority.

[23] The majority argues that this decision "relied not simply on a 'navigational servitude' unique to that case, but rooted that 'navigational servitude' in the public trust doctrine." *Ante* at 649-650 n 15. However, *Peterman* specifically states that "plaintiffs' [littoral] rights are subject to the navigational servitude retained by the State of Michigan." *Peterman, supra* at 193-194. *Peterman* does not state that littoral rights are subordinate to the right to fish and hunt or the right to walk. Rather, the Court limited its holding to the *state's* right to improve navigation.

analysis in *Peterman* by affirming that the " 'title of the [littoral] owner follows the shore line under what has been graphically called "a moveable freehold." ' " *Id.* at 192, quoting *Hilt, supra* at 219. However, we also found that such title is not absolute. Rather, the state retains a navigational servitude on unsubmerged property landward of the water's edge that may again become submerged during periods of high water.[24] In order to accommodate both the rights of the littoral owner and the potential use of unsubmerged land for navigation, we determined that the littoral owner's title is "a limited title . . . that is subject to the power of the state to improve *navigation*." *Peterman, supra* at 195 (emphasis added). That is, the state has the right to *regulate* this unsubmerged land to ensure that the littoral owner does not interfere with the public's future right to use the land for navigational purposes when it again becomes covered by the waters of the Great Lakes. Also, the state has the right to take this unsubmerged land or otherwise take action inconsistent with the owner's littoral rights without giving due compensation to the littoral owner when it is necessary to make navigational improvements or when the taking possesses an "essential nexus" to navigation. *Id.* at 201. However, just as in *Alger,* the public may only *use* the land in question for navigational purposes[25] *when the land is covered by the waters of the Great Lakes.*

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[24] The federal government also retains a navigational servitude on the Great Lakes and the lands beneath them.

[25] We have recognized fishing as an incident of the navigational servitude in inland rivers and lakes. *Collins, supra* at 48-49. In *Collins*, we noted that the right to fish was limited to the stream itself and that "in exercising this right people cannot go upon the uplands of riparian owners in order to gain access to the water. If they do that they are guilty of trespass." *Id.* at 49. See also *Bott, supra* at 64-65, in which the servitude was further limited.

Because the majority misapprehends the nature of this limited title, it has misconstrued the importance of the "ordinary high water mark" as it is described in *Peterman*. While recognizing the state's right to improve navigation, we also sought to limit the property that could be adversely affected by such improvements. To determine the scope of this limitation, we examined former MCL 281.952, which was part of the Inland Lakes and Streams Act, as well as cases defining the scope of the public trust doctrine on rivers, including *Grand Rapids Booming Co v Jarvis*, 30 Mich 308, 318-321 (1874) (holding that the public right of navigation was confined to the stream itself and that its boundary was the line of ordinary high water), and *Hall v Alford*, 114 Mich 165, 167-168; 72 NW 137 (1897) (noting that land alongside a river above the high water line could not be taken without just compensation and due process). On the basis of our review of these authorities, we determined that " 'the limit of the public's right is the ordinary high water mark of the river.[26] This means that the ownership of fast land[27] is unqualified and not burdened with [the state's right to improve navigation].' " *Peterman, supra* at 198 (citation omitted). Applying this rule of rivers to the Great Lakes, we held that destruction of the littoral owner's

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[26] We adopted the definition of "ordinary high water mark" from the Inland Lakes and Streams Act, former MCL 281.952(h). *Peterman, supra* at 198 n 29. That statute defined the mark as,

> the line between upland and bottomland which persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the surface of the soil, and the vegetation.

[27] "Fast land" is "property that is 'above the high-water mark of' the stream, river, or other body of water that abuts the property." *Peterman, supra* at 181 n 4, quoting 26 Am Jur 2d, Eminent Domain, § 192, p 873.

property above the "ordinary high water mark" was "an unconstitutional taking of property without due process and just compensation."[28] *Id.* at 200.

Thus, contrary to the claims of the majority, *Peterman* did not alter the rule of *Warner* and *Hilt* that the public's right to use property under the public trust doctrine is limited to submerged lands. Rather, the "ordinary high water mark" is simply the outside edge of property that may either be regulated to preserve future navigational interests at times of high water or taken without compensation for navigational improvements. *Id.* at 202. The majority fails to recognize that this Court's holding applied only to the "public's rights" under the *navigational servitude*. As a result, the majority unwarrantedly expands the scope of our holding in *Peterman* to create new rights under the public trust doctrine, rights that were never contemplated in that case.

II. MISDEFINITION OF LANDS WITHIN THE PUBLIC TRUST DOCTRINE

Even if the majority were correct in its understanding of the "ordinary high water mark," which for the

[28] The plaintiffs' recovery in *Peterman* was not limited to compensation for the damage done to the fast lands. We also concluded:

> While generally the navigational trust permits the state to improve waterways without compensating for nonfast lands, the trust does not grant blanket authority to destroy private property— the loss of the property must be necessary or possess an essential nexus to the navigational improvement in question. In the instant case, no essential nexus existed between the construction of the boat launch and the utter destruction of plaintiffs' beach. The taking of the property served no public interest because the ramp could have been built without destroying plaintiffs' property. Thus, we affirm the trial court's award of damages for the loss of plaintiffs' property [i.e., the property below the "ordinary high water mark"]. [*Id.* at 201-202.]

reasons set forth I do not believe it to be, its definition of lands encompassed by the public trust doctrine is inconsistent with both the common-law scope of the public trust doctrine and the realities of the Great Lakes. The majority does not apply Michigan law, but instead, without analysis or explanation, summarily adopts Wisconsin's definition of the "ordinary high water mark," which it derives from a case involving a Wisconsin *river*. Further, while the majority admits that the "ordinary high water mark" is a term used to define the scope of the public trust doctrine in tidal waters, it fails to account for the fact that the Great Lakes have no true scientific low and high water marks as exist on the seashore. Even given the majority's attempt to graft this tidal-based term upon the nontidal Great Lakes, its definition bears little resemblance to the common-law standard. In creating a new definition of "ordinary high water mark" based on the portions of the common law of Wisconsin it finds amenable, the majority fails to provide either lakefront property owners or the public with the slightest guidance in understanding the lands in which the new rights granted to the public may be exercised.

The majority defines the "ordinary high water mark" as " 'the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.' "[29] *Ante* at 691, quoting *Diana Shooting Club*

[29] The majority concludes that the boundary of the public trust doctrine is the "ordinary high water mark" because the "lake has not permanently receded from that point and may yet again assert its influence up to that point." *Ante* at 691. Does the majority mean that the public has access to a littoral owner's property that, although currently dry, has been wet at some point in the past and *may* again be wet some day in the future? If so, what is the relevant time frame to determine if

v Husting, 156 Wis 261, 272; 145 NW 816 (1914). This definition is derived from a State of Wisconsin case involving that state's public trust doctrine as it applies to an *inland river*. Why this court now finds it necessary to abandon Michigan common law and replace it with Wisconsin's common law, or at least those portions the majority finds persuasive, is not explained. As the United States Supreme Court noted in *Shively, supra* at 26, the determination of what lands fall within the scope of the public trust doctrine is different in each state. After reviewing the laws of several states, that Court remarked

> that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. *Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.* [*Id.* (emphasis added).]

The majority has failed to pay heed to the United States Supreme Court's advice in this matter. The majority has also failed to examine the Wisconsin public trust doctrine in order to determine whether the policy reasons underlying the majority's adoption of the Wisconsin understanding of the "ordinary high water mark" is even compatible with *Michigan's* "views of justice and policy . . . ." *Id.* Rather than conduct such a review, the majority concludes that this definition is apt

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the water has permanently receded or not? Is it a day? Or a month? Or a year? Or a decade? Or since statehood? Or since the retreat of the glaciers 14,000 years ago? The majority does not say. Further, how is a member of the public or a property owner to ascertain whether lands in question "may yet again" become submerged? Again, the majority does not say.

because it "has served another Great Lakes state for some hundred years and is in accord with the term's limited development in our own state." *Ante* at 693.[30]

However, even a cursory review of the Wisconsin cases cited by the majority suggests a rule more in line with the decision of our Court of Appeals—a decision unanimously rejected by this Court—than the rule favored by the majority. In *Diana Shooting Club*, a hunter had floated his boat into an area overgrown by vegetation for the purpose of shooting wild ducks. The riparian owner claimed that, pursuant to its ownership of the soil beneath the river, the members of its organization had the exclusive right to hunt in those waters. The Wisconsin Supreme Court recognized the riparian owner's title in the soil beneath the river, but also found that the waters themselves "should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation." *Diana Shooting Club, supra* at 271. It ultimately held that:

> Hunting on navigable waters is lawful *when it is confined strictly to such waters* while they are in a navigable stage, and between the boundaries of ordinary high water marks. When so confined it is immaterial what the character of the stream or water is. It may be deep or shallow, clear or covered with aquatic vegetation. By ordinary highwater mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. [*Id.* at 272 (emphasis added).]

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[30] While the *Diana Shooting Club* definition has been used by Wisconsin for nearly one hundred years, the initial express definition of the water's edge principle in *Warner* predates the *Diana Shooting Club* rule by sixteen years.

Thus, unlike the majority, *Diana Shooting Club* restricted public trust activity to the *waters themselves*. Indeed, the Wisconsin Supreme Court confirmed this interpretation in *Doemel v Jantz*, 180 Wis 225, 236; 193 NW 393 (1923), noting that:

> What was said in the *Diana Shooting Club Case* on the subject of the rights of a hunter to pursue his game up to the ordinary high-water mark, merely affirmed the public right to pursue the sport of hunting to the ordinary high-water mark of a navigable river while the waters of the river actually extended to such mark.[31]

The Wisconsin Supreme Court later suggested that the *Diana Shooting Club's* definition of the ordinary high water mark also applied to the Great Lakes. *State v Trudeau*, 139 Wis 2d 91; 408 NW2d 337 (1987).[32] In *Trudeau*, a littoral owner along Lake Superior sought to build condominiums within an area below the "ordinary high water mark" of Lake Superior. The littoral owner argued that the area in question was not navigable and, therefore, he was entitled to use the lake bed. The Wisconsin Supreme Court disagreed, reasoning that the state's interest extended to the "ordinary high water mark" of Lake Superior. *Id.* at 103. In discussing the

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[31] *Doemel* addressed the public trust doctrine as it applied to inland lakes. Interestingly, while the majority claims that a case applying the public trust to rivers is perfectly legitimate to apply in the littoral context, it concludes that *Doemel* is inapplicable, presumably because it applies to an inland lake.

[32] The majority observes that its new definition was also invoked in a footnote by the Wisconsin Supreme Court in *R W Docks & Slips v State*, 244 Wis 2d 497, 510 n 2; 628 NW2d 781 (2001) (citing *Trudeau, supra*, for the definition). *Ante* at 692. However, the *R W Docks* case involved a claimed regulatory taking, based on Wisconsin's refusal to issue a dredging permit. The location of the ordinary high water mark was not at issue and the case did not involve a question of public access to land within the public trust. Thus, the majority apparently is basing its new rule on mere *dictum* from the decision of another state's Supreme Court.

"ordinary high water mark," the court cited with approval the definition from *Diana Shooting Club*. However, the court's ultimate disposition in that case was to remand "for findings concerning those portions of the site higher than 602 feet [above sea level, according to the International Great Lakes Datum], the [ordinary high water mark] of Lake Superior." *Id.* at 110. Thus, *Trudeau* held that the "ordinary high water mark" is defined by the International Great Lakes Datum (IGLD) level—the very standard that has been unanimously rejected by the justices of this Court.[33]

To summarize, none of the few Wisconsin cases cited by the majority addresses the issue of whether the public has a right to use currently unsubmerged land below the "ordinary high water mark" for public trust purposes. Indeed, the Wisconsin public trust doctrine specifically limits the public's use of submerged lands to when those lands are covered by the waters themselves. In addition, to the extent that the majority believes that *Trudeau* makes the *Diana Shooting Club* definition applicable to the Great Lakes, the majority fails to note that *Trudeau* adopted the IGLD definition of the "ordinary high water mark" on the Great Lakes. *Trudeau,*

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[33] The majority, apparently recognizing the vagueness of its definition of the "ordinary high water mark," observes, "the precise location of the ordinary high water mark at any given site on the shores of our Great Lakes remains a question of fact." *Ante* at 694. While the majority again cites *Trudeau* as an example of how such a "question of fact" can be answered, *ante* at 692 n 20, it neglects to note that *Trudeau* adopted the International Great Lakes Datum (IGLD) definition of ordinary high water mark. *Trudeau, supra* at 110. However, the majority has held that the Great Lakes Submerged Lands Act (GLSLA), which also uses that datum, is *not* dispositive in defining the landward boundary of the public trust. *Ante* at 681-685. Does the majority mean to suggest that, despite this Court's holding that the GLSLA is not dispositive, the IGLD is still relevant in determining the location of the ordinary high water mark for public trust purposes in this state? The majority does not say.

supra at 110. In determining the location of the "ordinary high water mark," *Trudeau* specifically relied on the following evidence:

> The DNR's area water management specialist, Richard Knitter, testified that he determined the lake's OHWM [ordinary high water mark] approximately one-half mile from the site at a protected location with a clear erosion line that was free from excessive wave action. Knitter then determined that this site's elevation was 602 feet I.G.L.D. He transferred the elevation of the OHWM site to a number of points at the project site and concluded that approximately half of the site was below Lake Superior's OHWM. The developers' surveyor did not determine the OHWM of the site or Lake Superior. [*Id.* at 106-107.]

The court concluded that "[a]ny part of the site at or below 602 feet I.G.L.D. is within the OHWM of Lake Superior and is therefore protected lake-bed upon which building is prohibited." *Id.* at 109. The presence of this single, clear definition stands in stark contrast to the vague and ever-changing, "fact-specific," "ordinary high water mark" newly promulgated by the majority. In contrast to the Wisconsin Supreme Court, this Court expends its energies explaining why our Great Lakes Submerged Lands Act (GLSLA), MCL 324.32501 *et seq.*, which relies upon the IGLD, is *not* dispositive in defining the landward boundary of the public trust. *Ante* at 681-685.

In stating that "we are persuaded to adopt [the *Diana Shooting Club* definition of "ordinary high water mark"] to clarify a term long used but little defined in our jurisprudence," *ante* at 692, the majority adopts the law of another state, without much explanation as to why that law has been chosen from among the laws of the fifty states or, even more significantly, why the law of *any* other state is seen as necessary to replace the long-settled law of Michigan. Further, the majority

adopts only a part of the law of that other state, again without much explanation as to why it has chosen to adopt only parts of that other state's law. Finally, to compound this inexplicable process, the majority fails to accord significant consideration to the manner in which the courts of the other state have interpreted its own law, misconstruing in the process even the few decisions to which it gives consideration.

Even absent the differences between Wisconsin and Michigan law, the *Diana Shooting Club* standard was derived from the very different context of *riparian* property.[34] Undeterred, the majority simply utilizes this standard without explanation of how it should be modified for application on the Great Lakes. The result is a definition that is doubly vague, because the majority not only fails to explain what kind of "distinct mark" is considered to be so "easily recognizable" that it can be allowed to determine the limits of the public trust, but it also fails to provide any time frame for determining how "continuous" the "presence and action of the water" must be in order to leave such a mark. The majority fails to define either of these terms in a manner that will enable the public or property owners to determine which lands are within the public trust. What kind of "distinct mark" is sufficiently "recognizable" to bring unsubmerged land within the scope of the

[34] The majority observes that the *Diana Shooting Club* definition is not "far removed from meanings previously recognized in Michigan." *Ante* at 692. In support, the majority cites MCL 324.30101(i), a part of the current version of the former Inland Lakes and Streams Act. However, the majority fails to acknowledge that this statute *expressly states* that it does not apply to the Great Lakes. MCL 324.30101(f). I also assume that the majority in characterizing its definition as "not far removed" from another definition— that which, in fact, has *been* the law of Michigan— is acknowledging, albeit euphemistically, that it is adopting a new rule. The majority alternates between the adoption of new rules and disclaiming that it has adopted such new rules.

public trust? Since it cannot be that point at which wet sands give way to dry sands—the majority having rejected the position of this dissent—is this "distinct mark" a function of where the waves have deposited seashells? Is it a function of where debris has been washed ashore? Is it a function of where some line of vegetation can be identified? Or is it a function of where sand castles are no longer standing? The majority does not say. Moreover, even if the public or the property owner could discern the relevant "distinct mark," how would such persons determine how "continuous" the "presence and action of the water" has been— or indeed must be— in leaving such a mark. It cannot be limited to the "current ebb and flow of the waves," as that too is the position of this dissent which the majority rejects. How continuous then is "continuous"? Is it a month, a season, a year, a century, or an epoch? Again, the majority does not say.

Moreover, the majority would apparently expand public access to private littoral lands even *beyond* its new definition of the "ordinary high water mark." The majority states, " 'where the bank or shore at any particular place is of such a character that it is impossible or *difficult* to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.' " *Ante* at 691, quoting *Diana Shooting Club, supra* at 272 (emphasis added). Does the majority intend by this to say that the public may now cross onto private littoral property in order to determine *where* the new "ordinary high water mark" lies? If so, the public would seem to have access to such property even beyond the "ordinary high water mark." The only apparent limitation on the public's right of access is that the "ordinary high water mark"

must be "difficult" to ascertain. Given that under the majority's new definition the "ordinary high water mark" will never be anything *other* than difficult to ascertain—and, as the majority admits, will generally constitute a "question of fact" *ante* at 694—there appears to be considerable potential for access by the public upon private littoral lands even beyond the "ordinary high water mark." Still, the majority is indisposed to answer any of the questions that are most dispositive in determining where private and public rights begin and end. In eventual course, these questions, so indispensable to the determination of individual property rights, will have to be addressed by the Department of Natural Resources (DNR) with virtually no guidance from this Court.

In leaving such questions to the DNR, the majority adopts the premises of administrative law in the very different realm of property law, by defining critical questions of property rights not in well-understood terms that conduce toward specific boundaries, but in language drawn from the modern administrative process in which vague and empty terms are given meaning by regulatory agencies, such as the DNR, with subsequent deferential review by the courts. This is a prescription for uncertainty, and uncertainty is a prescription for litigation, and the majority with its eyes wide open has chosen to give Michigan both.

Further, the majority's inclusion of unsubmerged lands within the public trust because "the lake has not permanently receded from that point and may yet again exert its influence up to that point," *ante* at 691, conflicts with the traditional common-law definition of the public trust doctrine. At common law, the high water mark was defined as " 'the line of the medium

high tide between the springs and the neaps.[35] All land below that line is more often than not covered at high water, and so may justly be said, in the language of Lord Hale, to be covered by the ordinary flux of the sea.' " *Borax Consolidated, supra* at 25, quoting *Attorney-General v Chambers*, 4 De G M & G 206, 217; 43 Eng Rep 486 (1854).[36] High tides move with the moon as it revolves around the Earth. At most ocean shores throughout the world, two high tides and two low tides occur every lunar day.[37] A typical seaport will alternate between high and low tides about every six hours. Thus, while the ocean bed may be temporarily exposed to the

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[35] The "spring tide" is defined as "the large rise and fall of the tide at or soon after the new or full moon." The "neap" tide is defined as "those tides, midway between spring tides, that attain the least height." *Random House Webster's College Dictionary* (1997).

[36] The majority asserts that I offer this as an "authoritative definition for ordinary high water mark" and that somehow there is a tension between this definition and my criticism of the majority's creation of new law in this case. *Ante* at 701 n 33. That the majority does not recognize the English common-law definition of the ordinary high water mark is not surprising given that its novel definitions of the term bear no resemblance. According to the majority:

> [The] ebb and flow, thus reaching one point on the shore at low tide and reaching a more landward point at high tide. The latter constitutes the high water mark on a tidal shore. The land between *this mark* and the low water mark is submerged on a regular basis, and so remains subject to the public trust doctrine as "submerged land." [*Ante* at 686 (emphasis added).]

Thus, it appears that the majority takes the position that the public trust extends to the highest high tide. However, as noted in *Borax Consolidated,* the ordinary high water mark is *not* the highest high tide, but rather the medium high tide between the spring and neaps, which is rarely exposed to the open air for more than twenty-four hours.

[37] A lunar day is the time it takes for the moon to return to a point above the Earth: approximately twenty-four hours and fifty minutes. See definition of "day, lunar" at <http://www.ngs.noaa.gov/CORS-Proxy/cocoon/glossary/xml/D.xml> (accessed June 24, 2005).

open air during low tide, such land will again be submerged during the next high tide. Because the land is continually being affected by the action of the water, it falls within the scope of the English common-law doctrine, even when exposed to open air.

In contrast, tidal forces acting on the Great Lakes are of such a "trifling effect," *Warner, supra* at 239, that they cannot even be measured without precise instruments.[38] Thus, there is no "high" or "low" water marks, as they are scientifically understood. Instead, lake levels are affected seasonally by the natural operation of the hydrologic cycle, which includes precipitation, evaporation, condensation, and transpiration.[39] During the winter, the air above the lakes is cold and dry, compared to the relatively warm temperature of the lake. As a result, the amount of water that evaporates into the air exceeds the water vapor that condenses back into the lakes. Any precipitation that falls on the lands surrounding the lakes is in the solid form of snow, and, thus, is not returned to the lake via runoff. As a result, more water leaves the lake than enters it in this season, resulting in a decline in lake levels.[40] As snow begins to melt in the early spring, runoff into the lakes increases. Further, as temperatures increase, the warm,

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[38] According to the National Oceanic and Atmospheric Administration, spring tide in the Great Lakes is less than 2 inches (5 cm) in height. See <http://co-ops.nos.noaa.gov/faq2.html> (accessed June 24, 2005).

[39] See, generally, United States Army Corps of Engineers and the Great Lakes Commission, *Living with the Lakes* (1999), pp 13-18. This publication may be accessed at <http://www.glc.org/living/> (accessed June 24, 2005).

[40] According to the United States Army Corps of Engineers, the lowest average lake level from 1918 to 2003 occurred as follows: Lake Superior (March, 601.21 feet above sea level); Lakes Michigan and Huron (February, 578.48 feet above sea level); Lake St. Clair (February, 573.43 feet above sea level); and Lake Erie (February, 570.8 feet above sea level). See <http://www.lre.usace.army.mil/greatlakes/hh/greatlakeswaterlevels/historic-data/longtermaveragemin-maxwaterlevels/> (accessed June 24, 2005).

moist air above the relatively cold lakes limits evaporation to an amount less than the rate of condensation. As a result, average water levels rise throughout the spring and eventually peak during midsummer.[41]

These natural phenomena suggest the unworkability of placing the public trust boundary at the "ordinary high water mark" as it is defined by the majority. If the "ordinary high water mark" is defined as a static boundary, then the public trust doctrine would include unsubmerged lands that are only covered by the water on an infrequent basis. Under the English common-law definition, such lands should be treated in a manner similar to lands covered by the spring tides, i.e., they are not subject to the public trust doctrine. If the "ordinary high water mark" is defined as a floating boundary, then it becomes nearly impossible for either a beach user or a littoral property owner to determine where the boundary is located. To account for the hydrologic cycle, the "ordinary high water mark" would need to be redefined on a monthly or seasonal basis. Further, the boundary would have to be readjusted on a year-by-year basis to account for long-term changes to lake levels caused by weather fluctuations. Since 1918, the Great Lakes have experienced three periods of extremely low water levels, in the late 1920s, mid-1930s, and mid-1960s. Periods of extreme high water were experienced in the early 1950s, early 1970s, mid-1980s, and mid-1990s. The "point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized char-

[41] According to the United States Army Corps of Engineers, the highest average lake level from 1918 to 2003 occurred as follows: Lake Superior (September, 602.23 feet above sea level); Lakes Michigan and Huron (July, 579.43 feet above sea level); Lake St. Clair (July, 574.77 feet above sea level); Lake Erie (June, 571.95 feet above sea level). *Id.*

acteristic" in 1926 would have been in a completely different location than the point reached in 1986. Likewise, that point in February of each year would be a completely different location than the same point in July of each year. Thus, any definition of where "the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic" must vary depending on what method is used to calculate that level.[42]

The majority's "ordinary high water mark" also fails to account for changes to the location of the waterline caused by events unrelated to lake levels. First, wind and barometric forces can raise water at one end of the lake, causing a dip in water level at the opposite end. If the forces raising the water on one end suddenly cease, the entire lake may move in a see-saw fashion, alternatively rising and falling on each end in a "pendulum-like" movement. This phenomenon, called "seiche," can last from minutes to hours to days. Second, ice or foreign bodies such as plants may block the normal flow of rivers and channels connected to the Great Lakes, thereby causing an increase or decrease in the water level of connected lakes. Finally, most of the Great Lakes basin is rising, as the Earth's crust slowly rebounds from the removed weight of the glaciers that covered the area around 14,000 years ago. Because the glaciers were thickest in the northern part of the basin around Lake Superior, this region is rebounding at a faster rate, nearly twenty-one inches a century, than the rest of the basin. As a result, the Great Lakes are

[42] For example, on Lake Huron, the average yearly level of the lake in 2003 was 577.07 feet above sea level. The average yearly level of the lake from 1918 to 2003 was 578.94 feet above sea level. The monthly average for June 2003 was 577.43 feet above sea level. The monthly average for the month of June, from 1918 to 2003, was 579.33 feet above sea level.

"tipping" in a way that causes water increasingly to pool in the southern portions of the Great Lakes basin. The shoreline is receding in the northern basin and advancing in the southern basin. Thus, while the "ordinary high water mark" makes sense in tidal waters, it does not make sense in the nontidal Great Lakes because of the irregular nature of lake level fluctuations.

Further, the majority's new definition fails to account for those times when the waters of the Great Lakes go *beyond* the "ordinary high water mark," assuming that such an event could even occur under the majority's new definition. The majority justifies its new rule, on the basis of this Court's statement in *Peterman, supra* at 198, that " 'the limit of the public's right is the ordinary high water mark . . . .' " (Citation omitted.) *Ante* at 701. However, the majority also states that the public trust doctrine serves to protect "the waters of the Great Lakes and their submerged lands . . . ." *Ante* at 694. Thus, when the water's edge is beyond the "ordinary high water mark," there is a conflict between the majority's stated limit of the public right to the "ordinary high water mark" and its inclusion of submerged lands within the public trust. Is a property owner or a member of the public to understand that use of submerged lands between the "ordinary high water mark" and the water's edge is forbidden? Does this mean that a member of the swimming or walking public is trapped within the Great Lakes until the water recedes to the "ordinary high water mark"? How does a member of the public or a property owner determine where the "ordinary high water mark" is in such a circumstance? Does limiting public access to a submerged "ordinary high water mark" conflict with our holding in *Warner, supra* at 239, that the public trust begins where the water is, "whether the water be deep or shallow"? Or is the

majority's reliance on *Peterman* somehow silently qualified to apply only when water levels on the Great Lakes lie below the "ordinary high water mark"? The majority again does not say.

By contrast, limiting the public's right of access to the "water's edge," i.e., the point at which wet sands give way to dry sands, addresses all of the various forces at work on the lakes and is consistent with the common-law definition of the high water mark. First, the "water's edge" principle reflects the dynamic natural forces at work on the Great Lakes. As the waters of the Great Lakes move, so too does the area where wet sands give way to dry sands. The littoral property owner's title, and with it his or her littoral rights, including the right of exclusive possession, follows the movement of the water.[43] As we explained in *Warner*, the littoral property owner's rights end where the water is "whether the water be deep or shallow, and although it be grown up to aquatic plants, and although it be unfit for navigation." *Warner, supra* at 239. At that point, the state's public trust title begins. *Id.* As correctly observed by the DNR, the area "where the water is" includes the wet sands where the waters of the Great Lakes have marked their current and continuous presence. Because by definition such sands are infused with water, the wet sands fall within the definition of "submerged lands." As a result, the "water's edge" is the point at which wet sands give way to dry sands. The water's edge marks the boundary

[43] However, as noted in *Peterman, supra* at 193-198, the littoral owner's rights are subject to regulation by the state. See e.g., MCL 324.32503 (prohibiting filling or altering land below the statutorily defined high water mark without a permit), MCL 324.32512 (prohibiting certain acts of waterway maintenance without a permit), and MCL 324.32512a (prohibiting mowing or removing vegetation except as permitted by the DNR).

between submerged and unsubmerged lands.[44] This position is consistent with the position of the defendant littoral owners in the instant case. Contrary to plaintiff's expressions of concern that she would be forced to walk in the water, as a member of the public she has always had the right to walk along the wet sands abutting the Great Lakes. Because the wet sands are submerged lands, a littoral owner has never had the right to prevent a member of the public from using such lands.

While I agree with the DNR's inclusion of the wet sands as submerged lands, the DNR reaches the same erroneous conclusion as the Court of Appeals, namely that the littoral owner holds title only to the "ordinary high water mark."[45] This interpretation apparently is based on the following passage from *Hilt, supra* at 226:

> The riparian owner has the exclusive use of the bank and shore, and may erect bathing houses and structures thereon for his business or pleasure (45 C.J. p 505; 22 L.R.A. [N.S.] 345; *Town of Orange* v. *Resnick* [94 Conn 573, 578; 109 A 864 (1920)]); although it also has been held that he cannot extend structures into the space between low and high-water mark, without consent of the State (*Thiesen* v. *Railway Co*, 75 Fla. 28 [78 South. 491; L.R.A.

[44] The majority claims that I would "grant an exclusive right of possession to littoral landowners . . . down to where unsubmerged land ends, which [I] locate at the water's edge . . . ." *Ante* at 699. A significantly more precise statement of my position is that the littoral landowner has the right of exclusive possession to unsubmerged land, while the public has the right to use submerged land under the public trust doctrine. The water's edge, i.e., where the wet sands give way to dry sands, where submerged land meets unsubmerged land, marks the limit of each of these rights.

[45] The DNR's position is consistent with the Attorney General's opinion in 1978 noting that title to property between the high water mark and the water's edge remains in the state, but the right of exclusive use remains in the littoral owner. OAG, 1977-1978, No 5,327, p 518 (July 6, 1978).

> 1918E, 718]). And it has been held that the public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner, although the title is in the State. *Doemel v Jantz*, [*supra*].

However, this statement from *Hilt* does not represent a conclusion of this Court. Rather, it is cited as part of this Court's response to the notion that *Kavanaugh* "gave the State substantially absolute title . . . to the upland or to use them for any public purposes." *Id.* at 224. In rejecting this theory as a justification for maintaining *Kavanaugh*, we noted that the "title" conferred to the state in *Kavanaugh* was confined "to the same trust which applies to the bed of the lake, i.e., that the State has title in its sovereign capacity and only for the preservation of the public rights of navigation, fishing, and hunting." *Id.* Thus, "the right of the State to use the bed of the lake, except for the trust purposes, is subordinate to that of the riparian owner . . . ." *Id.* at 226, citing *Town of Orange, supra* at 578. To support this point, *Hilt* noted that "it has been held that the public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner, although the title is in the State." *Hilt, supra* at 226, citing *Doemel*.

This demonstrates that *Hilt* was not adopting the rule from *Doemel*, but rather was using that case to demonstrate that *Kavanaugh* did not give unlimited title to the state and, therefore, that the title granted to the state by *Kavanaugh* was not a valid basis for maintaining the meander line as a boundary. Thus, the only basis for holding that the state holds title to unsubmerged land up to the so-called high water mark is to misunderstand the importance of *Hilt*'s reference to *Doemel*. It is clear that when *Hilt* said that a littoral owner's title goes to the water's edge, it *meant* "water's

edge." Likewise, when *Warner* said that the state's title begins where the water is, it *meant* "where the water is."

Second, the "water's edge" principle is consistent with the common-law definition of the high water mark.[46] At common law, the area of medium high tide would seldom be dry for more than twenty-four hours at a time. *Lorman v Benson*, 8 Mich 18, 29 (1860). In other words, the land at or below medium high tide was generally covered by the ocean during the daily tidal cycle. Therefore, this tidal land was considered "waste land" that was " 'not capable of ordinary cultivation or occupation.' " *Id.* at 28-29 (citation omitted). Similarly, in the instant case, the wet sands are being inundated with water by the current ebb and flow of the waves. However, when lake levels fluctuate, any land that is no longer subject to the ebb and flow of the waves becomes unsubmerged land, which is suitable for "ordinary occupation" and, therefore, as with lands affected by the spring tides, is not within the scope of the public trust doctrine.

Finally, the "water's edge" principle is significantly more workable than the majority's "ordinary high water mark." A member of the public can, by simple observation, without the use of "aerial photographs, government survey maps . . . and stereo [three-dimensional] photographs," *ante* at 692 n 20, determine

[46] Although I do not agree that the "wet sands area" as it applies to the public trust doctrine is equivalent to the "ordinary high water mark" as it applies to the navigational servitude, at least one commentator has observed that the "wet beach" is the area "between ordinary high watermark and ordinary low watermark." Pratt, *The legal rights of the public in the foreshores of the Great Lakes,* 10 Mich Real Prop Rev 237, 237 (1983). According to this commentator, the "high water mark" and the "water's edge" are, for all practical purposes, the same in the nontidal Great Lakes.

where he or she is allowed to use land without seeking the littoral owner's permission.[47] When the waters recede, land that is no longer subject to the current ebb and flow of the waves will become unsubmerged land and, therefore, will again be under the exclusive control of the littoral property owner.

In conclusion, as we noted in *Warner, supra* at 239, although in dictum, the absence of tides "practically makes high and low water mark identical for the purpose of determining boundaries [along the Great Lakes]." The "water's edge" principle recognizes this reality by defining the rights of both the littoral property owner and the public in terms of the actual location of the water. This definition is consistent with the natural forces at work on the Great Lakes; it is consistent with the common-law scope of the public trust doctrine; it is consistent with historical practice in Michigan; and it creates a public trust area that can readily be identified. The majority has presented no

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[47] The majority claims that the "water's edge" principle provides no greater "clarity" than its new rule and that the "water's edge" standard constitutes a "charade of clarity." *Ante* at 702. The reader might wish to ponder this assertion. On the one hand, the traditional standard for delineating between public and private lands— the standard that I would retain— requires merely that a person be able to distinguish between wetness and dryness, between wet sands and dry sands, between where there is water and where there is not. Even a Supreme Court justice, I would submit, should be reasonably able to draw such distinctions. Contrast this to the majority's test that would require a person to locate "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." The majority does not even *attempt* to offer guidance to the public or property owners as to the meaning of this standard. Rather, the majority suggests that expert witnesses will be able to identify this mark by using "aerial photographs . . ., the government survey maps, the site's present configuration, and stereo [three-dimensional] photographs . . . ." *Ante* at 692 n 20.

reason why this longstanding rule no longer represents a reasonable balance between the competing interests at issue in this case. Yet, the majority discards this clear standard, which has operated for most of the history of our state to create harmonious relations between the public and littoral property owners, and replaces it with an unknowable standard of its own invention that requires littoral property owners and the public to guess where the "ordinary high water mark" is located.

III. MISUNDERSTANDING OF *JUS PRIVATUM*/*JUS PUBLICUM*

The majority's determination to apply what it has defined as the "ordinary high water mark," despite a lack of foundation in Michigan law, appears to be rooted in its fundamental misunderstanding of the distinction between the *jus privatum* and *jus publicum*. The majority notes, correctly, that the title to the submerged lands of navigable waters is bifurcated; with the *jus publicum* safeguarding the rights to the public and the *jus privatum* safeguarding private property rights, subject always to the *jus publicum*. *Nedtweg v Wallace,* 237 Mich 14, 20; 208 NW 51 (1927). However, rather than limit application of the doctrine to *submerged* lands, the majority instead holds that *any* conveyance of lakefront property consists solely of the *jus privatum*, with the state's *jus publicum* title including unsubmerged lands up to the "ordinary high water mark." I disagree, and instead believe that the *jus publicum* applies only to the submerged lands of the Great Lakes.

The distinction between *jus privatum* and *jus publicum* was first addressed by this Court in *Lorman, supra*. In *Lorman*, a former lessee of property abutting the Detroit River claimed that he had a right to use and

maintain a boom constructed in the water.[48] Under the English common law, private title to the bed of a navigable river was determined by whether the river was subject to the ebb and flow of the tides. *Lorman, supra* at 26-27. However, regardless of who held the *jus privatum*, the private owner's rights were limited to those uses that would not interfere with "the public easement of navigation[.]" *Id.* at 27. In tidal rivers, the *jus privatum* was subject to the public's "right of navigation over the whole bed of the stream at high tide, and over the water, so far as it was practicable, at all tides." *Id.* at 27-28. However, the public's rights too were not without limit. First, the public's rights did not extend to land "not commonly submerged by the average ordinary high tides, which would seldom leave any of the shore dry more than twenty-four hours at a time." *Id.* at 29. Second, the public's use of the *jus publicum* was limited to "water rights," i.e., the right of navigation and fishing. *Id*. at 30. No matter who held title to the river bed, the public's right to use the river was always limited to the water itself. Because the former lessee sought to use the Detroit River for purposes other than navigation or fishing, the Court determined that the former lessee's use was not superior to that of the riparian owner and, therefore, the riparian owner could bring an action for trespass.

The limitation of the *jus publicum* to use of the water itself was also expressed by this Court in *McMorran Milling Co v C H Little Co*, 201 Mich 301; 167 NW 990 (1918).[49] In *McMorran Milling*, a dredger entered into a

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[48] A "boom" is defined as "a chain, cable, etc., serving to obstruct navigation." *Random House Webster's College Dictionary* (1997).

[49] The majority cites Justice CAMPBELL's *dissenting* opinion in *Sterling v Jackson*, 69 Mich 488, 506-507; 37 NW 845 (1888), in support of its *jus privatum*/*jus publicum* analysis. *Ante* at 679. The *Sterling* majority observed that title to the river bed belongs to the riparian owner, but that

contract with the riparian owner for the right to remove sand from the river bed. The federal government, concerned that such dredging would adversely affect navigation, ordered the dredger to cease operation. After the dredger complied with this order, the riparian owner brought suit demanding the dredger continue to pay for the right to remove sand. This Court began its analysis by noting that the riparian owner "holds the naked legal title [the *jus privatum*], and with it he takes such proprietary rights as are consistent with the public right of navigation [the *jus publicum*], and the control of congress over that right." *Id.* at 314 (citation omitted). Thus, the riparian owner's title is " 'held at all times subordinate to such use of the *submerged lands and of the waters flowing over them* as may be consistent with or demanded by the public right of navigation.' " *Id.* at 310 (emphasis added; citation omitted). The Court concluded that the dredger was evicted from the river bed by the government, which on the basis of its right to protect navigation had superior title over the riparian owner. Therefore, the riparian owner was not entitled to further payment after the date of eviction. *Id.* at 318.

Unlike rivers and inland lakes, the state holds both the *jus privatum* and *jus publicum* title to the submerged lands of the Great Lakes. *Nedtweg, supra*. In *Nedtweg*, the state sought to lease several thousand acres of relicted land abutting Lake St. Clair that were

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such title is limited by the public's right of navigation. *Sterling, supra* at 500. However, the public's rights in that case were limited to "using the waters of the bay for the purpose of a public highway in the navigation of [the defendant's] boat over it . . . ." *Id.* at 501. Aside from the right of navigation, all other uses of the river bed belonged exclusively to the riparian owner. *Id*. In other words, the riparian owner's *jus privatum* was limited only by the uses *expressly* allowed under the *jus publicum,* i.e., the right of navigation. *Id.*

considered submerged in law.[50] In order to do so, the Legislature passed legislation authorizing long-term leases of such land to private individuals. The Department of Conservation refused to enter into such leases, arguing that the submerged-in-law land was held in trust for the public and could not be conveyed. We noted that the title to submerged land is bifurcated between the *jus publicum* and the *jus privatum*. *Nedtweg, supra* at 17.

> The State may not, by grant, surrender such public rights any more than it can abdicate the police power or other essential power of government. But this does not mean that the State must, at all times, remain the proprietor of, as well as the sovereign over, the soil underlying navigable waters. [*Id.*]

In other words, the state may convey the *jus privatum* in submerged Great Lakes land, as long as that conveyance does not interfere with the public's "rights of navigation, hunting and fishing." *Id.* at 18. The Court noted that, because the land in question was now dry land, it was no longer suited for the purposes protected by the *jus publicum*. *Id.* at 22. In other words, contrary to the majority's understanding, while the "submerged" lands in question were still *part* of the public trust, the lease was permissible because there was no interference with the *uses* protected by the public trust doctrine.[51]

To summarize, under the common law as it has developed in Michigan, the *jus privatum* is held by either the adjoining property owner (in the case of rivers or inland lakes), or by the state itself (in the case of the Great Lakes). In either case, the *jus privatum*

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[50] *Nedtweg* was decided during the reign of the *Kavanaugh* cases.

[51] The majority claims that the lands at issue in *Nedtweg* were "set[] apart from the public trust." *Ante* at 691.

title is held subject to the public's rights under the *jus publicum*. However, the public's *jus publicum* rights are limited to use of the waters themselves. *Lorman, supra*; *McMorran Milling, supra*. Further, the *jus publicum* only protects the public's right to use private property for specific purposes, such as navigation, fishing, and hunting. *Nedtweg, supra*. There are no cases that support the majority's view that the *jus publicum* extends beyond the water's themselves to include unsubmerged land. *Lorman, supra* at 29. On the Great Lakes, the overlap between *jus privatum* and *jus publicum* would only come into play when the Legislature conveyed a portion of the submerged lands to a third party. Because, as argued previously, the littoral owner's title never extends past the wet sands, unsubmerged land between the wet sands and the "ordinary high water mark" is simply not, and has never been, part of the *jus publicum*.

IV. QUESTIONS RAISED BY MAJORITY OPINION

Questions directly raised by the majority's departure from the longstanding status quo in our state include the following:[52]

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[52] The majority maintains that this case "raises none of the questions that [this dissent] poses," while, of course, choosing to answer none of these questions. *Ante* at 703. The majority is mistaken if it believes that it can replace settled law in Michigan with a selective part of the law of another state— indeed the least clear part of that other state's law— and create a new legal relationship between littoral property owners and the public, all the while avoiding giving rise to new legal questions and generating litigation. Each of the questions set forth in this section, as well as a great many more that neither I nor the majority can anticipate, will be introduced into the legal system as a direct result of the majority's opinion. This opinion will be subject to cryptanalysis for many years to come and will produce litigation and dispute where up to now there has been none. Perhaps equally troubling, when clarity in the law is once again established in the area of littoral property rights—many years

(1) Are there property tax consequences to the fact that the exclusive rights of littoral property owners would now extend not to the water's edge, but only to the "ordinary high water mark"?

(2) Given that the majority has expanded the lands subject to the public trust doctrine, will there be a corresponding expansion of uses that are considered "inherent in the exercise of traditional public trust uses"? That is, given that the public trust now encompasses dry land up to at least the "ordinary high water mark," are there new uses of these lands that arguably can be connected to traditional public trust uses?

(3) Given that there are always more members of the public who may wish to use a property in a particular manner than there are property owners, what permanent protections exist to ensure that the Department of Natural Resources, as a political institution, will not seize upon the vagueness and lack of definition of the majority opinion increasingly to broaden the "public trust" at the expense of littoral property rights?

(4) What are the implications of the majority's opinion for the rights of other littoral property owners on lakes other than the Great Lakes, whose properties also afford access to recreational opportunities for the public?

(5) Given the majority's conclusion that "the public trust doctrine serves to protect resources," what are the implications of the majority's opinion for the rights of non-littoral property owners, whose properties abut or have an impact upon state lands used by the public for recreational purposes?

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from now, and only after what is likely to be an unnecessary period of fractiousness and contention—it will likely come as a function of *administrative determinations of private property rights.*

V. CONCLUSION

I would not alter the longstanding status quo in Michigan, and I, therefore, dissent. The majority has altered this status quo by: (1) redefining the lands subject to the public trust doctrine on the basis of Wisconsin's definition of the "ordinary high water mark"; and (2) holding for the first time that the use of unsubmerged lands is permitted by the public trust doctrine.

The majority fails to identify any defects in the present rules of this state, rules that have endured since statehood, that would justify its departure from the "water's edge" principle in favor of unclear rules of its own design. The present rules have created a reasonable and harmonious balance between the rights of the public and the rights of littoral property owners. Under these rules, the littoral owner's title follows the shoreline, i.e., where the wet sands give way to the dry sands, wherever this may be from time to time. Because the boundary is dependent on the natural condition of the Great Lakes, it is easily identifiable, thus, creating a practical and workable rule. The public's legal right to use private property along the shores of the Great Lakes should remain, as it has always been, within this realm.

The critical flaw in the majority's decision making is that it creates new law, not on the basis of the millions of amicable interactions that occur each year between the public and lakefront property owners, but instead on the basis of the single aberrational dispute in this case. In the place of a stable and well-understood law that has worked well for more than a century and a half to define the rights of the public and littoral property owners and to minimize litigation, the majority, in reaction to the present dispute, finds it necessary to

introduce a range of novel concepts into Michigan property law. Apart from lacking any basis in present Michigan law, these concepts are essentially undecipherable. Thus, in an area of the law in which stability and clarity are paramount, the majority offers rules that are obscure and that will be subject to evolving definition by environmental regulatory agencies. Almost certainly, these new rules, in conjunction with the majority's disinclination to define the critical aspects of these rules, will lead to an escalation in the number of disputes between members of the public and property owners along the Great Lakes. In the place of harmony, there will be litigation.[53] In the place of unobstructed beachfront, there will be fences. Five hundred cases from now, and after the expenditure of enormous litigation costs and legal resources, Michigan, if it is fortunate, will once again reach the state of equilibrium that it enjoys today and that it has enjoyed for many decades under current law.

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[53] In the end, it will not be surprising if the day-to-day rights of the public even to beach-walk—the ostensible triggering concern of this case—were to be diminished by the majority's decision. For, in the place of a rule in which property rights are clearly defined and protected, and in the place of a regime in which most littoral property owners have easily accommodated the public's interest in activities such as beach-walking, the majority creates a far more uncertain rule, one in which property rights have become more ambiguous and uncertain, and more subject to political regulation and definition. Just as some members of the public are likely to become more assertive in their claim of a "right" to use the property of another, so too will some property owners become more assertive in purporting to "defend" their properties from the encroachments of such persons. At least some of these owners can be expected to assert their property rights in circumstances where today this has been thought unnecessary. It may well be that a legacy of the majority opinion is the proliferation of fences along the beaches of the Great Lakes. Fences and more fences. As a result of the majority's decision to replace clearly understood and longstanding rules of private property rights with new rules in which the public trust is to be expanded in an uncertain manner, the rights of both the public and the property owner will likely become less well protected.

I would affirm the result of the Court of Appeals, reverse that portion of the Court of Appeals opinion giving the state title to land below the "ordinary high water mark," and reaffirm the longstanding principle of *Hilt* that the littoral property owner's title extends to unsubmerged land and the public's legal rights under the public trust doctrine extend to the submerged lands, including the wet sands.[54]

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[54] Because I agree with the majority that the GLSLA does not establish the boundaries of the public trust, I concur in part II(A) of the majority opinion.

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Summary Disposition July 7, 2005:

FRITZE v INGHAM COUNTY ROAD COMMISSION, No. 128906. In lieu of granting leave to appeal, the Court of Appeals order vacating the preliminary injunction is affirmed. MCR 7.302(G)(1). The Court of Appeals order is modified to the extent that it failed to require dismissal of plaintiffs' Open Meetings Act claims in their entirety. The proofs did not establish a violation of the Open Meetings Act, MCL 15.261 *et seq*. See *Herald Co v Bay City*, 463 Mich 111 (2000), MCL 224.9(3) and 224.10(2), and MCL 15.265(4). Under the circumstances presented in this case, MCL 224.11(2) affords plaintiffs no remedy separate from or additional to the remedies available under the Open Meetings Act. Therefore, the case is remanded to the Ingham Circuit Court for the immediate entry of summary disposition in defendants' favor on all of plaintiffs' claims. Court of Appeals No. 262263.

WEAVER, J. (*dissenting*). I would grant leave to appeal in this case. The issues presented should not be decided in a peremptory order.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal July 8, 2005:

STAMPLIS v ST JOHN HEALTH SYSTEM, Nos. 126980, 127032. Pursuant to MCR 7.302(G)(1), the clerk is to schedule oral argument on whether to grant the applications or take other peremptory action permitted by MCR 7.302(G)(1). The parties are directed to include among the issues addressed at oral argument (1) whether the doctrine of res judicata applies to the stipulated order dismissing the suit against G. Phillip Douglass, and (2) whether the trial court abused its discretion in failing to grant plaintiffs' motion for relief from judgment or their motion for reconsideration. The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatement of arguments made in application papers. Court of Appeals No. 241801.

Summary Disposition July 8, 2005:

PEOPLE v ANTOINE RANSOM, No. 127785. In lieu of granting leave to appeal, the case is remanded to the Wayne Circuit Court for resentencing. *People v Kimble*, 470 Mich 305 (2004). MCR 7.302(G)(1). In all other respects, leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 245438.

Leave to Appeal Denied July 8, 2005:

CITY OF DETROIT v STATE OF MICHIGAN, No. 126711; reported below: 262 Mich App 542.

YOUNG, J. I concur in the order denying leave to appeal. I note that when *Burt Twp v Dep't of Natural Resources*[1] was decided by this Court, the Attorney General did not brief or argue the issue of state sovereignty as a basis of reversal. I believe that the question whether state sovereignty ought to play a part in the *Dearden*[2] analysis is a jurisprudentially significant issue and merits serious consideration by this Court. However, this case does not present a good vehicle for addressing the issue of state sovereignty as it applies to *Dearden*. The clear language of MCL 285.165 indicates that control of the state fairgrounds is vested solely in the State Exposition and Fairgrounds Authority. I would welcome another case where this issue is better presented.

MITCHELL v CITY OF DETROIT (STEVENSON v CITY OF DETROIT), No. 127406; reported below: 264 Mich App 37.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v COTTRELL, No. 127450; Court of Appeals No. 247539.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v MORROW, No. 127705; Court of Appeals No. 258166.

KELLY, J. (*dissenting*). I believe that the search and seizure issue raised in this case deserves more careful consideration. Therefore, I would grant leave to appeal.

Defendant was arrested in a hotel room and charged with resisting arrest. His rented car was parked in the hotel's parking lot. After arresting defendant, the police apparently approached the hotel manager and asked if he wanted to have the car removed from the lot. The manager indicated that he wished the car removed. The police searched the vehicle, then towed it away. Inside it, they found crack cocaine. Defendant was charged with possession with intent to deliver less than fifty grams of cocaine. He entered a guilty plea, conditioned on bringing this appeal.

Defendant argues that the removal of his car from the parking lot was unnecessary and was undertaken merely as a pretext to search it for evidence to be used against him. He may be correct. The automobile was not involved in the initial alleged crime or in the arrest. Defendant did not consent to have it searched. The police apparently suggested to the manager that he request its removal. There is no evidence that the manager or the police allowed, or even asked, defendant to make other arrangements to move the vehicle.

Under these circumstances, it seems that the search may have been unwarranted. An unjustified and random police search violates the protections of the Fourth Amendment. See *Mozzetti v Superior Court of Sacramento Co*, 4 Cal 3d 699 (1971). I would grant leave to appeal to

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[1] 459 Mich 659 (1999).

[2] *Dearden v Detroit*, 403 Mich 257 (1978). As this Court noted in *Burt Twp*, the *Dearden* test has proven "difficult to apply." 459 Mich 664 n 3.

determine whether the police were acting within the bounds of their authority in procuring the evidence used against defendant.

SCALISE v BOY SCOUTS OF AMERICA, No. 128085; reported below: 265 Mich App 1.

MARKMAN, J. I recuse myself from this case on the basis of the nature of my current participation with the defendant organization.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

CORRIGAN, J. (*concurring*). For the reasons stated in my concurring opinion in *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91 (2005), the recusal decisions of the other six members of the Court over the last two years, like Justice WEAVER's 251 pre-2003 recusal decisions, comport with the Constitution and the Michigan Court Rules.

WEAVER, J. (*dissenting*). I oppose the entry of any order in this case at this time until this Court addresses, resolves, and makes clear for all to know the proper procedures for handling motions for the disqualification of Supreme Court justices from participation in a case. In this case, plaintiff moved for the disqualification of Chief Justice TAYLOR and Justice MARKMAN. This Court opened an administrative file on the question on May 20, 2003, but has yet to address the matter further. See ADM 2003-26.

The question regarding the participation or nonparticipation of justices frequently recurs and is a matter of public significance because even one justice's decision to participate or not participate can affect the decision and outcome in a case. As I wrote in *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 97-101 (2005) (WEAVER, J., concurring):

> A justice's nonparticipation in a case may arise in one of two ways. A justice may decide, on his own initiative, not to participate in a case, and be shown as not participating. Alternatively, a party may request the recusal of a justice from a case. Recusal is defined as "[t]he process by which a judge is disqualified on objection of either party (or disqualifies himself or herself) from hearing a lawsuit because of self interest, bias or prejudice." Black's Law Dictionary (6th ed).
>
> It is now clear to me that there is a right and an expectation of the people of Michigan that a justice will participate in every case unless there is a valid publicly known reason why the justice should not participate in a particular case. Traditionally, in this Court a justice's decision on whether to participate or not participate in a case has been a secret matter, and justices have not made public the reasons for that decision.[1] But a justice's decision whether to participate or not participate in a case and the reasons for that decision should not be governed by tradition and secrecy; they should be governed by the law, the Constitution, and the Michigan Court Rules made in conformance with the Constitution;

and they should be made publicly and in writing for the record. This Court should set the highest standards for clear, fair, orderly, and public procedures.

The question whether a justice should participate or not participate in a case arises with regularity. Since May 2003, when I proposed opening an administrative file on the recusal procedure in *In re JK,* 468 Mich 1239 (2003), a justice has been shown as not participating, with no reason given, in at least 31 cases.[]

The questions raised in this and any other case in which a justice's participation or nonparticipation arises are:

1) Are individual justices bound by the requirements of art 6, § 6 of the 1963 Michigan Constitution that states, "Decisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . ."?

2) Do the procedures regarding the disqualification of judges set forth in Michigan Court Rule 2.003 apply to Supreme Court justices?

Const 1963, art 6, § 6, which states that "Decisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . ." requires that justices give written reasons for each decision.[3] There is no more fundamental purpose for the requirement that the decisions of the Court be in writing than for the decisions to be accessible to the citizens of the state. Because a justice's decision to not participate in a case can, itself, change the outcome of a case, the decision is a matter of public significance and public access and understanding regarding a justice's participation or nonparticipation is vital to the public's ability to assess the performance of the Court and the performance of the Court's individual justices. Thus, the highest and best reading of art 6, § 6 requires that a justice's self-initiated decision not to participate, or a challenged justice's decision to participate or not participate, should be in writing and accessible to the public.

Further, Michigan Court Rule 2.003, which regulates the procedures for the disqualification of judges, applies to Michigan Supreme Court justices.[] Michigan Court Rule 2.001 provides that the rules in chapter 2, which includes MCR 2.003, apply to all courts established by the Constitution and laws of the state of Michigan.[5] The Michigan Supreme Court is a court established by the Michigan Constitution. Thus, a plain reading of the court rule shows that MCR 2.003 governs the procedures for the disqualification of Michigan Supreme Court justices.

Almost two years ago, in May 2003, this Court's longstanding failure to follow and apply MCR 2.003 to itself became apparent to

me.[6] As a result, I proposed an amendment of MCR 2.003 that would clarify the applicability of MCR 2.003 and bring MCR 2.003 into conformance with the requirements of Const 1963, art 6, § 6. The amendment I proposed requires a justice to publish in the record of the case the reason(s) for the justice's decision whether to participate or not participate in a case.[7] In response to my recommendation that the Court open an administrative file and take public comments on such a rule, the Court opened an administrative file, ADM 2003-26, on May 20, 2003. But almost two years later, the Court has not yet placed the proposed amendment or the issue on any of the public hearing agendas on administrative matters held during that time. There have been five such public hearings since May 2003: September 23, 2003, January 29, 2004, May 27, 2004, September 15, 2004, and most recently January 27, 2005. Nor has the Court taken any other action regarding a clear, fair, orderly, and public procedure for the participation or nonparticipation of justices of the Supreme Court.

A justice's decision whether to participate or not participate in a case and the reasons for that decision should not be governed by tradition and secrecy; they should be governed by the law, the Constitution, and the Michigan Court Rules made in conformance with the Constitution; and they should be made publicly and in writing for the record. This Court should set the highest standards for clear, fair, orderly, and public procedures.

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[1] From January 1, 1995, when I began serving on the Michigan Supreme Court, until May 2003, when I first stated that justices should publish in the record of the case the reason(s) for the justice's decision whether to participate or not participate in a case, I was shown as not participating approximately 251 times, with no explanation given. In almost all these cases, I did not participate because I had been on the Court of Appeals panels that earlier decided the cases and I was informed that justices "traditionally" did not participate in such cases. In retrospect, I believe that reasons for my decisions not to participate should have been made part of the Court's orders or opinions.

I filed a detailed explanation of my decision not to participate in *In re JK*, 468 Mich 1239 (2003). In *Gilbert v DaimlerChrysler Corp,* 470 Mich 749; 685 NW2d 391 (2004), reconsideration den 472 Mich 1201 (2005), the plaintiff's attorney moved to disqualify then-Chief Justice CORRIGAN and Justices WEAVER, TAYLOR, YOUNG, and MARKMAN. I attached to the order denying that motion a written explanation for my decision to participate in the case. Similarly, in *Graves v Warner Bros,* 669 NW2d 552 (2003), the plaintiff filed a motion for reconsideration, asking that then-Chief Justice CORRI-

GAN and Justices WEAVER, TAYLOR, YOUNG, and MARKMAN recuse themselves from participating in the case. I filed a statement giving reasons for my decision to participate in the case.

[3]Art 6, § 6 of the 1963 Michigan Constitution states, in full:

"Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent."

[5]MCR 2.001 states:

"The rules in this chapter govern procedure in all civil proceedings in all courts established by the constitution and laws of the State of Michigan, except where the limited jurisdiction of a court makes a rule inherently inapplicable or where a rule applicable to a specific court or a specific type of proceeding provides a different procedure."

[6]In *In re JK,* 468 Mich 1239 (2003), my participation in a case became an issue, which led me to research the procedures governing the participation and disqualification of justices.

[7]See *In re JK*, 468 Mich 1239 (2003).

Thus, as I concluded in *Advocacy Org, supra* at 101, I conclude again by saying:

I continue to urge the Court to recognize, open for public comment, and address this ongoing need to have clear, fair, orderly, and public procedures concerning the participation or nonparticipation of justices.

Reconsideration Denied July 8, 2005:

KORN v SOUTHFIELD CITY CLERK, No. 126818. Leave to appeal denied at 472 Mich 867. Court of Appeals No. 251827.

Leave to Appeal Granted July 12, 2005:

WOODARD v CUSTER and WOODARD v UNIVERSITY OF MICHIGAN MEDICAL CENTER, Nos. 124994, 124995. Plaintiffs' cross-application for leave to appeal is granted. The parties are directed to include among the issues to be briefed: (1) what are the appropriate definitions of the terms "specialty" and "board certified" as used in MCL 600.2169(1)(a); (2) whether either "specialty" or "board certified" includes subspecialties or certificates of special qualifications; (3) whether MCL 600.2169(1)(b) requires an expert witness to practice or teach the same subspecialty as the

defendant; (4) whether MCL 600.2169 requires an expert witness to match all specialties, subspecialties, and certificates of special qualifications that a defendant may possess, or whether the expert witness need only match those that are relevant to the alleged act of malpractice. See *Tate v Detroit Receiving Hosp,* 249 Mich App 212 (2002); and (5) what are the relevant specialties, subspecialties, and certificates of special qualifications in this case. The American Osteopathic Association's Bureau of Osteopathic Specialists, the Accreditation Council for Graduate Medical Education, and the Council of Medical Specialty Societies are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals Nos. 239868, 239869.

WEAVER, J. I concur in the Court's decision to grant leave to appeal on plaintiffs' cross-application for leave to appeal. However, I would not have decided defendant's application for leave to appeal separately and peremptorily, see 473 Mich 1 (2005). I would have granted the defendant's application for leave to appeal to decide both applications at the same time.

I write separately to note that whether "specialty" or "board certified" in MCL 600.2169(1)(a) refers to subspecialties or certificates of special qualification is debatable.[1] It is possible that "board certified" refers only to the twenty-four board specialties recognized by the American Board of Medical Specialties (ABMS) and the eighteen board specialties recognized by the American Osteopathic Association (AOA).[2] But it has also been suggested that "board certified" refers to the more than one hundred subspecialties recognized and certified by the ABMS

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[1] Regarding subspecialties versus specialties, the policy statement of the American Board of Medical Specialties (ABMS) provides:

> [T]he established specialty boards as well as the American Board of Medical Specialties itself increasingly are facing concerted pressures to offer certification in additional specialty or subspecialty categories. This is occurring despite the fact that accredited educational programs and the evaluative examinations on which general certifications are based assign appropriate emphasis to each of the subspecialties or areas of special competence identified with the corresponding primary field. Accordingly, diplomates holding general certification normally acquire, to a greater or lesser degree, all of such special competencies in their educational and specialty practice experience. <http://www.abms.org/policy.asp> (accessed April 13, 2005).

[2] The ABMS is the primary standard-setting organization for medical doctors and the AOA sets standards for osteopathic physicians. See <http://www.quackwatch.org/04ConsumerEducation/QA/board.html> (accessed April 13, 2005).

and the AOA.[3] The ABMS website further acknowledges that there are over 180 non-ABMS, "self-designated" medical "boards" in the United States, and the statute itself provides no language excluding any medical board from relevance.[4]

How this Court interprets "specialty" and "board certified" in subpart 1(a) of MCL 600.2169 significantly affects the ability of a party to a medical malpractice action to find an expert qualified to testify.

This case and another case in which leave to appeal was granted today, *Hamilton v Kuligowski,* 473 Mich 858 (2005), present opportunities to provide guidance on recurring and difficult questions regarding the qualifications of expert witnesses under MCL 600.2169. I therefore concur in the decision to grant leave to appeal on plaintiffs' cross-application for leave to appeal.

HAMILTON V KULIGOWSKI, No. 126275. The parties are directed to include among the issues to be briefed: (1) the proper construction of the words "specialist" and "that specialty" in MCL 600.2169(1)(a) and MCL 600.2169(1)(b)(i); and (2) the proper construction of "active clinical practice" and "active clinical practice of that specialty" as those terms are used in MCL 600.2169(1)(b)(i). The American Osteopathic Association's Bureau of Osteopathic Specialists, the Accreditation Council for Graduate Medical Education, and the Council of Medical Specialty Societies are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 261 Mich App 608.

WEAVER, J. I concur in the Court's decision to grant leave to appeal. I write to emphasize that the issues of interpretation of MCL 600.2169 presented in this case are integrally related to the issues presented in *Woodard v Custer*, 473 Mich 1 (2005). As I stated in my concurrence with the order granting leave to appeal in *Woodard*, "[h]ow this Court interprets 'specialty' and 'board certified' in subpart 1(a) of MCL 600.2169 significantly affects the ability of a party to a medical malpractice action to find an expert qualified to testify." The same can be said regarding how this Court interprets "active clinical practice" and "active clinical practice of that specialty" in subpart 1(b)(i) of MCL 600.2169.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal July 14, 2005:

BEHNKE V AUTO-OWNERS INSURANCE COMPANY, No. 127459. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, the clerk is to

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[3] It is noteworthy that a medical doctor or a doctor of osteopathic medicine can practice without any specialty or subspecialty. Further, both certifications in specialties and subspecialties by the ABMS and the AOA require additional training, testing, and periodic renewal. <http://www.abms.org> (accessed April 13, 2005).

[4] <http://www.abms.org/faq.asp> (accessed April 13, 2005).

schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(l). The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatement of arguments made in application papers. Court of Appeals No. 248107.

Summary Dispositions July 14, 2005:

PEOPLE v GORDON, No. 126973. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals. MCR 7.302(G)(1). On remand, that Court is to treat the defendant's claim of appeal as an application for leave to appeal. Court of Appeals No. 255815.

CORRIGAN, J. I would deny leave to appeal.

PEOPLE v JONES, No. 127127. In lieu of granting leave to appeal, defendant's motion to remand for an evidentiary hearing regarding the effectiveness of trial counsel is granted. MCR 7.302(G)(1). The case is remanded to the Wayne Circuit Court for an evidentiary hearing pertaining to the reasons trial counsel did not introduce evidence of telephone records that could potentially support defendant's position that he made a number of telephone calls while the victim was present. Further, the Wayne Circuit Court is to determine whether defendant is indigent and, if so, to appoint counsel to represent defendant in connection with the motion on remand and any appeal therefrom. Based on the evidence presented and the circuit court findings on remand, either party may move for a new trial or appeal, by application for leave, any decision of the circuit court. In all other respects, not inconsistent with the foregoing, defendant's application for leave to appeal the August 10, 2004, judgment of the Court of Appeals is denied, because the Supreme Court is not persuaded that the questions presented should be reviewed by this Court. Jurisdiction is not retained. Court of Appeals No. 246818.

PEOPLE v DYE, No. 127206. In lieu of granting leave to appeal, the Court of Appeals order of August 18, 2004, is vacated. MCR 7.302(G)(1). Because the Court of Appeals may have dismissed defendant's application for leave to appeal under the misconception that defendant had not made any timely payments, the case is remanded to that Court for reconsideration of defendant's application for leave to appeal. Court of Appeals No. 253839.

KELLY, J. I assume the Court of Appeals will appoint counsel.

PEOPLE v MICHAEL RANSOM, No. 127301. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted on the issue whether defendant should be allowed to withdraw his plea. MCR 7.302(G)(1). In all other respects, leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 256757.

CORRIGAN, J. I would deny leave to appeal.

CARGAS v BEDNARSH, Nos. 127376, 127377. 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 Nos. 254718, 254742.

CAVANAGH, WEAVER, and KELLY, JJ. We would direct the Court of Appeals to include among the issues considered (1) whether the actual attorney fees recoverable under the lease include appellate attorney fees and, (2) if so, whether the amount recoverable is subject to a limitation of reasonableness.

CONSUMERS ENERGY v BEARD, No. 127419. In lieu of granting leave to appeal, that portion of the Court of Appeals judgment that affirms the Isabella Circuit Court's dismissal of plaintiff's claim of prescriptive easements based on plaintiff's use of the properties at issue since 1936 is vacated, and the Isabella Circuit Court, in the course of its proceedings on remand from the Court of Appeals, is to reconsider this claim. MCR 7.302(G)(1). In doing so, the Isabella Circuit Court should consider possible limits on the extent of the claimed prescriptive easements. See *Rozmarek v Plamondon*, 419 Mich 287, 294-296 (1984). Further, the 1983 agreement that resulted in plaintiff's receiving ten-year easements does not constitute evidence that can affect the claims in this case. See *Rozmarek v Plamondon, supra*. In considering the adverse possession claims of defendants, the Isabella Circuit Court should consider the principles discussed in *Rozmarek v Plamondon, supra, Burns v Foster*, 348 Mich 8 (1957), *Hamilton v Weber*, 339 Mich 31 (1954), and *Walker v Bowen*, 333 Mich 13 (1952). The judgment of the Court of Appeals is reversed to the extent it is otherwise inconsistent with this order, and in all other respects the application for leave to appeal is denied. Court of Appeals No. 246979.

PEOPLE v ZYLSTRA, No. 127460. In lieu of granting leave to appeal, the order of the Court of Appeals is reversed, and the case is remanded to the Clinton Circuit Court for resentencing. MCR 7.302(G)(1). The reasons for the departure from the sentencing guidelines as articulated by the circuit court are not substantial and compelling reasons that are objective and verifiable. MCL 769.34(3); *People v Babcock*, 469 Mich 247 (2003). In all other respects, leave to appeal is denied. Court of Appeals No. 256006.

WEAVER, J. (*dissenting*). I dissent from the remand order. Applying the analysis of my opinion dissenting in part and concurring in part in *People v Babcock,* 469 Mich 247, 280 (2003), I would deny leave.

MOORE v PRESTIGE PAINTING, No. 127475. In lieu of granting leave to appeal, the decision of the Court of Appeals is vacated. MCR 7.302(G)(1). The first sentence of MCL 418.331(b) confers a conclusive presumption of dependency only on a child who was living with the parent at the time of the parent's death. The matter is remanded to the Worker's Compensation Appellate Commission to determine whether plaintiff met her burden of proving that her daughter is the child of the decedent and, if so,

whether the daughter is a conclusively presumed dependent under any other provision of MCL 418.331(b). Jurisdiction is not retained. Reported below: 264 Mich App 123.

BISHOP v NORTHWIND INVESTMENTS, INC, No. 127536. In lieu of granting leave to appeal, the decision of the Court of Appeals is reversed in part for the reasons stated in the dissenting opinion, and the judgment of the Mackinac Circuit Court is reinstated. MCR 7.302(G)(1). The application for leave to appeal as cross-appellant is denied. Court of Appeals No. 250083.

Leave to Appeal Denied July 14, 2005:

KEWEENAW BAY INDIAN COMMUNITY v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 126673; Court of Appeals No. 253265.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals as on leave granted.

BUNDLES v MARKEL INSURANCE COMPANY OF CANADA, No. 127333; Court of Appeals No. 248843.

CAVANAGH, J. I would grant leave to appeal.

MCKINNIE v RAVEL, No. 127428; Court of Appeals No. 241842.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v SHAWN DAVIS, No. 127446; Court of Appeals No. 241710.

CAVANAGH, J. I would remand this case to the Wayne Circuit Court for a second *Ginther* hearing. *People v Ginther*, 390 Mich 436 (1973).

PEOPLE v SANDERS, No. 127454; Court of Appeals No. 256546.

CAVANAGH and KELLY, JJ. We would remand this case for resentencing.

GAMMAGE v CANCHOLA, No. 127490; Court of Appeals No. 246133.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

ROBINSON v YELLOW TRANSPORTATION, INC, No. 127530; Court of Appeals No. 256682.

CORRIGAN, J. I would remand this case to the Worker's Compensation Appellate Commission for further consideration.

FARMERS INSURANCE EXCHANGE v BAILER, No. 127559; Court of Appeals No. 248179.

PEOPLE v ALLEN, No. 127811; Court of Appeals No. 249857.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

Interlocutory Appeal

Leave to Appeal Denied July 14, 2005:

JOHNSON v KLEIN and JOHNSON v STATE POLICE, Nos. 127347, 127348; Court of Appeals Nos. 255333, 255335.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal July 15, 2005:

PEOPLE v WILLIAM JOHNSON, No. 127525. Pursuant to MCR 7.302(G)(1), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument whether OV 11 was correctly scored by the trial court. The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of arguments made in application papers. Court of Appeals No. 248480.

Summary Dispositions July 15, 2005:

LEASE ACCEPTANCE CORPORATION v ADAMS and LEASE ACCEPTANCE CORPORATION v ABELL, Nos. 127444, 127445. In lieu of granting leave to appeal, the October 7, 2004, orders are vacated, and these cases are remanded to the Court of Appeals for plenary consideration. MCR 7.302(G)(1). That Court is to address the appropriate standard of review for determining whether Michigan "is a reasonably convenient place for the trial of the action" within the meaning of MCL 600.745(2)(b). Jurisdiction is not retained. Court of Appeals Nos. 255487, 256582.

PEOPLE v HAWTHORNE, No. 127752. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to the Oakland Circuit Court for a ruling on defendant's motion in propria persona that asserted a violation of his right to a speedy trial. MCR 7.302(G)(1). The circuit court did not rule on that motion. As a consequence, the Court of Appeals lacked a factual basis for considering the factors under *Barker v Wingo*, 407 US 514, 530-532 (1972), and for concluding that those factors overcame the presumption of prejudice that follows from a nine-year delay. Court of Appeals No. 248657.

WEAVER, J. (*dissenting*). I would deny leave to appeal because I am not persuaded that the question presented should be reviewed by this Court.

Leave to Appeal Denied July 15, 2005:

BAYER v CITY OF KENTWOOD, No. 127176; Court of Appeals No. 249405.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

MARKMAN, J. I respectfully dissent. I would grant leave to appeal to consider a number of significant questions about the scope of the "highway exception" found within the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*

Plaintiff was riding her bicycle on a concrete-paved sidewalk running parallel to 32nd Street within the defendant city. Plaintiff came to the asphalt-covered driveway of defendant apartments, which bisected this sidewalk. She continued across the driveway in a straight line toward the sidewalk's continuation on the driveway's other side, but struck a pothole located at the midpoint of the driveway. The pothole surrounded

a recessed water main cap about eight inches wide maintained by the city, but plaintiff could see neither the pothole nor the water main cap because they were covered with water from recent rain. The pothole was in a direct line with the sidewalk. Plaintiff claimed the pothole was part of the "sidewalk," which is within the GTLA's definition of the highway exception. MCL 691.1401(e). The city claimed that it was part of a private driveway, which is not within this definition. The trial court denied the city's motion for summary disposition, and the Court of Appeals reversed.

I would grant leave to consider the following questions:

First, does a sidewalk continue to be a sidewalk where it crosses a driveway? That is, does the area encompassed by the parallel lines defining the sidewalk, extended over the driveway, retain its nature as a sidewalk? For purposes of the exception to governmental immunity, is a sidewalk a continuous thoroughfare, or does it stop and start as it comes upon driveways?

Second, of what significance to the scope of the highway exception is the city's exclusive control over the area in controversy? What is the relevance of the testimony of the city's director of public works that defendant apartments had no authority to make any changes, improvements, or repairs to the water main area within its driveway?

In re ALLEN (FAMILY INDEPENDENCE AGENCY V ALLEN) NO 1, No. 129016; Court of Appeals No. 258301.

Summary Disposition July 21, 2005:

DEPARTMENT OF CIVIL RIGHTS *ex rel* BURNSIDE V FASHION BUG OF DETROIT, No. 126254. On April 14, 2005, the Court heard oral argument on respondent-appellant's application for leave to appeal the February 19, 2004, judgment of the Court of Appeals. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the case is remanded to the Wayne Circuit Court for entry of judgment in favor of Fashion Bug of Detroit. Claimant Burnside did not establish a prima facie case of unlawful discrimination because she failed to demonstrate that she was treated differently than a similarly situated, comparable employee. Claimant Burnside was not similarly situated to Theresa Jawoszek because Jawoszek was a store manager accused of acting discourteously to a customer, while Burnside was an hourly employee accused of acting dishonestly for personal gain. Thus, the relevant aspects of Burnside's employment situation were not "nearly identical" to those of Jawoszek's employment situation. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699-700 (1997). In addition, it was not established that the ultimate decision maker harbored any racial animus toward Burnside. Court of Appeals No. 240325.

TAYLOR, C.J. (*concurring*). I concur in the peremptory order to reverse the judgment of the Court of Appeals and remand this case to the trial court for entry of judgment in defendant's favor. I write separately to respond to the dissents.

Claimant Burnside was a sales associate at one of defendant Fashion Bug's stores in Detroit. On Saturday, September 29, 1991, Burnside was shopping at one of Fashion Bug's other stores in Warren with her twin sister, Benita Withers, and other family members. Burnside attempted to exchange some clothes, and return some others, that she had purchased at the Detroit store with her employee discount. Because they can purchase clothing with the discount, Fashion Bug policy requires employees to produce a receipt when returning or exchanging items. Theresa Jawoszek, the manager of the Warren store, allowed Burnside to either exchange or return some items that Burnside had a receipt for. According to Jawoszek, Burnside also attempted to return other clothes that she did not have a receipt for, but Jawoszek refused to accept them. Burnside denies that she tried to return items that she did not have a receipt for.

During this episode, Burnside also purchased a skirt that was on sale. When Jawoszek started to place the skirt in the bag with Burnside's other clothes, Burnside asked Jawoszek to put the skirt on a hanger. Jawoszek refused to do so, stating that it was not the Warren store's policy to put sale items on hangers. Burnside protested that Fashion Bug's policy was to put any item on a hanger if the customer requested it. According to Burnside and Withers, Jawoszek responded by saying, "Do you all hang your clothes on hangers?" or, "You people hang your clothes on hangers?" Burnside initially thought that Jawoszek was referring to the people who worked at Burnside's store. Withers, however, who was nearby but had not heard any of the conversation until this point, heard the "you all" or "you people" statement and thought that it might have been a racially motivated generalization. She approached the counter and asked Jawoszek to explain what she meant by the comment. According to Withers, Jawoszek responded by making a pointing gesture toward Burnside and her family members and saying, "You all are the people." Withers then asked, "Well, who are you?" Jawoszek gestured with her hand around the room and then toward herself and the other two employees behind the counter, all of whom were white, and said, "We all are individuals." Jawoszek testified that she uses the phrase "you people" often when referring to both black and white employees, but did not remember making either the specific comment or hand gestures that Burnside and Withers alleged. Lorna Stout, another employee working in the store that day who witnessed the incident, also testified that she has often heard Jawoszek use the phrase "you people" when referring to both black and white employees, but that she did not recall Jawoszek making the specific comment or hand gestures alleged by Burnside and Withers. A verbal confrontation ensued, but Jawoszek eventually gave Burnside a hanger for the skirt, and Burnside and her family members left.

The following Monday, Jawoszek informed her district supervisor that Burnside had attempted to return merchandise without a receipt in violation of Fashion Bug's policy. At the district supervisor's request, Jawoszek prepared a written statement and sent it to Fashion Bug's regional supervisor, Deborah Kerins. After receiving Jawoszek's written statement, Kerins had the district supervisor conduct an investigation. The district supervisor obtained written statements from the other Fashion Bug employees who were working in the store at the time of the

incident. She did not obtain one from Burnside. After reading the written statements and consulting Fashion Bug's human resources department in Philadelphia, Kerins decided to fire Burnside, and did so on October 18, 1991.

Meanwhile, about a week after the September 29, 1991, incident, Withers returned to the Warren store and tried to exchange merchandise without a receipt. Jawoszek refused to exchange the clothes, even though Withers was not an employee and, thus, not subject to Fashion Bug's employee-return policy. According to Jawoszek, she refused to give Withers a refund for the merchandise because she thought that Withers was trying to return the same items that Burnside had tried to return on the previous occasion. Thus, she thought that Withers was trying to return items that Burnside had bought with her employee discount. On the basis of this incident, Withers lodged a complaint with Fashion Bug's offices in Chicago alleging that Jawoszek had refused to exchange the items for her because of Withers's race.[1] The complaint was apparently referred to a district supervisor in Michigan, who spoke with Jawoszek and asked her to file a written response. Jawoszek was not disciplined, and neither the district supervisor nor Fashion Bug appears to have done anything further regarding Withers's complaint.

Burnside filed a complaint with the Michigan Civil Rights Commission, asserting that her termination was racially motivated, in violation of MCL 37.2201(2)(a)[2] of the Michigan Civil Rights Act. The complaint

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[1] In his dissent, Justice CAVANAGH states that he finds it "gratifying" and "telling" that I have prepared such a lengthy response to the dissents from the peremptory order. Be that as it may, I thought that this case required careful factual analysis. In fact, the absence of this tainted the earlier handlings, where there were misstatements of fact and misinterpretations of the record that are in some cases again repeated by the dissents. As an example, Justice CAVANAGH, to lay the foundation for a claim that Jawoszek reported Burnside's violation of the return policy as retribution for Withers's having lodged her complaint against Jawoszek, states in his dissent that Jawoszek informed her superior of Burnside's violation *after* learning that Withers had lodged a complaint against her. *Post* at 873. But this simply is not the case. What actually happened is that Jawoszek reported Burnside's violation *before* the events that gave rise to Withers's lodging her complaint. There are other examples of this phenomenon *infra.* I am left puzzled as to why this avoidable misreading of the transcript has taken place.

[2] MCL 37.2202(1)(a) provides:

> An employer shall not . . . [f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

was referred to a hearing officer who, after taking testimony and reviewing the evidence, filed a report recommending that the commission determine that Burnside had not established a prima facie case of discrimination. The commission did not adopt the hearing officer's recommendation, instead holding that Burnside had established a prima facie case of discrimination and awarding her damages. Fashion Bug appealed to the circuit court, which, after a review de novo of the evidence and testimony presented to the hearing officer,[3] affirmed the commission's holding.[4] Fashion Bug then appealed to the Court of Appeals, which determined that the circuit court had not clearly erred[5] in determining that Burnside had established a prima facie case of discrimination and, therefore, affirmed.[6]

I believe that the circuit court clearly erred in determining that Burnside established a prima facie case of discrimination. As was the case with the decisions of the lower courts, the primary fallacy of the dissents

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[3] Const 1963, art 5, § 29; MCL 37.2606(1); *Walker v Wolverine Fabricating & Mfg Co, Inc,* 425 Mich 586 (1986). I find questionable this Court's holding in *Walker* that the circuit court's review is limited to the record introduced before the commission given that Const 1963, art 5, § 29 states that appeals from the commission "shall be *tried* de novo before the circuit court . . . ." (Emphasis added.) It seems to me that by ratifying the phrase "tried de novo," instead of "reviewed de novo" or some other phrase, the ratifiers did not intend for the circuit court to merely review the evidence presented to the hearing officer, but, instead, to conduct a completely new trial where it would have the opportunity to hear testimony and assess credibility first-hand. Nevertheless, because the parties in this case did not challenge our decision in *Walker* by seeking to introduce new evidence in the circuit court, this case is not the appropriate vehicle for this Court to reevaluate its decision in *Walker.*

[4] However, the circuit court modified the commission's determination of damages.

[5] *Dep't of Civil Rights ex rel Johnson v Silver Dollar Cafe,* 441 Mich 110, 116-117 (1992). Again, I am concerned with this Court's previous determinations of the standards of review to be applied on appeal. Namely, I find unsettling this Court's blanket conclusion in *Silver Dollar* that a circuit court's determination whether unlawful discrimination occurred is reviewed for clear error. While the circuit court's determinations of fact are surely subject to review under the clearly erroneous standard, MCR 2.613(C), I do not believe that that is the rule for the review concerning whether a prima facie case has been presented. It seems unmistakable that this is a legal issue, which, as such, should be subject to a review de novo. Perhaps this is what the *Silver Dollar* Court meant to say but did not clearly state.

[6] Unpublished opinion per curiam, issued February 19, 2004 (Docket No. 240325).

in this case is that they disregard the fact that Burnside failed to present any evidence to support a finding that the person who was responsible for her termination, Kerins, harbored any racial animus. Indeed, Burnside herself testified that Kerins never made any comments toward her that she viewed as racially motivated. Rather, the only alleged discriminatory comments that Burnside identified in her testimony came not from Kerins, but from Jawoszek. However, these comments are not sufficient to establish a prima facie case of racial discrimination against Kerins or Fashion Bug.[7]

Although this Court has never addressed the criteria by which alleged discriminatory remarks by one other than the decision maker, or so-called "stray remarks," can be imputed to the decision maker, our Court of Appeals has adopted a four-part test that looks to (1) whether the alleged discriminatory remarks were made by the person who made the adverse employment decision or by an agent of the employer that was uninvolved in the challenged decision, (2) whether the alleged discriminatory remarks were isolated or part of a pattern of biased comments, (3) whether the alleged discriminatory remarks were made in close temporal proximity to the challenged employment decision, and (4) whether the alleged discriminatory remarks were ambiguous or clearly reflective of discriminatory bias. *Krohn v Sedgwick James of Michigan, Inc,* 244 Mich App 289, 292 (2001).

In the present case, the only one of these factors that even arguably weighs in Burnside's favor is the third, as it is undisputed that Kerins's decision to fire her was made not long after the incident in which Jawoszek made the challenged comments. The rest of the factors, however, do not support Burnside's claim. With regard to the first factor, there is no dispute that the alleged discriminatory remark was not made by the decision maker, Kerins, but by Jawoszek, who was not Burnside's supervisor and who was not involved in Kerins's decision to fire Burnside. Rather, Jawoszek's undisputed testimony was that, although she informed Kerins that Burnside had attempted to return merchandise without a receipt, she did not make any recommendation to Kerins as to how, or if, Burnside should be disciplined for her actions. Moreover, Kerins testified that her decision to terminate Burnside was based solely on her consultation with her contact in Fashion Bug's human resources department in Philadelphia. Further, with regard to the second factor, Burnside has not claimed that the alleged discriminatory comments by Jawoszek were part of a pattern of biased comments rather than an isolated incident. Finally, with regard to the fourth factor, the challenged comments by Jawoszek were not clearly reflective of a discriminatory animus by Jawoszek, but were merely ambiguous. Burnside's own

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[7] In his dissent, Justice CAVANAGH accuses me of failing to consider the context in which the "you people" comment was made in this case. *Post* at 872. I am joined by many, then, because the hearing officer, the commission, the circuit court, and the Court of Appeals did not find the "you people" comment to be direct evidence of discrimination. This suggests, to me at least, that it is he who misunderstands the context.

testimony reflects this, as she stated that she thought that Jawoszek was referring to the employees who worked at Burnside's store rather than making a discriminatory comment.[8] Moreover, both Jawoszek and Lorna Stout testified that Jawoszek often uses the phrase "you people" when referring to both white and black employees.

Additionally, even if one were to accept Burnside's and Withers's testimony that Jawoszek made the "you people" comment and made the hand gestures, and assume that the comment was discriminatory, Burnside failed to present any evidence that Kerins knew about the comments before she fired Burnside. Indeed, while the dissents join the lower courts in relying on the fact that Kerins never interviewed Burnside before she fired her to infer that Kerins's decision was racially motivated, that very fact prevents Jawoszek's comments and alleged hand gestures from being imputed to Kerins.

Unsatisfied by this lack of direct evidence of a discriminatory animus behind Kerins's decision to fire Burnside, the dissents, as did the lower courts, claim there is circumstantial evidence that Burnside's termination was racially motivated by engaging in a flawed disparate treatment analysis.

To establish a prima facie case of racial discrimination based on a "disparate treatment" theory, a plaintiff must prove that she was a member of a class protected by the act and that she was treated differently than a member of a different class for the same or similar conduct. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 181 (1998) (opinion of WEAVER, J.); *Betty v Brooks & Perkins,* 446 Mich 270, 281 (1994); see also *Merillat v Michigan State Univ,* 207 Mich App 241, 247 (1994). The first element is met because Burnside, as an African-American, is a member of a protected class. Nonetheless, Burnside has failed to establish the second element because she did not introduce any evidence that Kerins treated her differently than a member of a different race for the same conduct: violating Fashion Bug's policy against employees returning merchandise without a receipt. Indeed, Burnside did not introduce any evidence whatsoever concerning how other employees

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[8] In particular, Burnside testified as follows:

> *Counsel*: Okay. And after you informed Ms. Jawoszek that you wanted a hanger and she told you that it was against policy, what if anything happened after that?
>
> *Burnside*: Well, then she says, "Do you all hang your clothes on hangers?"
>
> *Counsel*: And what did you say?
>
> *Burnside*: I told her that it shouldn't matter, you know, if we hang our clothes on hangers. And I was hoping that she was referring to my store, because I said we always–whatever a customer wish[es], that's what we do.

were disciplined for violating the employee return policy and, in fact, could not identify any other instance in which another employee had been accused of violating the return policy. See *Merillat, supra* at 248.

Burnside, however, attempts to rest her claim of disparate treatment on her assertion that she was treated differently from Jawoszek because Fashion Bug chose not to investigate Withers's complaint against Jawoszek as aggressively as it did Jawoszek's allegation that Burnside attempted to return merchandise without a receipt and, more specifically, did not ultimately fire Jawoszek. The primary flaw in this argument, however, and one that the dissents and the lower courts failed to realize, is that Burnside was fired by Kerins, who testified that she did not investigate Withers's complaint against Jawoszek. In fact, she testified that she was not even aware that Withers had filed a complaint against Jawoszek with Fashion Bug's offices in Chicago.

Moreover, even disregarding this crucial fact, Burnside's assertion that she was treated differently than Jawoszek is not sufficient to create a prima facie case of discrimination because, "[t]o create an inference of disparate treatment, [Burnside] must prove that [she and Jawoszek] were similarly situated, i.e., 'all of the relevant aspects' of [her] employment situation were 'nearly identical' to those of [Jawoszek's] employment situation." *Town v Michigan Bell Tel Co,* 455 Mich 688, 699-700 (1997) (opinion by BRICKLEY, J.), citing *Pierce v Commonwealth Life Ins Co,* 40 F3d 796, 802 (CA 6, 1994); see also *Smith v Stratus Computer, Inc,* 40 F3d 11, 17 (CA 1, 1994); *Mitchell v Toledo Hosp,* 964 F2d 577, 583 (CA 6, 1992).

The relevant aspects of Burnside's employment were not sufficiently identical to Jawoszek's. First, as pointed out by our peremptory order, the most relevant aspect in this case is the wrongs for which Burnside and Jawoszek were accused. Burnside was accused of violating a Fashion Bug policy aimed at preventing theft by employees. Not only did Burnside admit during her testimony that she was aware of this policy, but her former store manager, Sharon Mitchell-Harvey, testified that she had previously given Burnside several oral and written warnings about attempting to return merchandise without a receipt. Jawoszek, on the other hand, was merely accused of declining to refund money to a nonemployee, Withers, for merchandise for which Withers did not have a receipt. In fact, Withers testified that Jawoszek did not tell her that she could not return the merchandise at all, but, instead, merely told her that she could only return the merchandise at the Fashion Bug outlet from which she had purchased it. This, according to Jawoszek, was because she suspected that Withers was attempting to return the same items that Burnside had attempted to return on the previous occasion. Accordingly, Jawoszek recommended that Withers take the merchandise back to the store from which she had purchased it because that store would have a backup receipt. That way, Jawoszek could ensure that Withers was not returning clothing that Burnside had purchased with her employee discount. Quite simply, evidence about how Fashion Bug treated Jawoszek for refusing to issue a refund to a customer who could not produce a receipt (merchandise that could have been purchased by an employee at a discount) is irrelevant to how it treated an employee who was accused of trying to defraud the company and, indeed, had been warned about such conduct in the past.

Second, as is also pointed out by our peremptory order, another relevant aspect in this case is the disparity between Burnside's and Jawoszek's positions at Fashion Bug, as well as the disparity between the persons by whom they were accused of wrongful conduct. Specifically, Jawoszek was a store manager accused by a customer of poor service because the customer was upset that Jawoszek had asked her to return merchandise at the store from which she had bought it, an action aimed at avoiding a potential monetary loss to the company. Burnside, in contrast, was accused by a store manager of trying to defraud the company. Why the dissents and the lower courts believe that something dark and suspicious is shown by Fashion Bug's decision to fire an employee accused by a manager of attempting to defraud the company, an accusation that was supported by the testimony of another employee working in the store at the time,[9] and coincidentally not to conduct an equally searching investigation of a customer's complaint about poor customer service is beyond my understanding. Rather, in my view, Fashion Bug's decisions to fire an employee accused by a manager of theft and to run the risk of losing a customer by not aggressively investigating the customer's complaint reflect a prioritization that does not implicate racial discrimination, but business judgment. As such it should not be second-guessed by the courts. See, *Hazle v Ford Motor Co,* 464 Mich 456, 475-476 (2001).

Finally, even if the dissents were correct in asserting that Burnside presented a prima facie case of discrimination based on a theory of

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[9] As did the lower courts, the dissents attempt to create an inference of discriminatory animus on Kerins's behalf by asserting that her investigation into Jawoszek's accusation was flawed because she only interviewed the white persons who were in the store at the time that Burnside attempted to return merchandise without a receipt. This assertion by the dissents, however, is based on an erroneous reading of the record. In particular, Withers testified that, aside from Jawoszek and the two other white employees who were in the store at the time, there were approximately four or five white customers standing at the checkout counter at the time of the incident. It is not disputed, however, that these other white customers were not interviewed. Instead, only the other employees who were working at the time of the incident were interviewed. Thus, contrary to the dissents' conclusions, the most reasonable inference from the testimony presented at the hearings was not that the investigation focused only on interviewing the white persons who were present during the incident, but on interviewing the other Fashion Bug employees who were working at the time of the incident. Why the dissents and the lower courts find it so odd that Fashion Bug, which was conducting an internal investigation concerning alleged employee misconduct, would focus its investigation on interviewing identifiable Fashion Bug employees who were working at the time of the incident and to whom it had access, and did not attempt to seek out unidentified nonemployees to whom it did not have access, is curious. I find it quite unremarkable.

disparate treatment, this conclusion would not support a finding that Fashion Bug wrongfully terminated Burnside's employment. Rather, Burnside's having met her burden of establishing a prima facie case would merely create a rebuttable presumption of discrimination. This presumption, however, is not conclusive of unlawful discrimination and dissipates if Fashion Bug articulated a legitimate, nondiscriminatory reason for firing Burnside. *Hazle, supra* at 462-465; *Lytle, supra* at 172-173. In this case, Fashion Bug articulated such a reason by introducing evidence that Kerins's decision to fire Burnside was motivated by Jawoszek's allegation that Burnside had attempted to violate its policy against employees returning merchandise without a receipt or, in other words, Kerins's belief that Burnside had attempted to defraud the company. Thus, any presumption of unlawful discrimination was rebutted, and the burden then shifted back to Burnside to show by a preponderance of the evidence that Fashion Bug's stated reason for her termination was not the true reason, but was merely a pretext for discrimination. *Hazle, supra* at 465-467; *Lytle, supra* at 175-176; *Town, supra* at 695-698. Rebuttal information of this sort was never presented by Burnside.

Rather, to establish pretext, the lower courts followed the commission's conclusion that Burnside had not, in fact, attempted to return merchandise without a receipt. Even assuming this conclusion to be correct, it does not satisfy Burnside's burden. Specifically, it is not sufficient that Burnside merely disprove Fashion Bug's proffered nondiscriminatory reason for her termination. Rather, such disproof must not only evince mere falsity, but must also evince a discriminatory motive. *Lytle, supra* at 182; *Town, supra* at 706. Stated simply, even if one were to assume, arguendo, that Jawoszek falsely accused Burnside of attempting to return merchandise without a receipt, this does not inevitably lead to the conclusion that Kerins harbored any discriminatory motive in deciding to fire Burnside on the basis of the accusation. See *Hazle, supra* at 474-475. Rather, all that this would show is that Kerins's decision to fire Burnside was based on inaccurate information, and it is not within the province of the courts to second-guess whether Kerins's decision was " 'wise, shrewd, prudent, or competent.' " *Hazle, supra* at 464 n 7, quoting *Town, supra* at 704. Instead, they must focus only on whether Kerins's decision was " 'lawful', that is, one that is not motivated by a 'discriminatory animus.' " *Id.*, quoting *Texas Dep't of Community Affairs v Burdine,* 450 US 248, 257 (1981). In the present case, there can be no dispute that Kerins's decision to fire an employee accused by a manager of attempting to defraud the company was a lawful decision. Moreover, as outlined above, Burnside did not offer any direct evidence that Kerins's decision was motivated by a discriminatory animus, and failed to present sufficient circumstantial evidence of a discriminatory animus on Kerins's part to establish a prima facie case.

Accordingly, I believe that the circuit court's determination that Burnside established a prima facie case of discrimination was clearly erroneous. I therefore concur in the peremptory order to reverse the Court of Appeals and remand this case to the circuit court for entry of judgment in defendant's favor.

CAVANAGH, J. (*dissenting*). Claimant Burnette Burnside established a prima facie case of unlawful discrimination based on race because she was treated differently than another employee, Theresa Jawoszek. In all relevant aspects, Burnside and Jawoszek were similarly situated. Burnside's and Jawoszek's circumstances were nearly identical because they were two of defendant's employees accused of misconduct that necessitated defendant to conduct investigations to determine the validity of the allegations. Any differences in job classification were irrelevant to explain the widely disparate manner in which defendant conducted its subsequent investigations.

Jawoszek was accused not merely of acting discourteously to a customer, but of acting discourteously to a customer *on the basis of race*. This is arguably as serious, if not more serious, than the highly questionable allegation by Jawoszek that Burnside attempted to exchange clothing items without a receipt.

Notably, Jawoszek's allegation against Burnside came after Jawoszek allegedly made a racist remark to Burnside. After Burnside requested a hanger for a skirt she was purchasing, Jawoszek allegedly said, "You people hang your clothes on hangers?" When asked to explain this comment, Jawoszek allegedly referenced Burnside and Burnside's family members and said, "You all are the people." She then motioned to herself and other white employees and said, "We all are individuals." While Chief Justice TAYLOR argues that Jawoszek's alleged comment was not a racist one because she had used the phrase "you people" in the past to refer to African-American and Caucasian employees, he fails to consider the context of the statement made in this case.[1]

Even assuming that Jawoszek had previously used the phrase "you people" to refer to African-American and Caucasian employees, in this context Jawoszek's comment could only reasonably be viewed to be racially biased. It is implausible that Jawoszek, a retail manager at a clothing store, suddenly was experiencing newfound wonder at whether customers hang their clothes on hangers. And the fact that she just happened to be referring only to African-American customers when she wondered aloud about this newfound concern is equally implausible. While a hearing officer is generally in the best position to judge the credibility of witnesses, it does not mean that the Michigan Civil Rights Commission, the circuit court, the Court of Appeals, and this Court must unquestionably accept the hearing officer's determination of a witness's version of events. Considering that the Michigan Civil Rights Commission, the circuit court, and the Court of Appeals have all been in agreement that Burnside established a prima facie case of unlawful discrimination based on race, I do not agree with this Court's decision to substitute its judgment for that of the lower courts.

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[1] I find it somewhat gratifying, and telling, that in response to the dissents, the Chief Justice deems a twenty-page concurrence necessary to explain the majority's five-sentence order reversing the Michigan Civil Rights Commission, the circuit court, and the Court of Appeals.

Further, Chief Justice TAYLOR states that Burnside presented no evidence that Deborah Kerins, the person who was ultimately responsible for Burnside's firing, harbored any racial animus. However, what Chief Justice TAYLOR ignores is that Jawoszek set the termination process in motion by alleging that Burnside tried to improperly exchange merchandise. It is misleading to claim, as Chief Justice TAYLOR does, that Jawoszek was not involved in the decision to fire Burnside. Jawoszek is the one who alleged that Burnside was attempting to violate defendant's policies. Jawoszek's allegation began the process that ended with Burnside being fired. If Jawoszek had a racial bias, as her "you people" comment appears to indicate, then her racial bias is absolutely relevant to the validity and reliability of her allegation against Burnside.

After considering the allegations against Burnside and Jawoszek, the glaring disparity in how defendant treated each employee becomes apparent when one examines how defendant conducted its investigations. Jawoszek, a Caucasian employee, was accused of making a racially disparaging comment to Burnside and treating Benita Withers, Burnside's sister, discourteously and discriminatorily because of her race. In response, after learning that Withers had filed a complaint, Jawoszek alleged to Kerins that Burnside attempted to exchange clothing items without a receipt. In investigating these allegations, defendant interviewed only Jawoszek and Caucasian employees. Defendant did not interview Burnside, Withers, or an African-American employee who was present when Burnside allegedly was trying to improperly exchange clothing items and when Jawoszek allegedly made the "you people" comment. Remarkably, after interviewing only Caucasian employees, defendant decided not to discipline Jawoszek and to fire Burnside. Jawoszek's complaint—which led to Burnside's being fired—was categorically accepted by defendant, even though Jawoszek had been accused of racist behavior.

There is no rational reason for the disparity in how defendant conducted its investigations. A savvy employer can always argue that there is a difference in job classification or conduct, but any difference in job classification or alleged misconduct is irrelevant in this case to explaining why defendant engaged in such widely differing standards in investigating alleged wrongdoings. Chief Justice TAYLOR states that defendant's actions do not implicate racial discrimination, but merely business judgment. But the fact that the termination process was set in motion by a manager who allegedly made racist remarks casts the entire process in tremendous doubt. Firing an employee under these circumstances should not be classified as yet another mere "business decision." Defendant should not be able to insulate itself from liability because of inconsequential differences that do not affect the fundamental issue that, when faced with allegations of misconduct, defendant treated an African-American employee and a Caucasian employee differently for no discernable reason. Accordingly, I would deny leave to appeal.

WEAVER, J. (*dissenting*). I dissent from the order peremptorily reversing the Court of Appeals decision in this case because I believe the Court of Appeals decision is correct. In affirming the conclusion that Ms.

Burnside, an African-American employee, was treated differently for the same or similar conduct than Ms. Jawoszek, a Caucasian employee, the Court of Appeals stated:

> Here, the trial court concluded that claimant and Jawoszek were similarly situated, both subject to the return/exchange policy. The fact they were treated differently for allegedly violating the policy was sufficient to give rise to a prima facie case. The trial court noted that there appeared to be only one policy related to investigation of allegations of violating store policy, regardless of whether the allegations involved managers or nonmanagerial employees, and that in that respect, claimant and Jawoszek were considered comparables. Accordingly, the "relevant aspect" of claimant's and Jawoszek's employment situation—that they both are subject to the same store policies regarding investigations and discipline—is the same. We cannot conclude that the trial court's decision in this regard was clearly erroneous. *Silver Dollar Café, supra*.[1]
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> Under the burden shifting framework of *McDonnell Douglas*,[2] the establishment of a prima facie case creates the presumption of discrimination, requiring the defendant to articulate " 'legitimate non-discriminatory reason' " for the plaintiff's termination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998). The purpose of this explanation serves to overcome the presumption of discrimination, shifting the burden back to the plaintiff to demonstrate that the proffered explanation was merely pretextual. *Id.* at 173-174. Here, respondent offered that claimant was terminated because she violated the store's policy by attempting to exchange clothing without a receipt.
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> The commission concluded that this explanation was pretextual because, as it found, claimant had not, in fact, violated store policy inasmuch as she actually had a receipt for the clothes she sought to return and exchange. The trial court agreed with the commission that claimant's "prima facie case strongly indicates race played a part in the decision to terminate plaintiff. As noted above, Fashion Bug, through Kerins, employed racially discriminatory methods of investigation which led it to terminate [claimant]." Moreover, the trial court agreed with the commission that plaintiff never actually violated the policy because she never exchanged merchandise without a receipt. Finally, the trial court

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[1] *Dep't of Civil Rights ex rel Johnson v Silver Dollar Cafe (On Remand)*, 198 Mich App 547 (1993).

[2] *McDonnell Douglas Corp v Green*, 411 US 792 (1973).

reasoned that the use of the "you people" language[3] by Jawoszek could be construed as racially derogatory. The trial court reasoned that use of this language by Jawoszek could explain why Jawoszek complained about claimant, which initiated the investigation process, which ultimately led to claimant's termination.

Respondent first argues that the conclusion of the commission and the trial court that claimant did not violate respondent's policy was not supported by the evidence. As previously stated, our review of this issue is not de novo. *Silver Dollar Café, supra*. The commission as the reviewing body was entitled to make a de novo decision on all questions of fact and law, see *Ferrario v Escanaba Bd of Ed*, 426 Mich 353, 366-367; 395 NW2d 195 (1986), and the trial court's review of that decision is de novo. *Silver Dollar Café, supra*. Respondent points out that, while claimant did not successfully return items without a receipt, there is no dispute that claimant attempted to do so. The commission and trial court were able to determine that claimant went to respondent's store to exchange her blouse and blazer. Claimant found the blouse that she wanted, but could not find the blazer in the right size. Therefore, claimant exchanged the blouse, but kept her blazer; claimant had the receipt for the blouse. This evidence supports the conclusion of the trial court and the commission that claimant did not violate the policy. Actually, what is unsupported by the evidence is respondent's assertion that claimant attempted to violate respondent's policy. One of the ways a plaintiff may show that a defendant's explanation or the plaintiff's termination is a pretext is by showing that that reason had no basis in fact. *Feick v Monroe County,* 229 Mich App 335, 343; 582 NW2d 207 (1998). Here, by showing that respondent's explanation has no basis in fact supports the conclusion that respondent was racially motivated in terminating claimant.

Respondent next argues that the decision to terminate claimant was made in good faith, and was a matter of business judgment that should not be second-guessed. This argument ignores the conclusion that the investigation and disciplinary methods employed by respondent were racially disparate. Although Kerins may well have believed claimant violated the policy, that fails to

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[3] The Court of Appeals is referring to a statement made by Ms. Jawoszek, manager of defendant's Warren store, when Ms. Burnside, an employee of defendant's Detroit store, and her sister, Benita Withers, were shopping at the Warren store. When Ms. Burnside requested that Ms. Jawoszek leave the skirt that Ms. Burnside was purchasing on the hanger, Ms. Jawoszek replied, "You people hang your clothes on hangers?"

explain why the allegations against claimant were investigated only by talking to white employees, and why claimant was terminated, when allegations directed at Jawoszek were not investigated, and Jawoszek was not punished. Respondent's reasoning is flawed, in that all employment decisions can be said to involve "business judgment," but this fact alone does not insulate an employer from liability for using racially based motives for making such decisions.

Respondent also argues that the trial court erred when it relied on Jawoszek's "you people" language as a basis for concluding respondent's reason for terminating claimant was pretextual. Respondent asserts that the language used by Jawoszek was irrelevant because it was Kerins, and not Jawoszek, who ultimately decided to terminate claimant. In looking at the relevancy of comments which may or may not amount to direct evidence of discrimination, this Court looks at whether the "proffered comment was made by an agent of the employer involved in the decision to terminate plaintiff's employment." *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 300; 624 NW2d 212 (2001). Jawoszek was an agent of the decisionmaker who decided to terminate plaintiff's employment. Respondent fails to establish how the trial court's consideration of these comments amount to clear error warranting reversal. *Silver Dollar Café, supra.*

We do not second guess the conclusion of the trial court and commission, as factfinder, that claimant's prima facie case was sufficiently strong to conclude that respondent's decision to terminate claimant was racially motivated. The reasons for finding a prima facie case can also serve to rebut a defendant's proffered nondiscriminatory explanation. *Town v Michigan Bell Telephone Co,* 455 Mich 688, 695; 568 NW2d 64 (1997). Moreover, as further evidence to rebut respondent's explanation, the trial court and the commission concluded that respondent's explanation was untrue. Finally, the trial court considered the comments made by Jawoszek to determine that the explanation was pretextual. The trial court did not err in so concluding. *Silver Dollar Café, supra.* [*Dep't of Civil Rights v Fashion Bug of Detroit,* unpublished opinion per curiam of the Court of Appeals, issued February 19, 2004 (Docket No. 240325).]

I agree with this analysis and therefore would deny leave to appeal.

KELLY, J. (*dissenting*). I fully concur in the dissenting statements of Justices CAVANAGH and WEAVER.

The Michigan Department of Civil Rights determined that respondent discriminated against claimant Burnette Burnside on the basis of her race. The circuit court and the Court of Appeals affirmed. This Court

finds that each of these decisions was clearly erroneous. It reverses them and, in so doing, steps out of its proper role and acts as the finder of fact, notwithstanding that it is not the best situated to make factual rulings.

The case arises from complaints lodged against Burnette Burnside, who is African-American, and Theresa Jawoszek, who is Caucasian, for violating their employer's company policy. Both women were Fashion Bug employees. However, the investigations of the complaints against the two employees differed greatly.[1] The trial court found no legitimate material basis for the difference. This Court's peremptory order reversing provides no explanation for its conclusion that the trial court clearly erred in its analysis.

I disagree, also, with the order's statement that "it was not established that the ultimate decision maker harbored any racial animus toward Burnside." Regional manager Deborah Kerins, who is Caucasian, investigated the complaint against Burnside and discharged her. Kerins interviewed only the Caucasian individuals involved, none of the African-American individuals, including employee Burnside.[2] Contrary to the majority's statement, the evidence sufficiently supports the trial court's conclusion that the ultimate decision maker harbored racial animus toward claimant.

The Court of Appeals, the trial court, and the Department of Civil Rights did not clearly err in finding that Burnside was subjected to racial discrimination by respondent. I would deny leave to appeal and leave the decisions of the earlier tribunals intact.

PEOPLE v MCGRAW, No. 127154. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(G)(1). The Court of Appeals shall, while retaining jurisdiction, remand this case to the Saginaw Circuit Court for the appointment of appellate counsel pursuant to *Halbert v Michigan*, ___ US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Appointed counsel may file a supplemental application for leave to appeal with the Court of Appeals within 56 days of the date of the Circuit Court's appointment order. Jurisdiction is not retained. Court of Appeals No. 255864.

KELLY, J. (*concurring*). While I concur with the order, in addition I would direct counsel to address the claim that OV 9 was misscored.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal July 22, 2005:

COSTA v COMMUNITY EMERGENCY MEDICAL SERVICES, INC, Nos. 127334, 127335. Pursuant to MCR 7.302(G)(1), the clerk is to schedule oral

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[1] This is pointed out by Justice WEAVER, quoting the Court of Appeals, and Justice CAVANAGH in their dissenting statements.

[2] One would reasonably expect that a company "conducting an internal investigation concerning alleged employee misconduct," *Ante* at 870 n 9, would interview the employee who is the subject of the alleged misconduct.

argument on whether to grant the application or cross-application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument: (1) whether among the remedies against a party who fails to file an affidavit of meritorious defense, as required by MCL 600.2912e, is a default, and under what circumstances, if any, is such a remedy mandatory; and (2) the effect, if any, that reliance on the defense of governmental immunity has on the obligation to file an affidavit of meritorious defense under MCL 600.2912e. The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of arguments made in application papers. Reported below: 263 Mich App 572.

QARANA V NORTH POINTE INSURANCE COMPANY, No. 127488. Pursuant to MCR 7.302(G)(1), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument: (1) whether defendant was required to use "reasonable diligence" in securing the cooperation of the insured; and, if so (2) whether a question of fact existed regarding whether defendant used "reasonable diligence" in securing the cooperation of the insured; (3) whether defendant must establish that it was prejudiced by the insured's noncooperation; and, if so (4) whether a question of fact existed regarding whether defendant was prejudiced by the insured's noncooperation. The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting restatements of arguments made in application papers. Court of Appeals No. 244797.

Leave to Appeal Denied July 22, 2005:

PEOPLE V ROBINSON, No. 125441. The cause having been briefed and orally argued, the order of June 11, 2004, 470 Mich 874 (2004), granting leave to appeal is vacated, and leave to appeal is denied because the Supreme Court is no longer persuaded that the questions presented should be reviewed. Court of Appeals No. 252755.

CORRIGAN, J. (*concurring*). I concur in the determination that leave was improvidently granted, given the ruling regarding double jeopardy by the United States Supreme Court in *Smith v Massachusetts,* 543 US __; 125 S Ct 1129, 160 L Ed 2d 914 (2005). I write separately to note a tension between our statutes and case law regarding whether corroboration is an element of the crime of perjury under MCL 750.422.

Defendant was charged with perjury, MCL 750.422, stemming from testimony that he furnished at the trial of his friend, Timothy Polak. At Polak's trial for drunk driving, defendant testified that he, and not Polak, had been driving. The officer testified that he saw Polak and defendant switch seats and that Polak had been driving. Polak was convicted of drunk driving.

At defendant's trial, the prosecution offered the statements defendant made during Polak's trial. The same officer furnished his previous

testimony that Polak and defendant had switched seats. The trial court thereafter granted defendant's motion for a directed verdict and dismissed the case because the prosecutor had failed to provide any corroboration as required by *People v Cash*, 388 Mich 153 (1972). The prosecutor appealed, and the Court of Appeals denied leave to appeal.

I believe that *Cash* was wrongly decided. The statutes prohibiting and defining perjury, MCL 750.422 and MCL 750.423, do not require corroboration as an element of the offense. The requirement of corroborative evidence is derived from the so-called "two-witness rule." Under that rule, "the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury." *Hammer v United States,* 271 US 620, 626 (1926). The two-witness rule did not always require the direct testimony of two witnesses to prove the perjury. The direct testimony of one witness and sufficient corroborative evidence could also satisfy the rule. *Weiler v United States,* 323 US 606, 610 (1945).

Our jurisprudence on the two-witness rule is confused and contradictory. In 1916, this Court held without any analysis that, in a perjury case, the trial court must instruct upon request that the testimony of one witness was not sufficient to convict a defendant of perjury, that there must also be strong corroborating circumstances. *People v McClintic,* 193 Mich 589, 601 (1916).

Subsequently, this Court held that "[t]he early rule of direct testimony of two witnesses no longer obtains." *People v Phelps,* 261 Mich 45, 49 (1932). This Court thereafter followed the *Phelps* repudiation of the two-witness rule, holding that one witness's testimony that the defendant had bribed him was sufficient to sustain the defendant's conviction of perjury. *People v Taylor,* 386 Mich 204, 208 (1971).

One year later, however, this Court again reversed course, relying on *McClintic* and *People v Kennedy,* 221 Mich 1 (1922). We held that the testimony of one witness was not sufficient to convict of perjury. *Cash, supra* at 162.[1] The Court held that

> [t]he law is well established that to sustain a conviction for perjury the prosecution must prove the falsity of the statement made by the defendant. This is done by establishing the truth of its contradiction. It is not enough simply to contradict it, but evidence of the truth of the contradiction must come from evidence of circumstances bringing strong corroboration of the contradiction. *People v Kennedy,* 221 Mich 1 (1922); *People v McClintic,* 193 Mich 589 (1916). [*Id.*]

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[1] In *People v Lewandowski*, 102 Mich App 358 (1980), a Court of Appeals panel recognized the conflict between *Cash* and *Taylor.* The panel elected to follow *Cash,* and held that one witness's testimony was not sufficient to sustain a perjury conviction: "[S]trongly corroborative evidence which directly contradicts the alleged perjured testimony is still required." *Lewandowski, supra* at 361.

In applying the two-witness rule, *Cash* disregarded the Court's prior opinions in *Phelps* and *Taylor*, and misapplied the Court's holding in *Kennedy.* In *Kennedy,* the holding was limited to applying the new rule of *McClintic* that two contradictory sworn statements by the defendant would not be sufficient to sustain the defendant's conviction.

At common law, the two-witness rule defined the crime of perjury. But, as this Court has recently reaffirmed, under Const 1963, art 3, § 7, the Legislature has constitutional authority to change the common law. *People v Lively,* 470 Mich 248, 252 (2004).[2]

Our Legislature altered the common law by enacting a statute criminalizing perjury. MCL 750.422 provides:

> Any person who, being lawfully required to depose the truth in any proceeding in a court of justice, shall commit perjury shall be guilty of a felony, punishable, if such perjury was committed on the trial of an indictment for a capital crime, by imprisonment in the state prison for life, or any term of years, and if committed in any other case, by imprisonment in the state prison for not more than 15 years.

MCL 750.423 defines perjury, stating:

> Any person authorized by any statute of this state to take an oath, or any person of whom an oath shall be required by law, who shall wilfully swear falsely, in regard to any matter or thing, respecting which such oath is authorized or required, shall be guilty of perjury, a felony, punishable by imprisonment in the state prison not more than 15 years.

These statutes do not specify any number of witnesses required to prove guilt. By contrast, the Legislature has specifically provided that "[n]o person shall be convicted of treason unless upon the testimony of 2 witnesses to the same overt act, or on confession in open court." MCL 750.544.

Given the explicit statutory language, the codified offense of perjury does not require corroboration. In a perjury case, as in criminal cases generally, the prosecution's burden is to prove the defendant's guilt beyond a reasonable doubt. Because our Legislature did not codify the two-witness rule in our perjury statutes, the two-witness rule should not be controlling.

In re ALLEN (FAMILY INDEPENDENCE AGENCY v ALLEN) NO 2, No. 129049; Court of Appeals No. 259948.

In re LENDRUM (FAMILY INDEPENDENCE AGENCY v LENDRUM), No. 129067; Court of Appeals No. 258360.

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[2] In *Lively, supra* at 254, 258, this Court held that the materiality of the false statement is not an element of the statutory offense of perjury.

Interlocutory Appeal

Leave to Appeal Denied July 22, 2005:

LOTTNER v HARPER-HUTZEL HOSPITAL, No. 129025; Court of Appeals No. 262327.

Summary Dispositions July 26, 2005:

AUTO CLUB INSURANCE ASSOCIATION v NOVI CAR WASH, No. 127600. 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. 255373.

PEOPLE v BURKE, No. 128004. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration, as on leave granted, of whether defendant was entitled to jail credit in the amount of time spent in pretrial incarceration in the Grand Traverse County Jail. MCR 7.302(G)(1). In all other respects, leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 257604.

Leave to Appeal Denied July 26, 2005:

KING v DENTON TOWNSHIP, No. 127162; Court of Appeals No. 243350.

MORRIS v COMERICA BANK, No. 127388; Court of Appeals No. 245563.

PEOPLE v GREENE, No. 127394; Court of Appeals No. 250699.

PEOPLE v HAMILTON, No. 127421; Court of Appeals No. 247036.

FARMERS INSURANCE EXCHANGE v MICHIGAN AUTO RECOVERY, INC, No. 127439; Court of Appeals No. 256040.

PEOPLE v CATHERINE ANDERSON, No. 127452; Court of Appeals No. 257410.

WILKERSON v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 127469; Court of Appeals No. 247834.

PEOPLE v DUNBAR, No. 127517; reported below: 264 Mich App 240.

LITTLE CAESAR ENTERPRISES, INC v CITY OF FARMINGTON HILLS, No. 127527; Court of Appeals No. 255850.

PEOPLE v HOLTSCHLAG, No. 127535; Court of Appeals No. 226715 (on remand).

PEOPLE v HOBBS, No. 127543; Court of Appeals No. 244913.

ABE v MICHIGAN STATE UNIVERSITY, No. 127545; Court of Appeals No. 256365.

FARM BUREAU GENERAL INSURANCE COMPANY v DETROIT EDISON COMPANY, No. 127549; Court of Appeals No. 248576.

PEOPLE v RHIMES, No. 127554; Court of Appeals No. 248955.

CLAYBANKS TOWNSHIP v HAYSTEAD, No. 127560; Court of Appeals No. 256234.

MARKMAN, J., not participating.

PEOPLE v CONKLIN, No. 127569; Court of Appeals No. 248542.

MCWILLIAMS v SECRETARY OF STATE, No. 127572; Court of Appeals No. 248364.

PEOPLE v MAST, No. 127585; Court of Appeals No. 248951.

PEOPLE v STINSON, No. 127587; Court of Appeals No. 255599.

PEOPLE v GREER, No. 127588; Court of Appeals No. 255867.

PEOPLE v SCOTT, No. 127589; Court of Appeals No. 248764.

PEOPLE v DAOUD, No. 127591; Court of Appeals No. 250166.

PEOPLE v VALLEJO, No. 127592; Court of Appeals No. 246341.

PEOPLE v RODRIGUEZ, No. 127594; Court of Appeals No. 249413.

JOHNSON v LASON SYSTEMS, INC, No. 127596; Court of Appeals No. 256109.

PEOPLE v FULLER, No. 127597; Court of Appeals No. 248948.

MORRILL v ST JOSEPH COUNTY ROAD COMMISSION, No. 127599; Court of Appeals No. 247771.

PIERCE v BALTIMORE TOWNSHIP, Nos. 127604, 127605; Court of Appeals Nos. 247422, 247425.

GROSSE POINTE ACADEMY v GROSSE POINTE TOWNSHIP, No. 127608; Court of Appeals No. 248340.

YOUNG, J., not participating.

HUTCHERSON v SMITH, No. 127623; Court of Appeals No. 248143.

PEOPLE v LEE, No. 127628; Court of Appeals No. 255912.

PEOPLE v PERKINS, No. 127630; Court of Appeals No. 250159.

RODRIGUEZ v T MOLITOR, INC, No. 127637; Court of Appeals No. 248140.

PEOPLE v HEARD, No. 127644; Court of Appeals No. 258193.

PEOPLE v STEVENSON, No. 127648; Court of Appeals No. 256670.

PEOPLE v JECZEN, No. 127658; Court of Appeals No. 257255.

PEOPLE v DELAINE, No. 127662; Court of Appeals No. 249193.

SAMMAN v SAMMAN, No. 127664; Court of Appeals No. 249877.

KILPATRICK v CAG CORPORATION, No. 127668; Court of Appeals No. 249466.

PEOPLE v MAYFIELD, No. 127670; Court of Appeals No. 249887.

PEOPLE v LANCASTER, No. 127672; Court of Appeals No. 248612.

AMBROSE v FRIED, No. 127691; Court of Appeals No. 249482.

RAVITZ v COMERICA BANK, No. 127693; Court of Appeals No. 246994.

PEOPLE v HARDNETT, No. 127708; Court of Appeals No. 249418.

PEOPLE v ROLAND, No. 127710; Court of Appeals No. 256207.

CHILINGIRIAN v MIRO, WEINER & KRAMER, PC, No. 127714; Court of Appeals No. 247798.

PEOPLE v CAVETT, No. 127717; Court of Appeals No. 257434.

PEOPLE v ONUMONU, No. 127719; Court of Appeals No. 249106.

FOUST v MATEJEK, No. 127725; Court of Appeals No. 246437.

SHR LIMITED PARTNERSHIP v SHELL OIL COMPANY, No. 127728; Court of Appeals No. 255615.

METRO INDUSTRIAL CONTRACTING, INC v BUREAU OF SAFETY AND REGULATION, No. 127736; Court of Appeals No. 256721.

SHACKLEFORD v THOMAS, No. 127737; Court of Appeals No. 255810.

TUFENKJIAN v MICHIGAN CONSOLIDATED GAS COMPANY, No. 127739; Court of Appeals No. 248844.

OLARU v FEDEX CUSTOM CRITICAL, INC, No. 127748; Court of Appeals No. 248190.

PEOPLE v FISHER, No. 127757; Court of Appeals No. 250700.

PEOPLE OF YPSILANTI CHARTER TOWNSHIP v RABCHUN, No. 127773; Court of Appeals No. 258204.

PERRY v DELPHI AUTOMOTIVE SYSTEMS CORPORATION, No. 127778; Court of Appeals No. 256529.

PEOPLE v MCGOWAN, No. 127782; Court of Appeals No. 250610.

SANTINO v STATE EMPLOYEES RETIREMENT SYSTEM, No. 127788; Court of Appeals No. 255934.

OLYMPIA SHISH-KEBAB, INC v GAMING CONTROL BOARD, No. 127789; Court of Appeals No. 256516.

PEOPLE v CHANCY, No. 127792; Court of Appeals No. 249893.

PEOPLE v TILLMAN, No. 127801; Court of Appeals No. 249414.

PEOPLE v WHITE, No. 127804; Court of Appeals No. 249210.

PEOPLE v TYRON DAVIS, No. 127809; Court of Appeals No. 249241.

PEOPLE v FOOTE, No. 127812; Court of Appeals No. 256316.

PEOPLE v CALVIN SMITH, No. 127815; Court of Appeals No. 248655.

PEOPLE v MOORE, No. 127816; Court of Appeals No. 258252.

BELL v AUTO ALLIANCE INTERNATIONAL, INC, No. 127822; Court of Appeals No. 256939.

PEOPLE v MICHAEL SMITH, No. 127843; Court of Appeals No. 258404.

PEOPLE v RALSTON, No. 127852; Court of Appeals No. 249828.

PEOPLE v LOVE, No. 127873; Court of Appeals No. 249214.

PEOPLE v DELANGELO JOHNSON, No. 127874; Court of Appeals No. 249497.

MUSCAT v MUSCAT, No. 127883; Court of Appeals No. 256317.

PEOPLE v DARNELL ANDERSON, No. 127898; Court of Appeals No. 243341.

PEOPLE v ROACHE, No. 127899; Court of Appeals No. 249992.

PEOPLE v ALSPAUGH, No. 127900; Court of Appeals No. 256041.

PEOPLE v PATMORE, No. 127908; reported below: 264 Mich App 139.

PEOPLE v STRICKLAND, No. 127915; Court of Appeals No. 249897.

PEOPLE v CLEUNION, No. 127919; Court of Appeals No. 258549.

PEOPLE v MARTINEZ, No. 127921; Court of Appeals No. 250330.

PEOPLE v LEGETTE, No. 127922; Court of Appeals No. 250158.

PEOPLE v BRAYMAN, No. 127924; Court of Appeals No. 227942 (on remand).

PEOPLE v SHELLY, No. 127933; Court of Appeals No. 250002.

PEOPLE v VERDULLA, No. 127939; Court of Appeals No. 258022.

PEOPLE v PEOPLES, No. 127940; Court of Appeals No. 250680.

PEOPLE v SETTLES, No. 127941; Court of Appeals No. 249207.

PEOPLE v MOBLEY, No. 127943; Court of Appeals No. 250698.

PEOPLE v PINSON, No. 127945; Court of Appeals No. 251809.

PEOPLE v HENTON, No. 127951; Court of Appeals No. 258111.

PEOPLE v ST PIERRE, No. 127957; Court of Appeals No. 258855.

PEOPLE v ZIRKER, No. 128000; Court of Appeals No. 250333.

In re MCCORMICK ESTATE (BRAVERMAN V MCCORMICK), No. 128005; Court of Appeals No. 258065.

PEOPLE V THOMAS, No. 128018; Court of Appeals No. 258224.

PEOPLE V LARSEN, No. 128025; Court of Appeals No. 258228.

PEOPLE V BLANKS, No. 128066; Court of Appeals No. 250142.

PEOPLE V PORTER, No. 128077; Court of Appeals No. 250229.

PEOPLE V HEICHEL, No. 128078; Court of Appeals No. 250805.

PEOPLE V NOBLE, No. 128090; Court of Appeals No. 250074.

PEOPLE V SHATTUCK, No. 128104; Court of Appeals No. 247351.

PEOPLE V LINDSEY, No. 128110; Court of Appeals No. 250145.

PEOPLE V MARVIN REED, No. 128114; Court of Appeals No. 240726.

PEOPLE V WEBB, No. 128121; Court of Appeals No. 247654.

PEOPLE V HELTON, No. 128125; Court of Appeals No. 258489.

PEOPLE V STEMBRIDGE, No. 128127; Court of Appeals No. 248548.

PEOPLE V RATAJCZAK, No. 128128; Court of Appeals No. 242715.

PEOPLE V HOLTS, No. 128136; Court of Appeals No. 259198.

PEOPLE V DESHAWN REED, No. 128147; Court of Appeals No. 251932.

PEOPLE V MARVIN SMITH, No. 128150; Court of Appeals No. 249833.

PEOPLE V TUCKER, No. 128152; Court of Appeals No. 256873.

PEOPLE V BROWN, No. 128176; Court of Appeals No. 246794.

PEOPLE V BARBARA DAVIS, No. 128215; Court of Appeals No. 246810.

PEOPLE V MISSOURI, No. 128221; Court of Appeals No. 251307.

POULTON-ZAREMBA V ZAREMBA, No. 128756; Court of Appeals No. 257376.

OSTER V ORH, INC, No. 128871; Court of Appeals No. 261360.

Interlocutory Appeals

Leave to Appeal Denied July 26, 2005:

STATE TREASURER V HANN, No. 128793; Court of Appeals No. 260328.

Reconsideration Denied July 26, 2005:

PEOPLE V STIFF, No. 127063. Leave to appeal denied at 472 Mich 882. Court of Appeals No. 247827.

NGUYEN v PROFESSIONAL CODE INSPECTIONS OF MICHIGAN, INC, No. 126901. Leave to appeal denied at 472 Mich 885. Court of Appeals No. 247584.

PEOPLE v PULLIAM, No. 127103. Leave to appeal denied at 472 Mich 894. Court of Appeals No. 247550.

ZAMMIT v CITY OF NEW BALTIMORE POLICE DEPARTMENT, No. 127209. Leave to appeal denied at 472 Mich 895. Court of Appeals No. 256687.

PEOPLE v OSBORNE, No. 127280. Leave to appeal denied at 472 Mich 896. Court of Appeals No. 256876.

MCDONALD v VAUGHN, No. 126771. Leave to appeal denied at 472 Mich 901. Court of Appeals No. 244687.

CAVANAGH and KELLY, JJ. We would grant reconsideration and, on reconsideration, would remand this case to the Oakland Circuit Court.

WOLTERS REALTY, LTD v SAUGATUCK TOWNSHIP, No. 127022. Leave to appeal denied at 472 Mich 908. Court of Appeals No. 247228.

PEOPLE v CHRISTOPHER ANDERSON, No. 127117. Leave to appeal denied at 472 Mich 912. Court of Appeals No. 245708.

PEOPLE v NORMAN, No. 127149. Leave to appeal denied at 472 Mich 913. Court of Appeals No. 256344.

PEOPLE v FLICK, No. 127221. Leave to appeal denied at 472 Mich 914. Court of Appeals No. 254194.

PEOPLE v CRISTINI, No. 127777. Leave to appeal denied at 472 Mich 920. Court of Appeals No. 255040.

PEOPLE v HARDESTY, No. 127807. Leave to appeal denied at 472 Mich 920. Court of Appeals No. 259666.

PEOPLE v CASWELL, No. 127929. Leave to appeal denied at 472 Mich 921. Court of Appeals No. 256980.

Summary Disposition July 29, 2005:

PEOPLE v CABAN, No. 128441. 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. 258556.

YOUNG, J. (*concurring*). I concur in the Court's decision to remand this matter to the Court of Appeals for consideration as on leave granted. I write separately to set forth what I believe to be the proper application of the Michigan Rules of Evidence in this case.

Defendant fraudulently posed as an agent of a homeowner and purported to "sell" the property to the victim. He obtained $20,000 from the victim as a "down payment." During the preliminary examination, the district court refused to allow hearsay evidence to establish that the homeowner told the victim that he did not authorize defendant to sell his home. Without that key testimony, the prosecutor was forced to rest her

case, and, subsequently, the district court dismissed the charges against defendant for failure to establish probable cause.

MRE 1108(b)(8) allows hearsay evidence in preliminary examinations "to prove, with regard to property, the ownership, authority to use, value, possession and entry." In this case, the meaning of the phrase "authority to use" is clear.[1] The word "use" is defined as "employ[ing] for some purpose; . . . avail[ing] oneself of; apply[ing] one's own purposes;"[2] "exploit[ing] for one's own advantage or gain."[3] Defendant "used" the property to defraud the victim. In other words, he "exploited [the property] for his own advantage" by representing that he had the authority to sell it to the victim. The homeowner's hearsay statement directly pertained to defendant's authority to "use" the property for this purpose. Furthermore, the homeowner's hearsay statement would have shown that the defendant did not own the property. MRE 1101(b)(8) permits the introduction of hearsay evidence to prove ownership of property. The victim's statement was therefore admissible under MRE 1101(b)(8) for this purpose as well.

For these reasons, I believe the district court erred in refusing to admit the hearsay evidence in the preliminary examination.

KELLY, J. (*dissenting*). I dissent from this Court's decision to remand the case to the Court of Appeals. I would simply deny leave to appeal.

Defendant was charged with larceny by false pretenses involving property worth $20,000 or more.[1] Defendant had claimed that he had the authority to sell real property when he did not. At the preliminary examination, the complainant started to testify that the true owner had told him that defendant did not have authority to sell the property. But defendant objected and the district court barred the testimony on hearsay grounds. It then dismissed the case for want of probable cause. The circuit court affirmed the decision, and the Court of Appeals denied leave to appeal for lack of merit.

The prosecution appealed, arguing that MRE 1101(b)(8) permitted the hearsay to be admitted into evidence. The rule provides:

> At preliminary examinations in criminal cases, hearsay is admissible to prove, with regard to property, the ownership, authority to use, value, possession and entry.

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[1] Rules concerning the interpretation of statutes apply with equal force to the interpretation of court rules. *Hinkle v Wayne Co Clerk*, 467 Mich 337, 340 (2002). First and foremost, when the plain and ordinary meaning of a word is clear, judicial construction is neither permitted nor necessary. *Id*. Unless otherwise defined, each word and phrase of a statute must be assigned its plain and ordinary meaning. *Halloran v Bhan*, 470 Mich 572, 578 (2004).

[2] *Random House Webster's College Dictionary* (1995).

[3] *Webster's II New College Dictionary* (2001).

[1] MCL 750.218(5)(a).

The question becomes whether the authority to sell property is equivalent to the authority to use it. I believe that it is not. A contrary ruling requires an overly expansive reading of the rule. Had its drafters intended to allow hearsay evidence at preliminary examinations regarding the authority to sell property, they would have made that clear.

Selling property is, of course, very common. "Authority to sell" could easily have been included in the rule. The drafters listed several other common activities associated with property. Hence, I believe that the omission of "authority to sell" was intentional. It would be inappropriate for us to read it into this rule of evidence when it appears to have been intentionally excluded.

I believe that the lower courts properly construed the intent of MRE 1101(b)(8) by not allowing admission of the hearsay evidence. Therefore, I would deny leave to appeal.

Leave to Appeal Denied July 29, 2005:

TRAXLER v ROTHBART, No. 125948. The cause having been briefed and orally argued, the order of December 27, 2004, 471 Mich 937, granting leave to appeal is vacated, and leave to appeal is denied because the Supreme Court is no longer persuaded that the questions presented should be reviewed. The Court unanimously agrees that a purchaser of trust property may be considered a protected third party under MCL 700.7404. Court of Appeals No. 243492.

MARKMAN, J. (*dissenting*). I would reverse the decision of the Court of Appeals and remand to the trial court for the entry of an order of specific performance of the purchase agreement. MCL 700.7404 provides that a third party is "fully protected" in dealing with a trustee when the third party lacks actual knowledge that the trustee has exceeded or improperly exercised a trust power. Here, the trustee exceeded her authority by entering into a purchase agreement with the defendant without first obtaining her cotrustee's approval. Because the statute mandates that defendant be "fully protected," specific performance is required in order to put defendant in the same position he would have been in had the trustee possessed the power she purported to exercise.

FISHER v W A FOOTE MEMORIAL HOSPITAL, No. 126333. The cause having been briefed and orally argued, the order of January 13, 2005, 471 Mich 957, granting leave to appeal is vacated, and leave to appeal is denied because the Supreme Court is no longer persuaded that the questions presented should be reviewed. Reported below: 261 Mich App 727.

KELLY, J. (*dissenting*). A majority of the Court has decided that we improvidently granted leave to appeal in this case. I disagree. At issue is a jurisprudentially significant question: whether an osteopath may bring suit against a hospital for unlawful discrimination when the statute barring the discrimination provides no explicit individual remedy.

The Court of Appeals issued a published decision holding that no private cause of action exists. Because this Court now denies leave, the Court of Appeals decision will stand as binding precedent. But the Court of Appeals analysis is flawed. It finds that the statute contains remedies for the physician that are nonexistent.

Given that the question is significant and the Court of Appeals analysis is unsound, leave to appeal was correctly granted and this Court should address the merits of the case.

I would hold that the Public Health Code at MCL 333.21513(e) creates a private cause of action for physicians allegedly discriminated against by a licensed hospital because they were trained as osteopaths. Thus, I would reverse the decision of the Court of Appeals and remand the case to that Court for consideration of plaintiff's appeal.

FACTS

The surgery department of the defendant hospital had a written policy that required surgeons entitled to practice there to have ACGME-approved[1] training and American Board of Surgery certification. The department could waive the policy on a case-by-case basis. ACGME-approved training is available only to graduates of allopathic schools. Plaintiff is a board-certified osteopathic surgeon.[2] When he applied for staff privileges at the hospital, defendant denied his request.

Plaintiff then asked that the policy be waived, and defendant denied the request. It responded that plaintiff's training and experience were not reasonably equivalent to ACGME-approved training. It offered plaintiff the opportunity to supplement his application with information demonstrating that his training met the standards set by the surgery department, essentially the training of an allopathic doctor.

Plaintiff filed suit, alleging that defendant had violated the statutory requirement that, when granting staff privileges, hospitals not discriminate against physicians on the basis of their medical training as osteopaths. MCL 333.21513(e). The trial court granted summary disposition to the hospital and dismissed plaintiff's claim. It found that a hospital's staffing decisions were not subject to judicial review. Even if courts could review these decisions, it found, plaintiff failed to establish that he was subjected to discriminatory treatment because he is an osteopath. It noted that defendant regularly awarded staff privileges to osteopathic physicians.

The Court of Appeals affirmed in a published per curiam opinion. 261 Mich App 727 (2004). However, it used different reasoning than the trial court and concluded that no private cause of action exists for a violation of MCL 333.21513(e). The panel reasoned that the Public Health Code can be enforced adequately through other provisions in article 17. MCL

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[1] Accreditation Council for Graduate Medical Education.

[2] Osteopaths are referred to as "DOs"; allopathic doctors are referred to as "MDs."

333.20101 *et seq*. (covering facilities and agencies). As a result, it held that plaintiff had no cause of action. Thus, it did not reach the issues adjudicated by the trial court.

THE STATUTE AND THE STANDARD OF REVIEW

The grant or denial of a motion for summary disposition is reviewed de novo. *J & J Farmer Leasing, Inc v Citizens Ins Co of America,* 472 Mich 353, 357 (2005). Statutory interpretation involves questions of law that are also reviewed de novo. *American Alternative Ins Co, Inc v York*, 470 Mich 28, 30 (2004).

MCL 333.21513(e) is located in article 17 of the Public Health Code. It reads:

> The owner, operator, and governing body of a hospital licensed under this article:
>
> * * *
>
> (e) Shall not discriminate because of race, religion, color, national origin, age, or sex in the operation of the hospital including employment, patient admission and care, room assignment, and professional or nonprofessional selection and training programs, and *shall not discriminate in the selection and appointment of individuals to the physician staff of the hospital or its training programs on the basis of licensure or registration or professional education as doctors of medicine, osteopathic medicine and surgery, or podiatry.* [Emphasis added.]

THE AVAILABILITY OF PRIVATE CAUSES OF ACTION

In reviewing questions of statutory construction, the Court's primary purpose is to discern and give effect to the Legislature's intent. *People v Morey*, 461 Mich 325, 329-330 (1999). When interpreting a statute to determine whether an implied private cause of action exists to remedy its violation, we have developed rules of construction to assist in discerning this intent. Those rules were summarized in *Pompey v Gen Motors Corp*,[3] where we stated that

> [t]he general rule, in which Michigan is aligned with a strong majority of jurisdictions, is that where a new right is created or a new duty is imposed by statute, the remedy provided for enforcement of that right by the statute for its violation and nonperformance is exclusive.

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[3] 385 Mich 537, 552 (1971).

Importantly, the *Pompey* Court summarized the longstanding exception to this "general rule":

> There are two important qualifications to this rule of statutory construction: [The first is that in] the absence of a pre-existent common-law remedy, the statutory remedy is not deemed exclusive if such remedy is plainly inadequate . . . . [*Id.* at 553 n 14 (citations omitted).]

Thus, in determining whether MCL 333.21513(e) creates a private cause of action, two questions are presented. First, it must be determined whether the statute creates a new right in a particular class of persons. If that question is answered in the affirmative, the court must then address the second question whether the statutory remedy is adequate for the enforcement of that right or duty.

THE PRIVATE RIGHT IMPLICIT IN MCL 333.21513(e)

This Court has long held that, where the Legislature intends to protect a particular class, an individual member of that class may pursue an action asserting a violation. Beginning in 1890 with *Ferguson v Gies,*[4] Michigan has consistently recognized that "whenever a particular equal protection right is recognized, whether by constitution, statute, or common law, then fused to that right is the right to pursue judicial relief." *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405, 422-423 (1996) (opinion of CAVANAGH, J.). In *Bolden v Grand Rapids Operating Corp*,[5] we articulated the already longstanding rule that " 'where a statute requires an act to be done or abstained from by one person for the benefit of another, an action lies in favor of the latter for failure to observe the requirements of the statute.' " (Citation omitted.)

With this time-honored rule in mind, I would address whether the Legislature intended MCL 333.21513(e) to protect only the public in general, or also to protect individual physicians from discrimination. If only the general public is protected, no private right is created in plaintiff, and he could have no private right of action. However, if individual physicians are specifically protected, plaintiff has a private right to be free from the proscribed discrimination and is entitled to some means of upholding that right. As the *Bolden* Court noted:

> "It is the general rule that a civil action is maintainable where the person complaining is *of a class entitled to take advantage of the law*, is a sufferer from the disobedience, is not himself a partaker in the wrong of which he complains, or is not otherwise precluded by the principles of the common law from his proper

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[4] 82 Mich 358 (1890).

[5] 239 Mich 318, 326 (1927).

> standing in court." [*Bolden* at 327 (emphasis added; citation omitted).]

The Public Health Code as a whole is directed at protecting the general public. However, it is clear that the provision in question prohibits certain acts directed against particular individuals and classes of individuals. Unlike other provisions of the code, MCL 333.21513(e) speaks specifically in terms of individual physicians, barring discrimination in "the selection and appointment of *individuals* to the physician staff . . . ." (Emphasis added.)

In addition, under the doctrine of *noscitur a sociis*, " 'a word or phrase is given meaning by its context or setting.' " *Koontz v Ameritech Services, Inc*, 466 Mich 304, 318 (2002) (citation omitted). In general, "words and clauses will not be divorced from those which precede and those which follow." *Sanchick v State Bd of Optometry,* 342 Mich 555, 559 (1955). It is significant that the ban on discrimination against osteopaths is set forth in the very sentence that contains the ban on discrimination based on traditionally protected characteristics.

Hence, the Legislature states that hospitals are not to engage in "traditional" forms of discrimination that are based on race, religion, color, national origin, age, or sex. In the same sentence it also states that individual osteopathic physicians are to be free from professional discrimination by hospitals that is based on their training as osteopaths.

Although MCL 333.21513(e) may not be viewed as a traditional civil rights act, that is of no particular moment. By its clear language it is designed, *inter alia*, to protect specific individuals from discrimination. As such, I have no trouble concluding that MCL 333.21513(e) constitutes an antidiscrimination provision. It creates the right of individual physicians to be free from discrimination and the concomitant duty on the part of hospitals not to discriminate against physicians because they are osteopaths.

Thus, plaintiff has a private right to be free from discrimination that is based on his osteopathic training. It is the same right that female, African-American, or Asian doctors have who seek but are denied privileges because of their race, gender, or national origin. The statute requires hospitals to treat doctors seeking privileges equally regardless of race, gender, national origin, or status as osteopaths.

In writing the statute in question, the Legislature presumably intended to end discriminatory hospital staffing decisions against physicians based on their education. The Legislature's focus on the individual shows that the public benefit of increased access to physicians with various kinds of training was a secondary consideration. Foremost was the Legislature's intention to protect osteopaths as identifiable victims of discrimination.

By placing the protection in the Public Health Code, the Legislature signaled that it intended to shield osteopaths from discrimination as osteopaths in the limited context of hospital staffing decisions. It was not the Legislature's intent to prevent members of the general public from discriminating against osteopaths because they are osteopaths in housing, entertainment, or other venues.

It was not the Legislature's intent to treat the protected category at issue in this case in the same manner as more traditional protected categories. Therefore, there is utterly nothing inappropriate about the Legislature's decision to insert a more limited civil rights protection for osteopaths in the Public Health Code.

Likewise, in MCL 333.21513(e), the Legislature has not prohibited a hospital from discriminating against an osteopath, as an osteopath, when assigning him or her to a hospital room as a patient. By contrast, the statute protects against discrimination in hospital room assignments that is based on protected characteristics such as race and gender. MCL 333.21513(e). Thus, it is logical that the limited protection for osteopaths from discrimination in hospital staffing decisions is written as it is and located in the Public Health Code rather than the Civil Rights Act. The former is specific, while the latter is comprehensive.

THE LACK OF A PERSONAL REMEDY IN MCL 333.21513

The Public Health Code is complex. The requirements placed on medical facilities in article 17 alone are numerous. For example, this article requires medical facilities to inform the families of patients with Alzheimer's disease about the facility's philosophy, its staff training, and the type of activities provided. MCL 333.20178. It also requires that a facility possess the technical, diagnostic, and treatment services and equipment necessary to ensure safe health care. MCL 333.20141. Most provisions of the code are directed at protecting the public as a whole by requiring that medical facilities and agencies maintain safe policies, practices, and premises.

The particular section of the code of concern here does not contain an express penalty or remedy for noncompliance. The Court of Appeals pointed to other parts of article 17 that contain various penalties for violations of MCL 333.21513(e). It held that such penalties constitute an adequate means by which to enforce the protections in the statute.

However, under prevailing case law, the remedies available must make the individual whole. The penalties in other parts of article 17 are not "remedies" designed or adequate to make Dr. Fisher whole. None of them is available of right to an individual victim of discrimination. They are of little value to the individual osteopath who has suffered economic loss or damage to his or her reputation through conduct of the kind specifically prohibited by MCL 333.21513(e).

Moreover, merely because penalties are available to the state does not mean that the state will avail itself of them. As plaintiff argues, to suggest that the administrative authorities will revoke the license of the only hospital serving a community because one employee discriminated against a single individual is absurd.

Nor is it likely that the Legislature expected discrimination against osteopaths to be punished criminally. And injunctions are only useful against threatened future harm, not discrete acts of discrimination that have already occurred. Significantly, none of the "remedies" noted by the Court of Appeals requires a hospital that has discriminated against a

person protected by MCL 333.21513(e) to provide redress for the individual illegally discriminated against.[6]

With that in mind, I note that, in *Bolden*, this Court observed:

> "The true rule is said to be that the question should be determined by a construction of the provisions of the particular statute, and according to whether it appears that the duty imposed is merely for the benefit of the public, and the fine or penalty a means of enforcing his duty and punishing a breach thereof, or whether the duty imposed is also for the benefit of particular individuals or classes of individuals. If the case falls within the first class the public remedy by fine or penalty is exclusive, but if the case falls within the second class a private action may be maintained; particularly where the injured party is not entitled, or not exclusively entitled, to the penalty imposed." [*Bolden, supra* at 327, quoting 1 CJ at 957.]

Here, the injured party, the osteopath allegedly unlawfully discriminated against, is not entitled, let alone *exclusively* entitled, to the penalty imposed, which is the administrative fine. As noted in the preceding paragraph, the only remedy likely actually to be imposed is such an administrative fine. It is the state, not the osteopath, that is entitled to the benefit of that "remedy."

Consequently, it is far-fetched to describe the penalties cited by the Court of Appeals as "remedies." Although stated in terms of the adequacy of the *remedy*, the Court of Appeals analysis actually focused on the administrative *consequences* to the offending hospital. It failed to discuss the relief that the statute affords to victims of discrimination and whether an aggrieved osteopath has realistic access to the possibility of such relief. Because the Court of Appeals never considered whether the Legislature provided an adequate *remedy* to *plaintiff*, it failed to properly apply the test for determining whether a private right of action exists.[7]

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[6] It is likely that the only penalty that is going to be imposed for a violation of the statute is an administrative fine. Even if the other penalties mentioned, such as license suspension or revocation, were realistic possibilities, the Department of Community Health has the discretion to determine how to proceed. Its only statutory duty is to investigate. MCL 333.20176. The code simply provides a mechanism for bringing a violation to the attention of the regulatory agency charged with overseeing the statutory program. But that agency has the discretion to decide how, and even whether, to penalize a facility for noncompliance. Hence, the code does not set out a means of enforcement that vindicates the rights of *the injured physician*.

[7] Courts have always carefully distinguished penalties and individual remedies when considering whether to allow a private cause of action. Beginning with *Ferguson*, the Court noted that the common law in

In summary, the sanctions in the Public Health Code penalize a facility for noncompliance; they do not address the needs of the individual physician who has experienced discrimination. MCL 333.21513(e) creates a right on the part of identifiable victims not to be discriminated against. However, the penalty provisions found elsewhere in the code do not provide an adequate remedy for this individualized discrimination.

The administrative mechanism is of little value to an individual physician who has suffered irreparable economic loss and damage to reputation as a result of discriminatory conduct that violates MCL 333.21513(e). None of the remedies in the code serves, or even purports, to make a victim of discrimination whole. Thus, I do not believe that the "remedies" provided there are "adequate" to protect the rights of victims of unlawful discrimination in violation of MCL 333.21513(e). Accordingly, applying the state's rule of construction extending back more than a century, I would conclude that the Legislature intended, by writing MCL 333.21513(e), to allow a private cause of action.

Thus, I would hold that MCL 333.21513(e) creates a private cause of action for those who experience discrimination in hospital staffing decisions because of their status as osteopaths.

CONCLUSION

MCL 333.21513(e) makes it illegal to discriminate against individual osteopathic physicians in the granting of hospital privileges. In enacting that provision, the Legislature created a right in osteopaths to be free from discrimination and a duty on the part of hospitals to refrain from discriminating against osteopaths.

Once the Legislature creates a statutory right for a group not to be discriminated against, persons in that group are entitled to an adequate remedy for violations of the right. Because the Public Health Code contains no adequate remedy to enforce the protections contained in MCL 333.21513(e), it implicitly grants the individual discriminated against a private cause of action to obtain that protection. As an osteopathic physician allegedly aggrieved by such illegal discrimination, Dr. Fisher is entitled to bring an action for civil damages.

Thus, I would reverse the decision of the Court of Appeals. Because that Court did not address the grounds on which plaintiff appealed, I would remand the case to that Court for further consideration of plaintiff's claims of error.

Michigan gave a plaintiff unjustly discriminated against a remedy that included a right of action for civil damages. Applying *Bolden* to the Public Health Code, there are public remedies for a hospital's noncompliance, e.g., the hospital can be fined or lose its license. But there is no remedy *for the individual physician* who is harmed by the noncompliance unless it is through a private cause of action. *Bolden* and *Ferguson* demonstrate that statutory fines, loss or suspension of a hospital's license, and threat of criminal prosecution are not remedies that reimburse damages suffered by aggrieved individuals.

CAVANAGH, J. I join the statement of Justice KELLY.

MARKMAN, J. (*dissenting*). I respectfully disagree with the majority that leave to appeal has been improvidently granted in this matter. Rather, in light of the legal and judicial resources that have been expended by the parties and by this Court, in view of the continuing significance of the issues on which leave has been granted, and in the absence of any changed circumstances underlying this dispute, I would now resolve this matter. Justice KELLY has submitted a thoughtful analysis concerning the substantive issues in controversy. This Court would serve the Legislature and the legal community well to indicate where it is in agreement or disagreement with her analysis.

PEOPLE v CURVAN, No. 126538. The cause having been briefed and orally argued, that portion of the order of November 4, 2004, 471 Mich 914, granting leave to appeal is vacated, and leave to appeal is denied because the Supreme Court is no longer persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 242376.

KELLY, J. (*concurring*). I agree with the decision to vacate this Court's order granting leave. I write only because Justice CORRIGAN's dissent evokes a response. It pictures a parade of horribles that she envisions if *People v Wilder*[1] and *People v Harding*[2] are not overturned. I believe that her concerns are unrealistic.

First, neither the *Wilder* approach nor that advocated by Justice CORRIGAN changes the incentive for a defendant who kills someone during a robbery to engage in a crime spree. The incentive is the same under either theory. It is true that the defendant will be imprisoned for life with no possibility of parole regardless of whether he commits additional crimes. However, all capital crimes, once committed, arguably create the same "incentive" for a wrongdoer to blaze a trail of terror.

Additionally, the argument that a guilty person would go free is incorrect. First, her statement that a defendant is free from "any possibility of conviction" for the underlying crime is inaccurate. A prosecutor may bring charges and a jury may convict a defendant of the underlying crime. Any vacation of the punishment for that underlying crime occurs only after the conviction. Second, it is most infrequent that a federal court grants habeas corpus relief. It is even rarer that relief is granted on a finding of insufficient evidence of a felony murder but sufficient evidence of the underlying felony.

But if that should happen, the defendant would not then walk the streets, a free individual, never paying the price for his crime. Rather, we can reasonably expect that the prosecutor would act promptly to obtain reinstatement of the conviction of the felony that served as the predicate for the felony-murder conviction. We should not expect that the prosecutor would fail in his or her duty to act with dispatch. The action we can

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[1] 411 Mich 328 (1981).

[2] 443 Mich 693 (1993).

anticipate from the prosecutor would prevent a defendant from walking free.

In short, despite Justice CORRIGAN's fear that a guilty individual may go free,[3] it appears that such an event would never occur.

WEAVER, J. (*dissenting*). I dissent from the order to vacate this Court's previous order, which granted leave to appeal,[1] and to deny leave to appeal in this case. I would decide this case.

In deciding this case, I would adopt the concurrence/dissent of Justice RILEY in *People v Harding,* 443 Mich 693, 721-734 (1993), as the proper approach for double jeopardy claims involving multiple punishments. Under that approach, I would conclude, like Justice RILEY, that double jeopardy principles do not prohibit sentencing defendant for both felony murder and the underlying felony of armed robbery because the Legislature intended to allow dual punishments for both crimes. Therefore, I would overrule *People v Wilder*, 411 Mich 328 (1981), and *People v Harding, supra*, and I would reverse the Court of Appeals vacation of defendant's armed robbery conviction.

CORRIGAN, J. (*dissenting*). I must respectfully dissent from the majority's decision to vacate this Court's order granting leave to appeal and to deny leave to appeal.

In recent years, this Court has attempted to articulate coherently the meaning of our state analogue to the federal double-jeopardy provision. For example, in *People v Nutt*, 469 Mich 565 (2004), we clarified that the *Blockburger*[1] same-elements test should be used to discern whether two offenses that have been prosecuted successively are the same. Earlier this term, in *People v Davis*, 472 Mich 156 (2005), we held that the double-jeopardy prohibition does not preclude a prosecution in Michigan following a prosecution by another state for the same criminal acts because each state derives its authority to punish from distinct sources of power.

This case provides an opportunity to further clarify the appropriate method of analyzing double-jeopardy claims. In *People v Wilder*, 411 Mich 328 (1981), and *People v Harding*, 443 Mich 693 (1993), this Court announced that a defendant who has been convicted of felony murder, MCL 750.316(1)(b), may not be separately punished for the predicate felony underlying that murder. The rule invented in *Wilder* and *Harding* is flawed. Felony murder and the underlying felony in this case, armed robbery, MCL 750.529, plainly are not the "same offense." On the contrary, as Justice RILEY's partial concurrence and partial dissent in *Harding* explains, the statutes prohibiting felony murder and armed robbery protect distinct societal interests. Moreover, the structure of our

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[3] This reasoning can be dubbed *argumentum ad baculum*, an appeal to force or fear. The Latin term literally means "argument to the stick." The argument contains a fundamental fallacy along with an implied threat.

[1] 471 Mich 914 (2004).

[1] *Blockburger v United States*, 284 US 299 (1932).

first-degree murder statute reflects that felony murder is a category of murder, and not merely an enhanced form of armed robbery.

By refusing to decide this case, the majority essentially abandons any effort to clarify our jurisprudence on this subject, or to correct this Court's unwarranted conflation of wholly separate offenses. Rather than adopt the sound analytical approach articulated by Justice RILEY in *Harding*, the majority avoids deciding this case despite having received full briefing and having heard oral argument. The majority thereby leaves intact a judicial diktat that felony murder and armed robbery are the "same offense," contrary to the Legislature's clearly expressed intent to create separate offenses.

The majority's refusal to reject the fiction that plainly separate offenses are somehow the "same" is troubling not only because that fiction fails to honor the intent of our Legislature, but also because it may have dangerous consequences in the real world. Suppose that a defendant pulls a gun on a clerk in a store and kills a bystander. The defendant then takes property from the store clerk. Under *Wilder* and *Harding*, the defendant is free to take property from the clerk after killing the bystander *without any possibility of conviction and sentence for armed robbery*. Until the *Wilder*/*Harding* rule is corrected, *any* defendant in this situation will be free to commit armed robbery because the state will be barred from imposing punishment for both felony murder and the underlying armed robbery.

Moreover, suppose that the defendant's felony-murder conviction is later overturned by a federal court on habeas corpus review because the federal court deems the evidence of malice to be insufficient, and that, under *Wilder* and *Harding*, the defendant's armed robbery conviction has already been vacated by a state appellate court. It is quite possible that the defendant will then be completely free of any punishment, despite having been found guilty of armed robbery by a jury.

Justice KELLY attempts to discount the possibility of such a defendant avoiding punishment. She asserts that "it is most infrequent that a federal court grants habeas corpus relief," and that "[i]t is even rarer that relief is granted on a finding of insufficient evidence of a felony murder but sufficient evidence of the underlying felony." *Ante* at 896. Even accepting that Justice KELLY's empirical pronouncements, for which she cites no authority or evidence, are true, a danger would still remain under our current jurisprudence. If *even one* such defendant avoids punishment for an offense of which he has been properly adjudged guilty by a jury because of the erroneous decisions in *Wilder* and *Harding*, the result could be devastating. Therefore, I must respectfully question whether the majority has adequately considered the effect of *Wilder* and *Harding* on the public interest in protecting society from those who have been properly convicted of crimes, as well as the public interest in deterrence of crimes.

Justice KELLY further argues that any defendant who is granted habeas corpus relief in this situation would not be free to "walk the streets." *Ante* at 896. She says that "we can reasonably expect that the prosecutor would act promptly to obtain reinstatement of the conviction of the felony that served as the predicate for the felony-murder convic-

tion." *Id*. at 896 But Justice KELLY offers no explanation for why she believes that a defendant's conviction and sentence for the predicate felony may be reinstated after having been vacated under *Wilder* and *Harding*. She does not cite a single authority to support this view, nor does she address whether reinstating such a conviction would itself carry double-jeopardy implications. Justice KELLY also fails to explain whether her position is consistent with the very cases at issue here. Under *Wilder* and *Harding*, a defendant may not be separately punished for the predicate felony underlying a felony-murder conviction.[2]

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

Frank Bono was discovered lying in a pool of blood inside his laundromat. A screwdriver was impaled in his neck. The cash register was open, and the cash was gone. Bono died from blunt force trauma to the head. Defendant admitted to the police that he and an accomplice had gone to the laundromat with the intent to rob Bono. Defendant acted as a lookout. The accomplice hit Bono in the head with defendant's hammer and then stabbed him in the neck with a screwdriver. The accomplice took some money and gave defendant fifteen or twenty dollars.

Following a jury trial, defendant was convicted of felony murder and armed robbery. He was sentenced to mandatory life imprisonment for the felony-murder conviction and to a twenty- to forty-year term of imprisonment for the armed robbery conviction.

The Court of Appeals vacated the armed robbery conviction on the ground that defendant's convictions and sentences for both felony murder and the predicate felony violated the constitutional prohibition against multiple punishments for the same offense.[3] The Court of Appeals noted, however, that in *Nutt*, *supra* at 596, this Court had overruled *People v White*, 390 Mich 245 (1973), and thus abandoned the "same transaction" test used to apply the Double Jeopardy Clause in favor of the "same-elements test" set forth in *Blockburger*. In *Nutt*, we limited our holding to the successive-prosecutions strand of Const 1963,

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[2] In addition, I must respectfully disagree with Justice KELLY's assertion that my argument "appeal[s] to force or fear" and "contains a fundamental fallacy along with an implied threat." *Ante* at 897 n 3. In truth, I have merely attempted to describe what I believe to be the troubling ramifications and perverse incentives that flow from this Court's decisions in *Wilder* and *Harding*. I believe that the practical, real-world implications of *Wilder* and *Harding* are worth noting because they call into question the majority's refusal to decide this case following briefing and oral argument. Justice KELLY may not share my concerns about *Wilder* and *Harding*, but our principled disagreement about the appropriate course of action in this case does not turn my argument into "an implied threat" or "an appeal to force or fear." *Id.*

[3] Unpublished opinion per curiam, issued June 29, 2004 (Docket No. 242376).

art 1, § 15, stating that we were not concerned with the meaning of the term "offense" as it applies to the double-jeopardy protection against multiple punishments. *Nutt*, *supra* at 575 n 11. In light of this language in *Nutt*, the Court of Appeals determined that it remained bound by *Wilder* to conclude that multiple punishments for felony murder and the predicate felony of armed robbery were not permitted.

This Court granted the prosecution's application for leave to appeal.[4]

II. STANDARD OF REVIEW

Whether the constitutional protection against double jeopardy prohibits separate punishments for felony murder and the predicate felony of armed robbery is a question of law that this Court reviews de novo. *Nutt*, *supra* at 573.

III. ANALYSIS

The United States Constitution and the Michigan Constitution protect a person from being twice placed in jeopardy for "the same offense." US Const, Am V; Const 1963, art 1, § 15. The prohibition against double jeopardy includes three protections: "(1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *Nutt*, *supra* at 574. The first two of these protections are generally referred to as the successive-prosecutions strand of double-jeopardy protection, while the third is known as the multiple-punishments strand.

In *Nutt*, this Court adopted the *Blockburger* same-elements test for determining whether two offenses are the "same" for purposes of the successive-prosecutions strand. The *Blockburger* test " 'focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.' " *Id*. at 576 (citation omitted).

While the *Blockburger* test now applies to successive-prosecutions claims in Michigan, it has not been extended to multiple-punishments claims. The test articulated in *People v Robideau*, 419 Mich 458 (1984), continues to govern a court's analysis of multiple-punishments claims in Michigan.[5]

In *Robideau*, this Court reviewed several United States Supreme Court decisions and concluded that the central question in resolving multiple-punishments claims is whether the Legislature intended to allow multiple punishments. The *Robideau* Court questioned the status of the *Blockburger* test in discerning that intent. The Court set forth

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[4] 471 Mich 914 (2004).

[5] The parties in this case do not argue that the *Robideau* test should be repudiated.

what it viewed as more traditional means of determining legislative intent, including identifying the type of harm the Legislature intended to prevent and the amount of punishment authorized. "Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments. . . . Where two statutes prohibit violations of the same social norm, albeit in a somewhat different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments." *Id*. at 487.

The *Robideau* Court asserted that its mode of analysis was consistent with the result reached in *Wilder* prohibiting dual convictions of felony murder and the predicate felony of armed robbery, reasoning that the two offenses have different penalties. *Id.* at 489 n 8.

In *Harding*, the majority reaffirmed the analysis in *Robideau* and the result in *Wilder*. The *Harding* majority stated that the felony-murder provision of the first-degree murder statute "serves to raise what would otherwise be second-degree murder to first-degree murder—for the sole purpose of increasing punishment." *Harding*, *supra* at 711 (opinion of BRICKLEY, J.). Because felony murder carries a greater penalty than the predicate felony, the *Harding* majority concluded that the Legislature did not intend to impose punishments for both crimes, and that sentencing the defendants for both crimes violated the state and federal double-jeopardy provisions.

In her opinion in *Harding*, Justice RILEY agreed that the dispositive question is whether the Legislature intended to allow dual punishments. She followed the *Robideau* framework of assessing legislative intent through traditional means rather than through the *Blockburger* test. She explained that while the United States Supreme Court has utilized the *Blockburger* test to determine the intent of Congress, Michigan courts are not bound to apply that test. "That the tests utilized by this Court and the United States Supreme Court regarding the finding of the legislative intent of their respective legislatures differ does not result in a clash of constitutional analysis, but simply a recognition that separate jurisdictions may utilize independent modes of statutory construction." *Harding*, *supra* at 729 n 21. This conflict does not endanger double-jeopardy protections as long as both jurisdictions recognize their duty to discern whether the legislature intended to authorize the punishment at issue. *Id*.

Applying the *Robideau* analysis, Justice RILEY concluded that our Legislature intended to allow dual punishments for felony murder and armed robbery. She noted that the maximum punishment for armed robbery is life imprisonment; thus, each offense may be punished by life imprisonment.[6] *Id*. at 730. Moreover, Justice RILEY explained that distinct social harms were targeted by the two statutes. After analyzing the elements of each offense, Justice RILEY observed that the felony-murder

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[6] Justice RILEY recognized that the mandatory punishment for felony murder was life imprisonment without the possibility of parole, but she did not view the distinction between the punishments for the two offenses as dispositive. *Id*. at 730 n 23.

statute protects against homicide committed with malice, whereas the armed robbery statute punishes the taking of property by force. *Id*. at 731.

> Thus, first-degree murder focuses upon homicide, armed robbery upon the violent deprivation of property. The first-degree murder statute does not punish the taking of property except when accompanied by a homicide. Nor does the armed robbery statute punish homicide. The societal interests are independent. In fact, the societal interests targeted by the felony murder provision of the first-degree murder statute generally are distinct from the underlying felonies. Felony murder is designed to punish homicide committed in the course of aggravated circumstances, while the societal interests undergirding the enumerated felonies are independent and also important to maintain. That the societal interests in prohibiting rape and kidnapping, for instance, are distinct from those prohibiting murder cannot be doubted. In a parallel fashion, the societal interests served by armed robbery and the first-degree murder statutes are distinct.
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> This is especially true in Michigan where felony murder requires malice. *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980). The societal interest in prohibiting first-degree murder is not only homicide, but one committed with malice. *Id*. Armed robbery, of course, does not possess such a requirement. "[T]he presence of the different intent elements indicates that the Legislature intended to prevent distinct types of harm, robbery and corporal harm," as well as intended to address separate social ills. *People v Smith*, 152 Mich App 756, 761; 394 NW2d 94 (1986) (holding that multiple punishments were intended with regard to assault with intent to do great bodily harm and assault with intent to rob and steal while armed). See also *People v Leach*, 114 Mich App 732, 735-736; 319 NW2d 652 (1982) (holding that multiple punishments were intended with regard to armed robbery and assault with intent to commit great bodily harm). The Legislature carefully crafted distinct offenses defending separate societal interests that defendants violated. Punishment for each offense was intended by the Legislature. [*Harding*, *supra* at 732-733.]

I agree with Justice RILEY's persuasive analysis of the legislative intent underlying the first-degree murder and armed robbery statutes. The *Harding* majority paid insufficient regard to the distinct societal interests protected by the respective statutes. Justice RILEY correctly articulated the manner in which the societal interests protected by the two statutes differ.

While it is not necessary to my analysis, I note that persuasive authorities from other jurisdictions support Justice RILEY's view. In *Todd v State*, 884 P2d 668, 677-680 (Alas App, 1994), the Alaska Court of

Appeals summarized the holdings of various state courts on this subject. Many state courts have concluded that their respective legislatures intended to allow multiple punishments for felony murder and the underlying felony on the basis of the distinct interests protected. See, e.g., *Todd*, *supra* at 685; *State v Blackburn*, 694 SW2d 934, 937 (Tenn, 1985); *Fitzgerald v Commonwealth*, 223 Va 615, 636-637 (1982); *State v Greco*, 216 Conn 282, 295-296 (1990); *Talancon v State*, 102 Nev 294, 300 (1986). While contrary authorities also exist, the *Todd* court concluded that "the great majority" of state courts that analyzed the constitutional issue on the basis of the intent of the state legislature had upheld separate punishments for felony murder and the underlying felony. *Todd*, *supra* at 679.[7]

In *Greco*, the Connecticut Supreme Court articulated the distinct interests protected by the respective statutes at issue:

> An obvious purpose of the felony murder statute, or any murder statute, is to protect human life. In contrast, "[t]he basic rationale [of the robbery statutes] is protection against the terror of the forcible taking"[,] while the primary rationale of the crime of burglary is "protection against invasion of premises likely to terrorize occupants." Each of these three statutes penalizes a different type of evil. Since the felony murder statute and the underlying felony statutes are designed to address separate evils, they provide clear evidence that the legislature intended multiple punishments. [*Greco*, *supra* at 296 (citations omitted).]

Legislative intent may also be inferred from the overall statutory scheme. *Harding*, *supra* at 730 n 24 (RILEY, J., concurring in part and dissenting in part), citing *People v Campbell*, 165 Mich App 1, 5 (1987). The structure of our first-degree murder statute reflects no intent to preclude multiple punishments for felony murder and a predicate felony. Felony murder is merely a classification of the crime of murder. It is not an enhanced degree of the predicate felony.

Foreign authorities support this structural analysis. The Virginia Supreme Court explained in *Fitzgerald* that its legislature had enacted the felony-murder statute in an effort to classify the types of murder. "The overriding purpose of the murder statutes being gradation, we can divine no legislative intent to eliminate punishment for other offenses included in the murder statutes solely for the purpose of categorizing the murder." *Fitzgerald*, *supra* at 636. Similarly, the Connecticut Supreme Court explained in *Greco*, *supra* at 294-297, that the felony-murder

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[7] The *Todd* court did not state that the majority of states permitted dual punishments for felony murder and the predicate felony, but only that the majority of states that analyzed the constitutional issue *on the basis of legislative intent* had concluded that multiple punishments for the two offenses were allowed.

statute set forth a method of committing murder, and that the statute did not represent merely an increased penalty provision for the underlying felonies.

The structure of our first-degree murder statute supports the same conclusion. MCL 750.316 sets forth three categories of first-degree murder: (1) "[m]urder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing"; (2) "[m]urder committed in the perpetration of, or attempt to perpetrate," any of several enumerated predicate felonies; and (3) murder of a peace officer or corrections officer. The structure of this statutory scheme reflects that felony murder is one of three classifications of first-degree murder. The predicate felonies are used to differentiate the crime from the other two types of first-degree murder, and from second-degree murder, MCL 750.317, rather than merely to enhance the penalty for the enumerated predicate felonies.

For these reasons, I would overrule *Wilder* and *Harding* and adopt Justice RILEY's opinion in *Harding*. Rather than decide this case, the majority vacates our order granting leave to appeal and denies leave to appeal. By its refusal to decide this case, the majority leaves intact perverse incentives spawned by *Wilder* and *Harding*. Justice RILEY's opinion in *Harding, supra* at 733-734, discussed the danger posed by the majority's holding in *Harding*. She quoted the following language from *People v Wakeford*, 418 Mich 95, 105 n 7 (1983):

> We have never held, as a matter of state or federal constitutional law, that only one conviction may result, for example, from the rape, robbery, kidnapping, and murder of victim A . . . even if the charges must be brought in a single trial under the "same transaction" test [i.e., the test adopted in *White*, which this Court overruled in *Nutt*]. Such a rule could be said to permit criminals to engage in an extended crime "spree," knowing that at most only one conviction could result and that any crime other than the most serious was "free" of any possibility of conviction. It would offend rationality, as well as our sense of equal justice, to require treatment of one defendant committing a single crime identically with another defendant committing four counts of the same crime in the "same transaction."

Justice RILEY explained in *Harding*, *supra* at 734, that "the majority's dismissal of the armed robbery conviction in the instant case presents the exact danger of which the Court forewarned in *Wakeford*."

Similarly, I question whether the majority here, by refusing to decide this case, has adequately considered the dangerous implications of the *Wilder* and *Harding* decisions. As discussed above, a defendant who kills a bystander while robbing a store will face no risk of an additional conviction by going through with the robbery after committing the murder. In effect, the defendant gets a "free" armed robbery under *Wilder* and *Harding*.

Moreover, a defendant in this situation may well face no punishment whatsoever if his felony-murder conviction is overturned on federal habeas review, because his conviction for the predicate offense will have been vacated under *Wilder* and *Harding*. This result is troubling because, despite having been adjudged guilty by a jury of armed robbery, the defendant would quite possibly face no punishment for that offense. These troubling ramifications of the *Wilder* and *Harding* decisions therefore warrant this Court's attention.

IV. CONCLUSION

On the basis of Justice RILEY's opinion in *Harding*, I would hold that sentencing a defendant for both felony murder and the predicate felony of armed robbery does not violate the multiple-punishments strand of the constitutional protection against double jeopardy. I would therefore overrule *Wilder* and *Harding* to the extent that they are inconsistent with this holding. Accordingly, this Court should reverse the judgment of the Court of Appeals and reinstate defendant's conviction and sentence for armed robbery.

PEOPLE v TOLBERT, No. 127368; Court of Appeals No. 246009.

CORRIGAN, J. I would hold this case in abeyance for *People v Drohan*, Docket No. 127489.

KELLY, J. (*dissenting*). I dissent from the decision of the majority of this Court to deny leave to appeal. I would remand for resentencing before a different circuit court judge.

In this case, a jury specifically acquitted defendant of two counts of first-degree premeditated murder and possession of a firearm during the commission of a felony. But the sentencing judge corrected what he thought was a mistake by the jury. Instead of sentencing defendant for the one crime of which he had been convicted, felon in possession, the judge sentenced him as if he had been convicted of murder.

Defendant received a sentence of fifteen to thirty years in prison. This is despite the fact that the maximum sentence for felon in possession is traditionally five years. MCL 750.224f(3). The sentencing judge stated:

> While [Mr. Tolbert was] not convicted of a homicide, I feel that there was enough evidence adduced at the trial to certainly create a preponderance of evidence that Mr. Tolbert did commit the murders although ultimately the Jury found him not guilty.
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> They apparently did not feel there was enough evidence to find him guilty, but I do . . . .

In essence, the judge replaced the decision of the jury with his own. Moreover, he used the wrong standard to convict a defendant, a preponderance of the evidence. Proof beyond a reasonable doubt is the standard required by the United States Constitution. *In re Winship*, 397 US 358, 362 (1970). Both errors should occasion a resentencing.

Defendant has a significant criminal history. This fact presents legitimate grounds for the sentencing judge to depart upward from the range of the sentencing guidelines. But defendant's criminal history does not allow the judge to sentence as if defendant had been convicted of murder. Just because the sentencing court may find the defendant to be a bad person does not entitle it to ignore the jury and to use a lesser standard to convict him.

For these reasons, I would remand the case for resentencing. Because the judge made statements that raise questions regarding his ability to impartially impose a sentence on this defendant, I would send the case to a different circuit court judge.

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.

Orders Entered July 13, 2005:

PROPOSED ADMINISTRATIVE ORDER REGARDING PRIVACY POLICY AND ACCESS TO COURT RECORDS. On order of the Court, this is to advise that the Court is considering adoption of the following proposed Administrative Order to ensure the confidentiality of social security numbers and management of nonpublic information contained within public documents filed within the judiciary. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

The Social Security Number Privacy Act, 2004 PA 454, requires all persons who, in the ordinary course of business, obtain one or more social security numbers, to create a privacy policy in order to ensure the confidentiality of social security numbers, prohibit unlawful disclosure of such numbers, limit access to information or documents containing social security numbers, provide for proper disposal of documents containing social security numbers, and establish penalties for violation of the privacy policy. While the separation of powers principles set forth in Const 1963, art 3, § 2, make it clear that the management of documents within court files is the responsibility of the judiciary, as a matter of comity with the Legislature, the Supreme Court issues this administrative order in an effort to prevent the illegal or unethical use of personal information found within all court records.

The management of documents within court files is the responsibility of the judiciary. In the regular course of business, courts are charged with the duty to maintain information contained within public documents that is itself nonpublic, based upon statute, court rule, or court order. In carrying out its responsibility to maintain these documents, the judiciary must balance the need for openness with the delicate issue of personal privacy. In an effort to prevent the illegal or unethical use of information found within court files, the following privacy policy is provided for all court records, effective January 1, 2006, and to be implemented prospectively.

Accordingly, on order of the Court,

A. The State Court Administrative Office is directed to assist trial courts in implementing this privacy policy and to update case file management standards established pursuant to this order.

B. Trial courts are directed to:

1. limit the collection and use of a social security number for party and court file identification purposes on cases filed on or after January 1, 2006, to the last 4 digits;

2. implement updated case file management standards for nonpublic records;

3. eliminate the collection of social security numbers for purposes other than those required by statute, court rule, court order, or collection activity when it is required for purposes of identification;

4. establish minimum penalties for court employees and custodians of the records who breach this privacy policy; and

5. cooperate with the State Court Administrative Office in implementing the privacy policy established pursuant to this order.

On further order of the Court, the following policies for access to court records are established.

ACCESS TO PUBLIC COURT RECORDS

Access to court records is governed by MCR 8.119 and the Case File Management Standards.

ACCESS TO NONPUBLIC RECORDS

1. Maintenance of nonpublic records is governed by the Nonpublic and Limited Access Court Records Chart and the Case File Management Standards.

2. The parties to a case are allowed to view nonpublic records within their court file unless otherwise provided by statute or court rule.

3. If a request is made by a member of the public to inspect or copy a nonpublic record or a record that does not exist, court staff shall state, "No public record exists."

SOCIAL SECURITY NUMBERS AND NONPUBLIC RECORDS

1. The clerk of the court shall be allowed to maintain public files containing social security numbers on documents filed with the clerk subject to the requirements in this section.

2. No person shall file a document with the court that contains another person's social security number except when the number is required by statute, court rule, court order, or for purposes of collection activity when it is required for identification. A person who files a document with the court in violation of this directive is subject to punishment for contempt and is liable for costs and attorney fees related to protection of the social security number.

A person whose social security number is contained in a document filed with the clerk may file a request pursuant to MCR 2.612(A)(1) asking the court to direct the clerk to:

a. redact the number on any document that does not require a social security number pursuant to statute, court rule, court order, or for purposes of collection activity when it is required for identification; or

b. file a document that requires a social security number pursuant to statute, court rule, court order, or for purposes of collection activity when it is required for identification, in a separate nonpublic file.

The clerk shall comply with the court's order and file the request in the court file.

4. Dissemination of social security numbers is restricted to the purposes for which they were collected and for which their use is authorized by federal or state law. Upon receiving a request for copies of a public document that contains a social security number pursuant to statute, court rule, court order, or for purposes of collection activity when it is required for identification, a court shall provide a copy of the document after redacting all social security numbers on the copy. This requirement does not apply to requests for certified copies or true copies when required by law. This requirement does not apply to those uses for which the social security number was provided.

RETENTION AND DISPOSAL OF NONPUBLIC RECORDS

Retention and disposal of nonpublic records and information shall be governed by General Schedule 16 and the Michigan Trial Court Case File Management Standards.

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 November 1, 2005, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-02. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/ index.htm.

PROPOSED AMENDMENT OF RULE 7.211 OF THE MICHIGAN COURT RULES. 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 also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 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) Motion to Remand.

(a) Within the time provided for filing the appellant's brief, the appellant may move to remand to the trial court. The motion must identify an issue sought to be reviewed on appeal and show:

(i) that the issue is one that is of record and that must ~~should~~ be initially decided by the trial court; or

(ii) that development of a factual record is required for appellate consideration of the issue.

A motion under this subrule must be supported by affidavit or offer of proof regarding the facts to be established at a hearing.

(b)-(d) [Unchanged.]

(2)-(9) [Unchanged.]

(D)-(E) [Unchanged.]

Staff Comment: The proposed change is intended to clarify that where claims that are the subject of motions for remand require development of facts not of record, the motion must be supported by affidavit or offer of proof regarding the facts to be established at a hearing.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by November 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. 2004-24. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULES 9.108 AND 9.109 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rules 9.108 and 9.109 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/ supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 9.108. ATTORNEY GRIEVANCE COMMISSION.

(A)–(D) [Unchanged.]

(E) Powers and Duties. The commission has the power and duty to:

(1) recommend attorneys to the Supreme Court for appointment as administrator ~~and deputy administrator~~;

(2)–(8) [Unchanged.]

RULE 9.109. GRIEVANCE ADMINISTRATOR.

(A) Appointment. The administrator ~~and the deputy administrator~~ must be an attorney~~s~~. The commission shall recommend one or more candidates for appointment as administrator ~~and deputy administrator~~. The Supreme Court shall appoint the administrator ~~and the deputy administrator~~, may terminate the~~ir~~ appointment~~s~~ at any time with or without cause, and shall determine the~~ir~~ salary~~ies~~ and the other terms and conditions of ~~their~~ employment.

(B)-(C) [Unchanged.]

Staff Comment: The proposed changes allow the grievance administrator, not the Court, to appoint a deputy administrator.

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 November 1, 2005, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-28. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Opinion Amended July 18, 2005:

GARG V MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, No. 121361. In lieu of granting rehearing, the opinion of the Court is amended by striking footnote 14 and renumbering the remaining footnotes. Reported at 472 Mich 263.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant rehearing.

Rehearing denied July 25, 2005:

FILLMORE TOWNSHIP V SECRETARY OF STATE, No. 126369. Reported at 472 Mich 566.

YOUNG, J. I would grant rehearing.

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INDEX–DIGEST

tionship with a plaintiff worker; a worker is entitled to bring an action against a nonemployer defendant if the worker can establish that the defendant affected or controlled a term, condition, or privilege of the worker's employment (MCL 37.2202). *McClements v Ford Motor Co*, 473 Mich 373.

COMMON WORK AREAS—*See*

NEGLIGENCE 2

CONTRACTUAL PERIODS OF LIMITATIONS—*See*

INSURANCE 1

CRIMINAL LAW

ASSAULT

1. An assault may be established by a showing that one has attempted an intentional, unconsented, and harmful or offensive touching of a person; an assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery; a battery is an intentional, unconsented, and harmful or offensive touching of the person of another, or of something closely connected with the person; the use of force against a person is not battery if the recipient consents to what is done; such consent cannot be coerced or fraudulently obtained, must be given by one who is legally capable of consenting to the deed, and cannot relate to a matter regarding which consent will not be recognized as a matter of law. *People v Starks*, 473 Mich 227.

AUTOMOBILES

2. The statute prohibiting the operation of a motor vehicle while intoxicated and causing death by that operation requires no causal link between the defendant's intoxication and the victim's death; in proving the causation element, the prosecution need only prove that the defendant's operation of the motor vehicle factually and proximately caused the victim's death (MCL 257.625[4]). *People v Schaefer*, 473 Mich 418.

JURY

3. A trial court may raise sua sponte the issue whether a

party is violating the prohibition against race-based peremptory challenges. *People v Bell*, 473 Mich 275.

4. The three-step process employed to determine whether a challenger has improperly exercised race-based peremptory challenges requires the opponent of the challenge to make a prima facie showing of discrimination based on race; once a prima facie showing is made, the burden shifts to the challenging party to come forward with a neutral explanation for the challenge; finally, the trial court must decide whether the opponent of the challenge has proven purposeful discrimination. *People v Bell*, 473 Mich 275.
5. To establish a prima facie showing of race-based discrimination, the opponent of a peremptory challenge must show that the defendant is a member of a cognizable racial group, that peremptory challenges are being used to remove a certain racial group from the jury pool, and that the circumstances raise an inference that the exclusions are based on race. *People v Bell*, 473 Mich 275.
6. A violation of the right to peremptory challenge does not require automatic reversal on appeal, but instead is reviewed for a miscarriage of justice if the error is preserved and for plain error affecting substantial rights if the error is forfeited. *People v Bell*, 473 Mich 275.

POSSESSION OF A FIREARM BY PERSON CONVICTED OF SPECIFIED FELONY

7. The felony of larceny from the person carries a substantial risk that physical force may be used against another and is a "specified felony" for purposes of the felon-in-possession statute (MCL 750.224f [2], [6] [i], 750.357). *People v Perkins*, 473 Mich 626.
8. A defendant charged with possession of a firearm by a person convicted of a specified felony has the burden of producing evidence to establish that the defendant's right to possess a firearm has been restored; only if the defendant meets this burden of production is the prosecution required to introduce evidence to prove lack of restoration (MCL 750.224f[2][b], 776.20). *People v Perkins*, 473 Mich 626.

DEATH—*See*

CRIMINAL LAW 2

DRIVING WHILE INTOXICATED—*See*

CRIMINAL LAW 2

EASEMENTS

ALTERATIONS

1. Neither party to an instrument that grants an easement may alter the easement without the consent of the other party. *Blackhawk Development Corp v Dexter Village*, 473 Mich 33.

JUDICIAL CONSTRUCTION

2. A court may examine evidence extrinsic to an instrument granting an easement to determine the scope of the easement only where the language in the instrument is ambiguous. *Blackhawk Development Corp v Dexter Village*, 473 Mich 33.

USE

3. The use of an easement must be confined strictly to the purposes for which it is granted or reserved; an easement holder may not make improvements to the servient estate where such improvements are unnecessary for the effective use of the easement or they unreasonably burden the servient tenement. *Blackhawk Development Corp v Dexter Village*, 473 Mich 33.

EMINENT DOMAIN

EVIDENCE

1. Evidence of rezoning after a taking is not admissible in a trial to determine the just compensation due at the time of the taking. *Dep't of Transportation v Haggerty Corridor Partners Limited Partnership*, 473 Mich 124.

HIGHWAYS

2. Private land may be condemned for a road where a public body establishes a road, pays for it out of public funds, and retains control, management, and responsibility for its repair, no matter what the proportional use of the road will be by the public or by private entities; it is the right of travel by all, and not the exercise of the right, that makes a road a public highway (Const 1963, art 10, § 2). *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242.

NECESSITY OF TAKING

3. The determination of necessity for the taking of property by eminent domain is left to the public agency, not the courts; an agency's determination of necessity may be challenged only on the basis of fraud, error of law, or

abuse of discretion (MCL 213.56[2]). *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242.

EMPLOYEE—*See*

WORKER'S COMPENSATION 1

EQUITABLE ESTOPPEL—*See*

INSURANCE 3

INSURANCE

CONTRACTS

1. A court must construe and apply unambiguous insurance contractual provisions as written unless the provisions violate law or public policy; a court may not modify or refuse to enforce the provisions based on a judicial determination of reasonableness; to do so undermines the parties' freedom of contract; in the specific context of insurance policies, MCL 500.2236(5) assigns the task of evaluating the "reasonableness" of an insurance contract to the Commissioner of the Office of Financial and Insurance Services; the "public policy" of Michigan, as determined by the Legislature, is that the reasonableness of insurance policies is a matter consigned to the executive rather than judicial branch of government. *Rory v Continental Ins Co*, 473 Mich 457.
2. An adhesion contract, however defined, is simply a species of contract; insurance policies, whether deemed "adhesive" or not, are subject to the same contract construction principles that apply to any other type of contract; an insurance contract is fully enforceable according to its plain terms unless violative of the law or unless a traditional contract defense applies. *Rory v Continental Ins Co*, 473 Mich 457.

NO-FAULT INSURANCE

3. A claimant who brings an action to recover personal protection insurance benefits may not recover benefits for any portion of the loss incurred more than one year before the date on which the claimant commenced the action; the one-year period is not subject to judicial tolling (MCL 500.3145[1]). *Devillers v Auto Club Ins Ass'n*, 473 Mich 562.

JURY

PEREMPTORY CHALLENGES

1. A party may not exercise a peremptory challenge to remove a veniremember solely on the basis of race. *People v Knight*, 473 Mich 324.
2. A three-step process is used to determine whether a peremptory challenge has been exercised solely on the basis of race: first, the opponent of the challenge must make a prima facie showing of discrimination based on race by showing that the opponent is a member of a cognizable racial group, that the proponent has exercised peremptory challenges to exclude members of a certain racial group, and that the relevant circumstances raise an inference that the proponent is excluding members on the basis of race; second, the burden then shifts to the proponent to articulate a race-neutral explanation for the challenge; third, the court must determine if the explanation is a pretext and whether the opponent has proved purposeful discrimination; the de novo standard of appellate review applies to the questions of law involved in the first step and to the second step while the clear error standard applies to the factual findings involved in the first step and to the third step. *People v Knight*, 473 Mich 324.

JUST COMPENSATION—*See*

EMINENT DOMAIN 1

LIMITATION ON RECOVERY—*See*

INSURANCE 4

MEDICAL MALPRACTICE—*See*

WITNESSES 1

MEDICAL MONITORING COSTS—*See*

NEGLIGENCE 1

NEGLIGENCE

ACTIONS

1. Mere exposure to a toxic substance and the increased risk of physical injury do not constitute an "injury" for purposes of a tort action based on negligent release of the toxic substance; present physical injury to person or

dictates of the doctrine of res ipsa loquitur, the case may proceed to the jury without expert testimony; a case satisfies the requirements of the doctrine by meeting the following four conditions: (1) the event must be of a kind that ordinarily does not occur in the absence of someone's negligence, (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant, (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff, and (4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. *Woodard v Custer*, 473 Mich 1.

WORKER'S COMPENSATION

WORDS AND PHRASES

1. *Reed v Yackell*, 473 Mich 520.