MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

August 10, 2005 to May 5, 2006

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

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TIMOTHY J. RAUBINGER	MICHAEL S. WELLMAN
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KATHLEEN A. FOSTER	RICHARD B. LESLIE
NELSON S. LEAVITT	FREDERICK M. BAKER, Jr.
DEBRA A. GUTIERREZ-McGUIRE	KATHLEEN M. DAWSON
ANNE-MARIE HYNOUS VOICE	RUTH E. ZIMMERMAN
DON W. ATKINS	LAURA L. MOODY
JÜRGEN O. SKOPPEK	SAMUEL R. SMITH[1]

State Court Administrator: CARL L. GROMEK

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

[1] From August 1, 2005.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM C. WHITBECK, Lansing	2011
Chief Judge Pro Tem	
BRIAN K. ZAHRA, Northville	2007[1]
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[2]
MICHAEL J. TALBOT, Grosse Pointe Farms	2009
KURTIS T. WILDER, Canton	2011
MICHAEL R. SMOLENSKI, Grand Rapids	2007[3]
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
DEBORAH A. SERVITTO, Mt. Clemens	2007[4]

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

[1] From January 9, 2006.
[2] To January 16, 2006.
[3] From January 9, 2006.
[4] From March 24, 2006.

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.	DEBORAH ROSS ADAMS, Detroit,	2007[1]
	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
	MEGAN MAHER BRENNAN, Grosse Pointe Park,	2007[2]
	HELEN E. BROWN, Grosse Pointe Park,	2009
	WILLIAM LEO CAHALAN, Grosse Ile,	2007[3]
	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
	CHARLENE M. ELDER, Dearborn,	2007[4]
	VONDA R. EVANS, Dearborn,	2009

[1] From April 10, 2006.
[2] From January 17, 2006.
[3] To February 1, 2006.
[4] From January 17, 2006.

	Term Expires January 1 of
EDWARD EWELL, Jr., Detroit,	2007
PATRICIA SUSAN FRESARD, Grosse Pointe Woods,	2011
SHEILA ANN GIBSON, Detroit,	2011
JOHN H. GILLIS, Jr., Grosse Pointe,	2009
WILLIAM J. GIOVAN, Grosse Pointe Farms,	2009
DAVID ALAN GRONER, Grosse Pointe Park,	2011
RICHARD B. HALLORAN, Jr., Detroit,	2007
AMY PATRICIA HATHAWAY, Grosse Pointe Park,	2007
CYNTHIA GRAY HATHAWAY, Detroit,	2011
DIANE MARIE HATHAWAY, Grosse Pointe Park,	2011
MICHAEL M. HATHAWAY, Detroit,	2011
THOMAS EDWARD JACKSON, Detroit,	2007
VERA MASSEY JONES, Detroit,	2009
MARY BETH KELLY, Grosse Ile,	2009
TIMOTHY MICHAEL KENNY, Livonia,	2011
ARTHUR J. LOMBARD, Grosse Pointe Farms,	2009
KATHLEEN I. MACDONALD, Grosse Pointe Woods,	2011
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[5]
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[6]
ISIDORE B. TORRES, Grosse Pointe Park,	2011
MARY M. WATERSTONE, Detroit,	2007
CAROLE F. YOUNGBLOOD, Grosse Pointe,	2007
ROBERT L. ZIOLKOWSKI, Northville,	2009

[5] To November 16, 2005.
[6] To October 14, 2005.

		Term Expires January 1 of
4.	EDWARD J. GRANT, Jackson,	2011
	JOHN G. McBAIN, Jr., Rives Junction,	2009
	CHARLES A. NELSON, Jackson,	2007
	CHAD C. SCHMUCKER, Jackson,	2011
5.	JAMES H. FISHER, Hastings,	2009
6.	JAMES M. ALEXANDER, Bloomfield Hills,	2009
	MARTHA ANDERSON, Troy,	2009
	STEVEN N. ANDREWS, Bloomfield Hills,	2009
	RAE LEE CHABOT, Franklin,	2011
	MARK A. GOLDSMITH, Huntington Woods,	2007
	NANCI J. GRANT, West Bloomfield,	2009
	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
	MICHAEL J. THEILE, Flushing,	2007[7]
	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

[7] From December 5, 2005.

		Term Expires January 1 of
	LEOPOLD P. BORRELLO, Saginaw,	2007[8]
	WILLIAM A. CRANE, Saginaw,	2011
	LYNDA L. HEATHSCOTT, Saginaw,	2007
	DARNELL JACKSON, Saginaw,	2007[9]
	ROBERT L. KACZMAREK, Freeland,	2009
11.	CHARLES H. STARK, Munising,	2009
12.	GARFIELD W. HOOD, Pelkie,	2009
13.	THOMAS G. POWER, Traverse City,	2011
	PHILIP E. RODGERS, Jr., Traverse City,	2009
14.	JAMES M. GRAVES, Jr., Muskegon,	2007
	TIMOTHY G. HICKS, Muskegon,	2011
	WILLIAM C. MARIETTI, North Muskegon,	2011
	JOHN C. RUCK, Whitehall,	2009
15.	MICHAEL H. CHERRY, Coldwater,	2009
16.	JAMES M. BIERNAT, Sr., Clinton Twp.,	2011
	RICHARD L. CARETTI, Fraser,	2011
	MARY A. CHRZANOWSKI, Harrison Twp.,	2011
	DIANE M. DRUZINSKI, Clinton Twp.,	2009
	JOHN C. FOSTER, Clinton Twp.,	2007[10]
	PETER J. MACERONI, Clinton Twp.,	2009
	DONALD G. MILLER, Harrison Twp.,	2007
	DEBORAH A. SERVITTO, Mt. Clemens,	2009[11]
	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

[8] To April 1, 2006.
[9] From May 1, 2006.
[10] From May 1, 2006.
[11] To March 24, 2006.

		Term Expires January 1 of
	KENNETH W. SCHMIDT, Bay City,	2007
19.	JAMES M. BATZER, Manistee,	2009
20.	CALVIN L. BOSMAN, Grand Haven,	2011
	JON H. HULSING, Jenison,	2007[12]
	WESLEY J. NYKAMP, Holland,	2009[13]
	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
	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, Corunna,	2009
36.	WILLIAM C. BUHL, Paw Paw,	2007

[12] From April 27, 2006.
[13] To April 1, 2006.

		Term Expires January 1 of
	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.	JANET M. ALLEN, Gaylord,	2007[14]
	DENNIS F. MURPHY, Gaylord,	2009
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.	THOMAS R. EVANS, Beaverton,	2007[15]
56.	THOMAS S. EVELAND, Dimondale,	2007
	CALVIN E. OSTERHAVEN, Grand Ledge,	2009
57.	CHARLES W. JOHNSON, Petoskey,	2007

[14] From October 24, 2005.
[15] From October 3, 2005.

DISTRICT JUDGES

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

		Term Expires January 1 of
15.	JULIE CREAL GOODRIDGE, Ann Arbor,	2007
	ELIZABETH POLLARD HINES, Ann Arbor,	2011
	ANN E. MATTSON, Ann Arbor,	2009
16.	ROBERT B. BRZEZINSKI, Livonia,	2009
	KATHLEEN J. McCANN, Livonia,	2007
17.	KAREN KHALIL, Redford,	2011
	CHARLOTTE L. WIRTH, Redford,	2009
18.	C. CHARLES BOKOS, Westland,	2009
	GAIL McKNIGHT, Westland,	2007
19.	WILLIAM C. HULTGREN, Dearborn,	2011
	MARK W. SOMERS, Dearborn,	2009
	RICHARD WYGONIK, Dearborn,	2007
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[1]
	LYDIA NANCE ADAMS, Detroit,	2011
	ROBERTA C. ARCHER, Detroit,	2007[2]
	TRUDY DunCOMBE ARCHER, Detroit,	2007[3]
	MARYLIN E. ATKINS, Detroit,	2007

[1] To April 10, 2006.

[2] From March 23, 2006.

[3] To March 1, 2006.

		Term Expires January 1 of
	JOSEPH N. BALTIMORE, Detroit,	2009
	NANCY McCAUGHAN BLOUNT, Detroit,	2009
	DAVID MARTIN BRADFIELD, Detroit,	2009
	IZETTA F. BRIGHT, Detroit,	2011
	RUTH C. CARTER, Detroit,	2007[4]
	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
	CYLENTHIA L. MILLER, Detroit,	2007[5]
	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[6]
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

[4] From April 10, 2006.
[5] From April 10, 2006.
[6] To January 19, 2006.

		Term Expires January 1 of
	JOHN C. FOSTER, Clinton Twp.,	2011[7]
	SEBASTIAN LUCIDO, Clinton Twp.,	2007
	SHEILA A. MILLER, Clinton Twp.,	2009[8]
42-1.	DENIS R. LeDUC, Washington,	2009
42-2.	PAUL CASSIDY, New Baltimore,	2007
43.	KEITH P. HUNT, Ferndale,	2007
	JOSEPH LONGO, Madison Heights,	2011
	ROBERT J. TURNER, Ferndale,	2009
44.	TERRENCE H. BRENNAN, Royal Oak,	2009
	DANIEL SAWICKI, Royal Oak,	2007
45A.	WILLIAM R. SAUER, Berkley,	2009
45B.	MICHELLE FRIEDMAN APPEL, Huntington Woods,	2009
	DAVID M. GUBOW, Huntington Woods,	2009
46.	STEPHEN C. COOPER, Southfield,	2011
	SHEILA R. JOHNSON, Southfield,	2009
	SUSAN M. MOISEEV, Southfield,	2007
47.	JAMES BRADY, Farmington Hills,	2009
	MARLA E. PARKER, Farmington Hills,	2011
48.	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
	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

[7] To May 1, 2006.

[8] From May 2, 2006.

		Term Expires January 1 of
	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
56A.	PAUL F. BERGER, Charlotte,	2009[9]
	HARVEY J. HOFFMAN, Grand Ledge,	2011
	JULIE H. REINCKE, Eaton Rapids,	2007[10]
56B.	GARY R. HOLMAN, Hastings,	2007
57.	STEPHEN E. SHERIDAN, Saugatuck,	2007
	JOSEPH S. SKOCELAS, Plainwell,	2007[11]
	GARY A. STEWART, Plainwell,	2009[12]
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.	PABLO CORTES, Wyoming,	2007[13]
	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

[9] To October 28, 2005.
[10] From January 16, 2006.
[11] From May 1, 2006.
[12] To January 17, 2006.
[13] From October 17, 2005.

		Term Expires January 1 of
67-3.	LARRY STECCO, Flushing,	2009
67-4.	MARK C. McCABE, Fenton,	2009
	CHRISTOPHER ODETTE, Grand Blanc,	2007
68.	WILLIAM H. CRAWFORD, II, Flint,	2007
	HERMAN MARABLE, Jr., Flint,	2007
	MICHAEL D. McARA, Flint,	2009
	NATHANIEL C. PERRY, III, Flint,	2009
	RAMONA M. ROBERTS, Flint,	2011
70-1.	TERRY L. CLARK, Saginaw,	2007
	M. RANDALL JURRENS, Saginaw,	2011
	M. T. THOMPSON, Jr., Saginaw,	2009
70-2.	CHRISTOPHER S. BOYD, Saginaw,	2011
	ALFRED T. FRANK, Saginaw,	2009[14]
	DARNELL JACKSON, Saginaw,	2009[15]
	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

[14] From May 1, 2006.

[15] To May 1, 2006.

		Term Expires January 1 of
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

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	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	JENNIE E. BARKEY	2007[1]
Genesee	ALLEN J. NELSON	2009[2]
Genesee	ROBERT E. WEISS	2007
Gogebic	JOEL L. MASSIE	2007

[1] From February 10, 2006.

[1] To January 31, 2006.

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	MARGARET MURRAY-SCHOLZ NOE	2007[3]
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	JOHN E. FITZGERALD	2007[4]
Montmorency	MICHAEL G. MACK	2007[5]

[3] From December 19, 2005.
[4] From May 1, 2006.
[4] To March 11, 2006.

Muskegon	NEIL G. MULLALLY	2011
Muskegon	GREGORY C. PITTMAN	2007
Newaygo	GRAYDON W. DIMKOFF	2007
Oakland	BARRY M. GRANT	2009
Oakland	LINDA S. HALLMARK	2007
Oakland	EUGENE ARTHUR MOORE	2011
Oakland	ELIZABETH M. PEZZETTI	2011
Oceana	WALTER A. URICK	2007
Ogemaw	EUGENE I. TURKELSON	2007
Ontonagon	JOSEPH D. ZELEZNIK	2007
Oscoda	KATHRYN JOAN ROOT	2007
Otsego	MICHAEL K. COOPER	2007
Ottawa	MARK A. FEYEN	2007
Presque Isle	KENNETH A. RADZIBON	2007
Roscommon	DOUGLAS C. DOSSON	2007
Saginaw	FAYE M. HARRISON	2009
Saginaw	PATRICK J. McGRAW	2007
St. Clair	ELWOOD L. BROWN	2009
St. Clair	JOHN R. MONAGHAN	2007
St. Joseph	THOMAS E. SHUMAKER	2007
Sanilac	R. TERRY MALTBY	2007
Shiawassee	JAMES R. CLATTERBAUGH	2007
Tuscola	W. WALLACE KENT, JR.	2007
Van Buren	FRANK D. WILLIS	2007
Washtenaw	NANCY CORNELIA FRANCIS	2009
Washtenaw	JOHN N. KIRKENDALL	2007[6]
Washtenaw	DARLENE A. O'BRIEN	2007[7]
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

[6] To December 31, 2005.
[7] From March 20, 2006.

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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
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ADMINISTRATIVE ORDER No. 2005-2

CLARIFICATION OF TIME FOR FILING POSTJUDGMENT MOTIONS

Entered October 18, 2005, effective January 1, 2006 (File No. 2003-04) —REPORTER.

On July 13, 2005, this Court entered an order, effective January 1, 2006, that reduced the time from 12 months to 6 months for filing postjudgment motions pursuant to MCR 6.310(C) (motion to withdraw plea), 6.419(B) (motion for directed verdict of acquittal), 6.429(B) (motion to correct invalid sentence), and 6.431(A) (motion for new trial). This amendment is not applicable to cases where the order appointing appellate counsel was entered on or before December 31, 2005. In cases where the order appointing appellate counsel was entered on or before December 31, 2005, such postjudgment motions shall be filed within 12 months of the date of the order appointing appellate counsel.

ADMINISTRATIVE ORDER No. 2005-3

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 45TH CIRCUIT COURT AND THE 3B DISTRICT COURT OF ST. JOSEPH COUNTY

Entered November 30, 2005, effective March 1, 2006 (File No. 2004-04—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective March 1, 2006:

The 45th Circuit Court and the 3B District Court

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

Amendments of concurrent jurisdiction plans may be implemented by local administrative order pursuant to MCR 8.112. Plan amendments shall conform to the requirements of Administrative Order No. 2003-1 and MCL 600.401 *et seq*.

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

ADMINISTRATIVE ORDER 2006-2

PRIVACY POLICY AND ACCESS TO COURT RECORDS

Entered February 10, 2006, effective March 1, 2006 (File No. 2005-02)—REPORTER.

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.

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 March 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 March 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 or allowed 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 or allowed 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.

3. A person whose social security number is contained in a document filed with the clerk on or after March 1, 2006, may file a motion asking the court to direct the clerk to:

a. redact the number on any document that does not require or allow 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 or allows 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 filed on or after March 1, 2006, 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 or for requests to view or inspect files. 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.

Entered February 23, 2006, effective immediately (File No. 2006-02) —REPORTER.

On order of the Court, Administrative Orders 1987-9, 1988-2, 1991-8, and 2000-1 are rescinded, effective immediately.

ADMINISTRATIVE ORDER
2006-3

MICHIGAN UNIFORM SYSTEM OF CITATION

Entered March 15, 2006, effective May 1, 2006 (File No. 2004-45)—REPORTER.

On order of the Court, Administrative Order Nos. 1987-2 and 2001-5, which amended the Michigan Uniform System of Citations, are rescinded. Effective May 1, 2006, all reported decisions of the Supreme Court and the Court of Appeals shall adhere to and follow the Michigan Uniform System of Citation as revised by this order.

The Michigan Uniform System of Citation provides a comprehensive scheme for citation of authority in documents filed with or issued by Michigan courts. This revision reflects the style currently used in the opinions of the Supreme Court as published in *Michigan Reports*. It is based on the former Uniform System of Citations, Administrative Order No. 1971-3, 385 Mich xxvi-xxxv (1971), Administrative Order No. 1973-5, 390 Mich xxxi (1973), Administrative Order No. 1987-2, 428 Mich cviii (1987), Administrative Order No. 2001-5, 464 Mich lxxviii (2001), and the Proposed Rules of Citation, 402A Mich 455-468 (1978).

For matters not covered, refer to *The Bluebook, A Uniform System of Citation* (18th ed), for guidance, but conform citations to Michigan citation style.

I. Citation of Authority

A. Citation of Cases

1. *Initial citation*.

The first time a case is cited in an opinion, either in the body of the text *or* in a footnote, cite *in full* the *official* reporter of its jurisdiction (where available), and *include the parallel citation* of the regional reporter.

> *Mayberry v Pryor*, 422 Mich 579; 374 NW2d 683 (1985).

If a case is first cited in an order, either in the body of the text or in a footnote, cite the official report only.

> *Mayberry v Pryor*, 422 Mich 579 (1985).

Where an official citation is not yet available, provide blanks for the volume and page numbers.

> *Mayberry v Pryor*, _____ Mich ____; 374 NW2d 683 (1985).

If a case is initially cited only in a footnote, it *must* be *re*-cited *in full* in the text if it is referred to subsequently in the text.

2. *Subsequent citation*.

a. Once cited in full in the text, a case need not be cited again in full in the text or a footnote. Subsequent reference in the text or in a footnote may use any of the following shortened forms:

E.g., *Mayberry*; *Mayberry, supra*; *Mayberry v Pryor*. (N.B.: "*Id*." may be used as a subsequent reference *only* if no other authority intervenes between the previous citation of the same source and "*id*.")

b. Where a case is cited in full *in a footnote*, a subsequent short-form citation may be used *in a subsequent footnote* to refer the reader to the full citation:

Mayberry, n 4 *supra*.

3. ***Point or "jump" citation***.

a. To refer to an internal page of an opinion, cite the *official* reporter where available:

1) *initial citation*: include the "jump" page in the complete citation:

Mayberry v Pryor, 422 Mich 579, 587; 374 NW2d 683 (1985); or

2) *subsequent citation*: append the "jump" page to any short-form citation:

Mayberry, *supra*, p 587; *Mayberry, supra* at 587; *Mayberry*, p 587; *id*., p 587; *id*. at 587; 422 Mich 587.

(N.B.: The form of the short-form citation *must* be consistent throughout an opinion. Do *not* mix *Mayberry, supra*, p 587, with *Mayberry, supra* at 587.)

b. If the official report of a case is not yet available, refer to the "jump" page in an unofficial report:

1) *initial citation*: *Galster v Woods* (*On Rehearing*), 173 Cal App 3d 529, ____; 219 Cal Rptr 500, 509 (1985);

2) *subsequent citation*: *Galster, supra*, 219 Cal Rptr 509; or *id.*, 219 Cal Rptr 509; or 219 Cal Rptr 509 (N.B.: it is *mandatory* in this situation that the identity of the *unofficial* reporter be shown because references to pages not otherwise identified are presumed to be to the *official* reporter.)

4. ***Case names***.

a. *Italicizing*. Names of cases should be italicized both in the text of an opinion and in footnotes. Underscoring no longer should be used to indicate italics.

b. *Official sources*. Cite the name of a case as set forth on the first page of the *official* reporter as fully as necessary for recognition. Do not show *et al*., *et ux*., or like references to other parties in a case name, but *do* show *ex rel* (for *on the Relation of* or *for the use and benefit of*) and the relator's name.

c. *Abbreviations*. Where the name of the case as it appears in the official reporter is long or involved, it should be shortened. Abbreviations are encouraged for common words such as Commission (Comm), County (Co), Manufacturing (Mfg), International (Int'l), etc., where appropriate. Citations should include only the first plaintiff's surname or corporate name and the first defendant's surname or corporate name.

Examples:

The title in the official report of 262 US 447 is *Commonwealth of Massachusetts v Mellon*, *Secretary of the Treasury, et al*., and should be cited as *Massachusetts v Mellon*, 262 US 447; 43 S Ct 597; 67 L Ed 1078 (1923).

International Union of Electrical, Radio and Machine Workers, AFL-CIO Frigidaire Local 801 v NLRB, 113 US App DC 342; 307 F2d 679 (1962), may be shortened to *Electrical Workers Union v NLRB*, etc.

d. *Identical titles.* Where two or more separate cases with the same title are referred to in an opinion:

1) add the first names of the parties in order to distinguish the cases, e.g., *People v John Smith*/*People v Mary Smith*, etc.; or

2) add a roman numeral after the case name, e.g., *Smith I*, *Smith II*, etc.

(N.B.: Where cases with identical surnames are reported in the same volume, first names are included. It is *not* necessary to include first names when cited in a slip opinion unless two or more cases with such names are cited in the slip opinion.)

e. *Officials as parties.*

1) *Michigan cases*: If a person was sued in an official capacity, use that person's official title, not the name of the person.

Jones v Secretary of State, not *Jones v Austin*;

Giannotta v Governor, not *Giannotta v Milliken*

2) *United States Supreme Court cases and cases from other jurisdictions*: Follow the commonly accepted practice within the jurisdiction (if known) regarding the surname or title of the party. Otherwise, follow (e)(1). E.g., in cases decided in the United States Supreme Court and some sister states, the title of a party is not ordinarily used.

Example:

Massachusetts v Mellon, not *Massachusetts v Secretary of Treasury*

f. *State or city as a party*. Where a state or a city is a party, use only the name of the state or city:

The title that appears at 383 Mich 579 is *Consumers Power Company v State of Michigan*; cite it as *Consumers Power Co v Michigan*.

If the name of a city also commonly may be used as a surname, such as the city of Warren, cite as *Jones v City of Warren*; but where a city is well known, it should be cited as *Jones v Detroit*.

g. *Traffic violations, civil infractions*.

1) In cases involving a civil infraction of a traffic ordinance of a political subdivision, the proper party is the subdivision:

City of Troy v Ohlinger, 438 Mich 477; 475 NW2d 54 (1991), not *People of the City of Troy*, or *People v Ohlinger*.

2) However, where a civil infraction is a violation of the Vehicle Code, the proper party is the state:

People v Ferency, 133 Mich App 526; 351 NW2d 225 (1984).

See 1978 PA 510, MCL 257.741.

h. *County, township, or school district as a party*. Place the name of the county, township, or school district first and then Co, Twp, School Dist, or Bd of Ed, regardless of the entitlement of the case in the reports.

Examples:

Oakland Co v Smith; *Bush v Waterford Twp*; *Jones v Waverly School Dist*; *Smith v Lansing Bd of Ed.*

i. *Second case name*. Do not give a second name for a case if the first will fully identify it.

Examples of a second name being required:

Harvey v Lewis (In re Escrow Funds), 364 Mich 491; 111 NW2d 119 (1961), and *Harvey v Lewis (In re Fee for Receiver's Attorney)*, 364 Mich 493; 112 NW2d 500 (1961).

j. *Rehearing, remand, or amended*. If the opinion

cited was decided on rehearing or after remand, the specification (*On Rehearing*), (*On Remand*), or (*After Remand*) is part of the title and *must* be included in the citation. Also if an opinion is amended by a special panel of the Court of Appeals, the specification (*Amended Opinion*) should be included.

Example:

People v Walker, 371 Mich 599; 124 NW2d 761 (1963); *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

k. *Supplemental opinions*.

Example:

In re Ernst, 373 Mich 337, *Supplemental Opinion*, 349; 129 NW2d 430 (1964).

l. *Punctuation in case citations.*

1) The official volume number, reporter abbreviation, page number, parallel citation and year are in nonrestrictive apposition with the case name and must be preceded by a comma and followed by a comma, semicolon, period, or other punctuation (except where parenthetical matter postpones it).

Example:

"resolved in *Village of Kingsford v Cudlip*, 258 Mich 144; 241 NW 893 (1932), where the Court . . . ."

2) Parallel citations are separated from official citations and from other parallel citations by semicolons to avoid confusion with the commas that frequently separate point citations. These semicolons should not be viewed as punctuation, but merely as separators.

Example:

People ex rel Gummow v Larson, 35 Ill 2d 280, 282; 220 NE2d 165 (1966).

However, where a string of citations is conjoined by "and," use commas to separate the complete citation of each case.

Example:

Nicholls v Charlevoix Circuit Judge, 155 Mich 455; 120 NW 343 (1909), *Kemp v Stradley*, 134 Mich 676; 97 NW 41 (1903), and *Backus v Detroit*, 49 Mich 110; 13 NW 380 (1882).

Where a string of citations is not conjoined by "and," separate with semicolons.

m. *Jurisdiction*.

1) Michigan and state courts. Jurisdiction is usually shown by the abbreviation of the title of the official reporter: Michigan Supreme Court (Mich); Michigan Court of Appeals (Mich App); United States Supreme Court (US). Where official reports are no longer published, the jurisdiction must be indicated in the parentheses at the end of the citation,

followed by a comma and the year of decision. For the highest court of a state, only the name of the state should be shown. Use the abbreviations of state names listed in State abbreviations, p XX (Appendix A). For intermediate appellate courts, abbreviate the name of the court in addition to the state name.

Examples:

People v Blythe, 417 Mich 430; 339 NW2d 399 (1983);
Gaines v Betts, 2 Doug 98 (Mich, 1845);
State v Gallion, 572 P2d 683 (Utah, 1977);
Miller v Stumbo, 661 SW2d 1 (Ky App, 1983)

2) Federal circuit courts. Federal courts of appeals are shown in parentheses with the date of decision as CA plus the circuit number or "Fed" for the federal circuit. E.g.: CA 6, not 6 Cir or 6th Cir or CCA 6. (N.B.: The Court of Appeals for the District of Columbia Circuit is *not* shown in parentheses because there is an official reporter: App DC or US App DC, and a citation of the official reporter indicates the jurisdiction.)

Examples:

Kirkland v Preston, 128 US App DC 148; 385 F2d 670 (1967).
Ierardi v Gunter, 528 F2d 929, 930-931 (CA 1, 1976).

3) Federal district courts. Federal districts, but not divisions, are shown in parentheses if one

exists (ED Mich, not ND ED Mich). If a state comprises only one district, use D plus the state abbreviation, not the state abbreviation alone.

Example:

United States ex rel Mayberry v Yeager, 321 F Supp 199, 211 (D NJ, 1971).

4) Early US Supreme Court cases. Early US reports, through 90 US, are to be cited by consecutive volume number in the US series. The corresponding reporter's name (abbreviated) and volume number in parentheses *may* be added.

Example:

Sexton v Wheaton, 21 US (8 Wheat) 229; 5 L Ed 603 (1823).

n. *Parallel citations*.

1) Parallel citations for United States Supreme Court reports are to be given in the order S Ct; L Ed.

2) A parallel citation of the National Reporter System Regional Reports is to be given if one exists. For New York or California cases, the New York Supplement or California Reporter citation also *must* be given.

3) Parallel citations of other reports, e.g., ALR, *may* be given if the case is reported *in full* therein.

o. *Unavailable citations.*

1) When an official and a parallel citation are not yet available, provide blanks in which the information later can be inserted.

Example:

____ Mich ____; ____ NW2d ____ (1978).

Do not use this form where the citation will *never* be available because reports have been discontinued.

2) USLW, LEXIS, WESTLAW, or other advance reports or abstract citations should be given only if *both* the official *and* the regional or other permanent unofficial report citations are not yet available.

p. *Periods and spacing of report names and capitalization.*

1) Use no periods in abbreviations of report names, even if there are two or more words, and do not insert a space where single letters abbreviate the words.

Examples:

NE; NW; NY; RI; US; ALR

2) Do insert a space where more than one letter is used to abbreviate the individual words, and capitalize the first letter of each word.

Examples:

Mich App; F Supp; US App DC; S Ct; L Ed

3) Insert a space between the report name and series designation (2d, etc.) if the last word is abbreviated with more than one letter; otherwise do not.

Examples:

(No space) F2d; NYS2d; ALR3d; A2d; NE2d; SW2d

(Space) Wis 2d; So 2d; Misc 2d; L Ed 2d

(Exception—-space) LRA NS

q. *Date of decision.* Generally, the year of *decision* should follow parallel citations in parentheses; however, in the Court of Appeals, where controlling authority is governed by MCR 7.215(J)(1), the year of *release* should be inserted.

E.g., *Farrell v Auto Club of Michigan* was decided on October 25, 1990, but was approved for publication on January 16, 1991. The correct citation form is: *Farrell v Auto Club of Michigan* (*On Remand*), 187 Mich App 220; 466 NW2d 298 (1991). The time of release is not to be noted in the citation.

r. *Subsequent history.* Citation of *denial* of discretionary action such as rehearing, leave to appeal, certiorari, reconsideration, or the like should *not* be indicated unless jurisprudentially significant within the jurisdiction. (N.B.: In Michigan, denial of leave has no effect on the precedence of a case, see MCR 7.321; this is also true with regard

to denial of certiorari by the United States Supreme Court, see *Maryland v Baltimore Radio Show*, 338 US 912, 919 [1950].)

Where given, subsequent history should be indicated by using the following abbreviations without periods and *not* followed by a comma:

affirmed	aff'd
affirming	aff'g
appeal dismissed	app dis
certiorari denied	cert den
leave to appeal denied	lv den
leave to appeal granted	lv gtd
modified	mod
rehearing denied	reh den
rehearing granted	reh gtd
reversed	rev'd
reversed on other grounds	rev'd on other grounds
reversing	rev'g
vacated	no abbreviation

Only the *official* report of subsequent action should be cited.

s. *Unreported matters*. Cite unpublished Michigan cases and orders as follows, and foreign cases by analogy:

A v B, unpublished opinion per curiam (or memorandum opinion) of the Court of Appeals, issued [month, day, year] (Docket No. _____).

A v B, unpublished order of the Court of Appeals, entered [month, day, year] (Docket No. _____).

A v B, unpublished opinion of the _____ Circuit Court, issued _____ (Docket No. _____ [suffix]).

Unpublished opinion of the Attorney General (No. _____, [month, day, year]).

t. *String citations*. Use of overly long string citations, even in footnotes, generally should be avoided inasmuch as "they may cast doubt upon the credibility of your claims because they can give the impression that your case is so weak that you have to substantiate it with every source you can find." More effective is the use of "only one or two of your strongest sources." Charrow & Erhardt, *Clear and Effective Legal Writing* (Boston: Little, Brown & Co, 1986), ch 3, p 64.

5. ***Consistent citation form***: The citation form used within an opinion should be uniform, i.e., do not mix *id*., p 270, with *id*. at 270, or *Ensign, supra*, p 270, with *Ensign, supra* at 270.

B. Citation of Constitutions, Statutes, Regulations, Court Rules, and Jury Instructions

1. ***Constitutions***.

a. *Michigan*. Give the year of the constitution (not the year of an amendment), article, and section number in *Arabic* numerals.

Example:
Const 1963, art 6, § 1; Const 1963, sched § 1.

If the section has been amended since adoption, the reference is presumed to be to the current section unless otherwise indicated.

b. *United States*. Give the article or amendment number in *Roman* numerals and the section number in *Arabic* numerals:

Example:

US Const, art III, § 1.

For amendments:

US Const, Am XIV (*not* Art XIV).

c. *Other states*. Cite by analogy to the Michigan Constitution and United States Constitution.

2. *Statutes*.

a. *Michigan*.

1) *Public and local acts*.

Cite the year, "PA" or "LA," and the act number.

Examples:

1974 PA 296, *not* Act 296, 1974; 1974 LA 1.

If enacted at an extra session, the extra session designation follows the year in parentheses.

Examples:

1912 (1st Ex Sess) PA 10, part 2, § 9
1967 (Ex Sess) PA 3

2) *Amended acts*.

Cite as: 1961 PA 236, as amended (or as added) by 1974 PA 52, MCL 600.103.

3) *Compiled Laws*. Cite the official compilations of 1948, 1970, and 1979 of the Michigan Compiled Laws. (N.B.: Michigan Compiled Laws Annotated [MCLA] and Michigan Compiled Laws Service [MCLS] have the same numbering system.)

Examples:

1948 CL 566.140
1970 CL 35.291.

When citing, use MCL for the current (1979) compilation, not MCLA or MCLS, e.g., MCL 776.20. Inclusion of the public act number is optional. If used, the form is: 1937 PA 286, MCL 487.703. Subsequent references in the same opinion may be shortened as follows:

§ 3, or Act 286, § 3.

4) *Catchlines*. The boldface catchlines found at the beginning of, and sometimes elsewhere in, statutes in the Public and Local Acts, MCL, MCLA, and MCLS were inserted by an editor, not enacted by the Legislature. They are *not* part of the statute and should not be included when quoting a statute. Similarly, catchlines found in a statute following the section number, as in many sections of the Michigan Penal Code, are not part of the statute and should not be included in quotations.

5) *Section numbers*. Generally speaking, any section number appearing at the beginning of a statute also should be omitted from the quotation unless needed for clarity, e.g., if the sections of the act are not evident and will be

used later in an opinion in short form for reference.

6) *History*. The statutory history that follows each section also is *not* part of the legislative enactment and should *not* be included in quoted material.

Examples:

~~<so>691.1412 Claims under act; defenses available.</so>~~ [delete]

[<so>~~Sec. 12.~~</so>] [delete] Claims under this act are subject to all of the defenses available to claims sounding in tort brought against private persons.

[<so>~~HISTORY: New 1964, p. 224, Act 170, Eff. Jul. 1, 1965.~~</so>] [delete]

7) *Short titles*.

a) *Official title*. If an act has an official "short title" enacted as part of the act, capitalize the initial letters of the title. Indication of the year of enactment is unnecessary, even though it may be given as part of the title.

Example:

1961 PA 236, § 101, MCL 600.101 provides:

"This act shall be known and may be cited as the revised judicature act of 1961."

Omit the 1961 in citation, referring to it merely as the Revised Judicature Act.

Generally recognized abbreviations of titles may be used, whether mentioned in the act or not. For example, § 101 of the Revised Judicature Act specifically authorizes use of the abbreviation "RJA"; § 1101 of the Uniform Commercial Code gives the title without mentioning an abbreviation, but UCC is permissible.

b) *No official title*. If an act does not have an official title, a short title used in referring to it should not be capitalized unless it is a word that is normally capitalized. For example, the teacher tenure act, MCL 38.71 *et seq*., has no official title, nor has the no-fault act, MCL 500.3101 *et seq*.

c) *Multiple titles*. An act may be referred to by an unofficial title even though it has an official title.

Worker's Disability Compensation Act/workers' compensation act

d) *Sponsors*. Generally omit the names of an act's sponsors in an official act.

The R. Hood-McNeely-Geake Malpractice Arbitration Act of 1975 should be referred to as the Malpractice Arbitration Act; the

Elliott-Larsen Civil Rights Act, as the Civil Rights Act or the Michigan Civil Rights Act where an opinion also refers to the federal Civil Rights Act.

b. *Federal*. Cite the title and section numbers of the United States Code without punctuation or section symbol: 11 USC 29, not 11 USC § 29. The official United States Code (USC), the United States Code Annotated (USCA), and the United States Code Service (USCS) all use the same numbering system; therefore, cite the *official* version (USC). Citation of the Statutes at Large is unnecessary except where there is no corresponding USC citation or where the particular USC title has not been enacted into positive law *and* the wording of USC is *materially* different from that of the Statutes at Large. Federal session laws are to be cited:

PL 96-123, § 109, 93 Stat 926.

c. *Other states*. Cite in the manner usually followed in the jurisdiction, preferably in the official reports, consistent withmanual form. The jurisdiction must appear clearly in or with the citation. Consult the Bluebook for titles.

Examples:

Ariz Rev Stat 13-4032, *not* ARS 13-4032.

NH Rev Stat Ann 651:57, *not* NHRSA 651:57.

The year of compilation should *not* be included unless the reference is *not* to a statute currently in force.

3. ***Court rules***.

a. *Michigan Court Rules of 1985*.

Cite as: MCR and the rule number. (MCR 2.625.)

b. *Michigan Rules of Evidence*.

Cite as: MRE and the rule number. (MRE 801.)

c. *Former court rules*.

1) *General Court Rules of 1963*: GCR 1963, 105.4.

2) *Court Rules of 1945*: Court Rule No 8, § 7 (1945).

3) *Earlier court rules*: Cite analogously to the Court Rules of 1945.

4) *Former District Court Rules*: DCR and the rule number.

5) *Former Probate Court Rules*: PCR and the rule number.

6) *Former Juvenile Court Rules*: JCR 1969, and the rule number.

d. *Local Court Rules.*

[*Jurisdiction*] LCR and the rule number. (30th Circuit LCR 2.119.)

e. *Proposed court rules.*

Proposed MCR and the rule number.

f. *Rules of Professional Conduct.*

MRPC 1.0.

g. *Code of Judicial Conduct.*

Code of Judicial Conduct, Canon 1.

h. *State Bar Rules.*

SBR 6, § 3.

i. *Rules of the Board of Law Examiners.*

BLE 5.

j. *Federal rules*.

1) *Federal Rules of Civil Procedure*: FR Civ P 52(a).

2) *Federal Rules of Criminal Procedure*: FR Crim P 11.

3) *Federal Rules of Evidence*: FRE 803(24).

k. *Other jurisdictions*. Cite in the same manner as cited by the official reporter of the court, but consistent with manual form.

4. *Administrative orders.*

Administrative Order No. 1993-1. Subsequent *extensive* references may be shortened: AO 1993-1.

5. *Jury instructions*.

a. Criminal Jury Instructions: CJI2d 1.1.

b. Michigan Model Civil Jury Instructions: M Civ JI 3.02.

6. ***Administrative rules***.

a. 1999 Administrative Code: 1999 AC, R 408.41863.

b. If the rule has been amended or superseded, cite the appropriate Annual Supplement where available: 1983 AACS, R 408.41863, or a more recent revision in the *Michigan Register*: 1985 MR 7, R 408.30495c.

(N.B.: Revisions appear monthly in the *Michigan Register* and are cumulated annually in AACS. E.g., regulations published in 1985 MR, vols. 1-12, are later reprinted in 1985 AACS.)

Subsequent references may be shortened: Rule 408.41863.

2003 PA 53 amended §§ 55 and 59 of the Administrative Procedures Act, MCL 24.255 and 24.259, effective July 14, 2003, to provide that the official Michigan Administrative Code is what is published and annually supplemented on the Office of Regulatory Reform website at <http://www.michigan.gov/orr>.

C. Miscellaneous Citations

1. ***Attorney General opinions***.

Cite as:

1 OAG, 1956, No 3,010, p 407 (August 26, 1957).
OAG, 1947-1948, No 146, p 217 (March 7, 1947).

2. ***Municipal charters and ordinances***.

a. *Charters*. Cite the name of the municipality, the charter, and sufficient data to identify the particular section of interest uniquely, but not redundantly. For example, if all the sections of chapter 6 of a charter are numbered as 6.1, 6.2, etc., and sections in no other chapter are so numbered, 6.2 is sufficient and ch 6 should not be added to the citation.

Examples:

Detroit Charter, tit VI, ch VII, § 11.

Lansing Charter, § 5-207.

b. *Ordinances*.

1) *Codified Ordinances*. Cite the name of the municipality, the ordinance code, and sufficient data to identify the particular section of interest uniquely, but not redundantly.

Example:

Detroit Ordinance, § 38-5-7.

2) *Uncodified Ordinances*. Cite the name of the municipality and the ordinance number and section; the date is unnecessary for ordinances currently in force, but should be added in parentheses when necessary to distinguish from other versions.

Example:

Saginaw Ordinance D-511, § 203.

3. ***Administrative decisions***.

Cite published cases as follows:

A v B, 1978 MERC Lab Op 328.
(Employment Relations Commission)

A v B, 95 LRRM 1274 (1977).
(Labor Relations Reference Manual)

A v B, 1 MTTR 95 (Docket No. 3799, May 15, 1975).
(Tax Tribunal Reports)

A v B, 1979 WCABO 2617.
(Workers' Compensation Appeal Board Opinions)

A v B, 1989 Mich ACO 1.
(Workers' Compensation Appellate Commission Opinions)

Cite other reports by analogy.

4. ***Constitutional Convention***.

2 Official Record, Constitutional Convention 1961, p 2038.

5. ***Legislative materials***.

a. *Bills*.

HB 4015.
SB 481.

b. *Journals*.

1) *Bound volumes*. Cite the year of the session and the page number:

1965 Journal of the House 77-78.
1983 Journal of the Senate 2280.

2) *Advance sheets*. Cite, in addition, the pamphlet number and the date of issue:

1986 Journal of the House 76 (No. 6, January 22, 1986).

1986 Journal of the Senate 449 (No. 26, March 6, 1986).

c. *Analyses*.

House Legislative Analysis, HB 6037, September 29, 1980.

6. ***Executive orders***.

Cite in full:

Executive Order No. 1991-1.
Short forms: order 1991-1 or EO 1991-1.

7. ***Legal treatises and texts***.

a. *Examples*:

3 ABA Standards for Criminal Justice (2d ed), Standard 18-4.1, commentary, p 18-240

78 ALR2d 218, § 2, pp 220-221

2 Am Jur 2d, Administrative Law, § 698, p 597

Anno: *Fraud or undue influence in conveyance from child to parent*, 11 ALR 735, 746

3 Callaghan's Michigan Pleading & Practice (2d ed), § 16.23, p 564

26 CJS, Declaratory Judgment, § 108, p 214

1 Cooley, Constitutional Limitations (2d ed), p 10

2 Couch, Insurance, 2d (rev ed), § 15:57, pp 298-302

1 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 312, p 374

Lewis, Trusts (13th ed), p 91

2 Martin, Dean & Webster, Michigan Court Rules Practice, p 334

McCormick, Evidence (3d ed), § 72, p 171

12 McQuillin, Municipal Corporations (3d ed, 1976 Cum Supp), § 32.133, p 141

12 Michigan Law & Practice, Fraud, § 10, pp 409-410

Prosser & Keeton, Torts (5th ed), § 4, p 21

Restatement Contracts, 2d (Tentative Draft No 8, 1973), § 267, pp 77-78

2 Restatement Torts, 2d, Appendix (1966), § 344, p 237

3 Restatement Torts, 2d, § 520, p 41

3 Sands, Sutherland Statutory Construction (4th ed), § 62.01, p 113

2 Weinstein & Berger, Evidence, ¶ 412[01], pp 412-10, 412-11

6 Wigmore, Evidence (Chadbourn rev), § 1747, p 195

b. *Subsequent citation*: Once an authority has been cited in full, a short-form citation may be used where it will not result in confusion. E.g.:

Weinstein, ¶ 411

Wigmore, § 1745

Cooley, p 10

Restatement, § 340

Note, however, where a citation of the Restatement of Contracts intervenes after a citation of the Restatement of Torts, simply providing "Restatement, § 340," will not suffice because it could refer to either.

8. ***United States Law Week.*** Use only where an official or regional reporter is unavailable.

Comm'r of Internal Revenue v Kowalski, ____ US ____; ____ S Ct ____; ____ L Ed 2d ____; 46 USLW 4015 (November 29, 1977).

Pechter v Lyons, ____ F Supp ____; 46 USLW 2251 (SD NY, November 8, 1977).

9. ***LEXIS/WESTLAW.*** Use only where an official or regional reporter is unavailable.

A v B, ____ [Official Reporter] ____; ____ [Unofficial Reporter(s)] ____; [year] LEXIS/WL [library] [page].

10. ***Nonlegal books***. Cite the author, editor, or issuing institution, title in italics, and, in parentheses, the place of publication, colon, publisher, edition number, and year of publication, fol-

lowed by, if appropriate, sufficient data to identify the matter of interest, such as the chapter and page number.

Examples:

Greenfield & Sternbach, eds, *Handbook of Psychophysiology* (New York: Holt, Rinehart & Winston, Inc, 1972), ch 19, p 749

Yung-Ping Chen & The Technical Committee on Income, *Income: Background & Issues* (Washington, DC: White House Conference on Aging, 1971)

United States Bureau of the Census, *Census of Population: 1970, Detailed Characteristics; Final Report PC(1)—-D24 Michigan* (Washington, DC: United States Government Printing Office, 1972)

Bernstein, *The Careful Writer* (New York: Atheneum, 1973)
Follett, *Modern American Usage* (New York: Hill & Wang, 1966)

Evans, *A Dictionary of Contemporary American Usage (New York: Random House, 1957)*

11. ***Dictionaries.***

Black's Law Dictionary (8th ed) (no italics)

Webster's Third New International Dictionary,
Unabridged Edition (1966)

The Random House Dictionary of the English Language: Unabridged Edition

Random House Webster's College Dictionary (1991)

The American Heritage Dictionary of the English Language (1973)

12. ***Law review material***.

a. Include the volume number, abbreviated name of the law review or journal, page number or numbers, and, in parentheses, the year.

b. Articles with named authors should be cited beginning with the surname of the author (unless more is needed for certainty) and the title in italics.

c. A commentary or note should be cited as commentary or note, comma, and *italicized* title. (N.B.: The name of the author should *not* be included.)

d. Matter in the nature of a regular department of a periodical having a number of contributors or anonymous contributors should be cited by the usual title, e.g., Current Law Notes, Recent Legislation, Recent Developments, and not italicized.

Examples:

Comment, *Prosecutorial discretion in the duplicative statutes setting*, 42 U Colo L R 455 (1971)

Conyers, *The politics of revenue sharing*, 52 J Urban L 61 (1974)

Crawford, *Local zoning control of billboards___A guide for Michigan*

Attorneys, 1989 Det Col L R 1473

Kimble, *Protecting your writing from law practice*, 66 Mich B J 912 (1987)

Kutak & Gottschalk, *In search of a rational sentence: A return to the concept of appellate review*, 53 Neb L R 463 (1974)

Moley, *The use of the information in criminal cases*, 17 ABA J 292 (1931)

Project, *Seventeenth annual review of criminal procedure*, 76 Geo L J 521, 925 (1988)

Richardson, 1983 Annual Survey of Michigan Law, *Natural resources, real property and trusts*, 30 Wayne L R 763, 769-772

13. ***Internet material***. Materials found only on an Internet website should include an author (if available), a title, an Internet address, *and* the date on which the site was accessed.

Examples:

James Wyman, Florida Law Online <http://www.gate.net/~wyman/flo.html> (accessed August 1, 1999).

Federal Judicial Center, *Federal Judicial Center Publications* <http://www.fjc.gov/pubs.html> (accessed July 10, 1999).

14. ***Michigan Child Support Formula Manual***.

Cite as [year] MCSF [section number]. Example: 2001 MCSF 208(A).

II. Material Quoted in Opinions

Generally, material quoted in opinions should be reproduced exactly as it appears in the original source.

Examples:

MCL 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of *misdirection of the jury*, or the improper admission or rejection of evidence, or for any 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 resulted in a miscarriage of justice. [Emphasis added.]

As this Court has noted,

> [t]he measure of control exercised in connection with the prevention and detection of crime and prosecution and punishment of criminals is set forth in the statutes of the State pertaining thereto, particularly the penal code and the code of criminal procedure. The powers of the courts with reference to such matters are derived from the statutes. [*People v Piasecki*, 333 Mich 122, 143; 52 NW2d 626 (1952).]

A. *Case Law.*

1. Where available, *official* sources should be quoted. (N.B.: the official opinions of the Michigan Supreme Court are published in the *Michigan Reports* [Mich], not the *North Western Reporter* or *Michigan*

Reporter [NW2d]; the official opinions of the United States Supreme Court are published in the *United States Reports* [US], not the *Supreme Court Reporter* [S Ct], the *United States Supreme Court Reports*, *Lawyers Edition* [L Ed, L Ed 2d], or *United States Law Week* [USLW].)

2. Published opinions of Michigan, federal, or foreign courts should be quoted *exactly*, except that a parallel citation or year of decision must be added with brackets if missing from the quoted material.

   Examples:

   In 378 Mich 195, the following citation appears:

   > *Brown* v. *City of Highland Park* (1948), 320 Mich 108.

   If the paragraph containing the citation is quoted in a current opinion, it should appear as:

   > *Brown* v. *City of Highland Park* (1948), 320 Mich 108 [30 NW2d 798]. (N.B.: A parallel citation has been added.)

   In 199 Mich 316, "*Jones* v. *Berkey*, 181 Mich. 472 (148 N.W. 375)," should be quoted:

   > "*Jones* v. *Berkey*, 181 Mich. 472 (148 N.W. 375) [1914]."

B. ***Statutes and Administrative Rules.*** These should be quoted *exactly as they appear in printed form, not off a website*. If it appears that the text of a statute or rule contains an error, "[sic]" should be inserted in the text immediately following the error.

C. ***Punctuation in Quoted Material***.

1. *Colons and semicolons*. Colons and semicolons that are not part of the original quoted material are placed *outside* quotation marks.

2. Question marks and exclamation points. Placement of question marks and exclamation points depends on their relation to the material quoted. The mark is placed inside quotation marks where it applies only to the material quoted, and outside where it applies to the entire sentence.

   Examples:

   The witness responded, "I saw him do it!"

   Why did you respond, "I saw him do it"?

3. Quotation marks. A quotation within a quotation is enclosed in single quotation marks.

   E.g., "Unless the legislation creates a 'classification scheme,' or 'impinges upon the exercise of a fundamental right,' it is 'accorded a presumption of constitutionality, and is reviewed by applying a rational basis standard.' " *Brown v Manistee Co Rd Comm*, 452 Mich 354, 361-362; 550 NW2d 215 (1996), quoting *Doe v Dep't of Social Services*, 439 Mich 650, 662; 487 NW2d 166 (1992).

D. ***Deletions in Quoted Materials (Ellipses)***.

1. *Within a sentence.* To delete material *within* a sentence, insert three periods (ellipses) and four spaces:

   "Insanity . . . is an extreme of mental illness."

   (Note: Ellipses without spaces are incorrect. "Insanity...is an extreme....")

2. *At end of a sentence*. To delete material at the *end* of a sentence, insert three periods and four spaces *before* the terminal punctuation:

> "To put it alternatively, the statutes provide that all insane people are mentally ill . . . ."
>
> "*The Court*: Well, what was this thing . . . ?"

3. *Following a sentence/between sentences*. To delete material *after* a complete sentence or *between* complete sentences, insert three periods and three spaces *after* the terminal punctuation:

> Insanity by definition is an extreme of mental illness. . . . To put it alternatively, the statutes provide that all insane people are mentally ill but not all mentally ill people are insane.
>
> Insanity by definition is an extreme of mental illness. . . . [T]he law provides that criminal responsibility does not attach.

Note that the "t" in the final sentence, lower case in the original, is capitalized in brackets [T] because the material remaining after deletion can be read as a complete sentence.

4. *At the middle of a sentence. No ellipses* are required where a quotation begins in the middle of a sentence and:

a) the fragment quoted completes an original sentence and begins with a lower case letter:

> E.g.: When a person is found to be insane, "the law provides that criminal responsibility does not attach."

b) a capital letter is inserted in brackets:

> E.g.: The lead opinion in *Fultz* noted, "[A]ll insane people are mentally ill but not all mentally ill people are insane."

5. *Internal punctuation in original*. *Internal punctuation* should be retained only where required for clarity:

> "When a person's mental illness reaches that extreme, . . . criminal responsibility does not attach." (The comma in the original is retained.)

but:

> "Defendant . . . admitted doing the particular act, but also stated that he was insane." (Punctuation in the deleted material is not retained.)

6. *At the end of a paragraph*. Where material is deleted at the *end* of a paragraph and the next paragraph immediately follows, insert three periods and three spaces after the terminal punctuation of the first paragraph:

> Furthermore, defendant's account of what transpired was clearly in accord with the psychiatric evaluation in that defendant admitted committing the act but stated that he could not help what he was doing. . . .
>
> *The Court*: Well, what was this thing that came over you?

7. *Between paragraphs*. Where one or more paragraphs are deleted *between* quoted paragraphs, insert three asterisks (centered) and two blank lines between the paragraphs quoted:

> So, just as a finding of no insanity is essential for an adjudication of guilt by trial, we hold such a finding to be equally essential for a plea of guilty. Such a finding was not made in the instant case and the plea for that reason is invalid.
>
> * * *
>
> Lastly, as we find the plea to be invalid for the aforestated reasons, it is unnecessary to address the claim of ineffective assistance of counsel.

E. ***Italics***. Italics should be used *only* in the following instances:

1. case names: *People v Smith*,
2. *supra*, *id*., *infra*, *ante*, *post*, *et seq*.,
3. words the author wishes to emphasize,
4. where italics are used in the material quoted,
5. unfamiliar foreign words and phrases or longer Latin "legal" phrases. E.g.:

Italicize:

> *expressio unius est exclusio alterius* and *en ventre sa mere*, etc.,

but not:

> de novo, arguendo, sua sponte, etc.
> (Check Black's Law Dictionary [8th ed] for guidance.)

Italicize:

> *Nec flectitur*, *nec mutant*; *hôtel de ville*; *die Weltanschauung*, etc.,

but not:

vis-à-vis; quid pro quo; der Bundestag; Arc de Triomphe; etc. (Check the Random House Dictionary for guidance.)

6. In titles of nonlegal books, law review articles, and ALR annotations.

7. The following should *not* be italicized:

abbreviations (e.g., i.e., viz., N.B., etc.);
signals (see, see also, compare . . . with);
later history of cases (cert den, lv den, aff'd);

8. When quoting from trial or other transcripts italicize:

a) "*Q*." and "*A*." (Do *not* use: "*Q*:" or "*A*:")

Examples:

"*Q*. Were you on Oakland Avenue on the date in question?

"*A*. No, sir."

b) Names or titles of the speakers:

The Court:
Mr. Smith (attorney for the defense):
The Defendant:

F. ***Quoting a Footnote***.

1. If material quoted contains a footnote that is to be included in the quotation, use the same footnote numbering as the original and add the footnote at the end of the block of quoted material, separated from the main quotation by lines from margin to margin above *and* below the footnote. For clarity,

where possible, put the citation in the opinion text *before* beginning the block quotation.

Example:

A discussion of presumptions and their effect upon the burden of producing evidence appears in *In re Wood Estate*, 374 Mich 278, 289; 132 NW2d 35; 54 ALR3d 1 (1965):

> "The immediate legal effect of a presumption is procedural___it shifts the burden of going forward with the evidence relating to the presumed fact.5 Once there is a presumption that fact C is true, the opposing party must produce evidence tending to disprove either facts A and B or presumed fact C; if he fails to do so, he risks jury instruction that they must presume fact C to have been established.
>
> ---
>
> "[5]Baker v Delano, 191 Mich 204, 208 [157 NW 427 (1916)], citing 1 Elliott on Evidence, § 91: ' "The office or effect of a true presumption is to cast upon the party against whom it works the duty of going forward with evidence." ' "
>
> ---

The thrust of the *Wood* case was to change the law in this state concerning the effect that a presumption was *after* rebuttal evidence has been introduced.

2. Where footnotes appear in the original source, but are not material to the purpose for which the text is quoted, footnote numbers in the text should be deleted without ellipses. Do *not* add "(footnotes deleted)" at the end of the quotation!

G. ***Placement of Citation***. A citation indicating the source of a block quotation generally should be supplied in the text *preceding* the quotation.

Example:

The Equal Protection Clause, US Const, Am XIV, § 5, provides:

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

A citation *may* follow the quotation in the block, immediately after the quoted material, without additional separation, followed by a period and enclosed in brackets.

The no-fault insurance act provides, in part:

An agreement for assignment of a right to benefits payable in the future is void. [MCL 500.3143.]

H. ***Parentheses and Brackets.***

1. Use *Parentheses* ( ):

a) To set off short, supplementary, parenthetic, or explanatory material when the interruption is *more marked* than that usually indicated by commas and when the inclusion of such material does not essentially alter the meaning of the sentence.

The work (he was preeminently fitted for it) absorbed his attention for weeks.
The cost of living (see chart II) has risen slowly but surely.

b) To enclose figures or letters used in enumerations.

The immediate results were these: (1) a cornering of the market; (2) a decrease in available material; (3) an advance in prices.

(N.B.: Parentheses postpone punctuation. No punctuation immediately precedes parentheses, except when a sentence ends with a period and the next sentence is in parentheses.)

2. Use *brackets* [ ]:

a) To enclose explanatory remarks, extraneous data, editorial interpolations, or additional citations within *quoted* passages or a citation following a block quotation where no quotation marks are used:

Example:

> There is no doubt that the April 23, 1973 finding was that defendant was guilty of civil contempt. Judge O'Hair specifically told the defendant that she would be jailed until she purged herself. She therefore was able to "carry the 'keys of [the] prison in [her] own pocket' [and] the action is essentially civil." *People v Goodman*, 17 Mich App 175, 177; 169 NW2d 120 (1969).
>
> If one substitutes "warehouse owner, lessee or operator" for "consignee," then the exclusion would read "no portion of any premises

> owned or leased or operated by a [warehouse owner, lessee or operator] shall be deemed to be a public warehouse." The expansive meaning sought by the city does not work unless there can be a consignor without a consignee.
>
> The proscription of "unreasonable searches and seizures" and the warrant requirement
>
> "must be read in light of 'the history that gave rise to the words'___a history of 'abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution . . . .' [*United States v Rabinowitz*], 339 US [56], 69 [70 S Ct 430; 94 L Ed 653 (1950)]. The amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence."

b) To indicate a change in capitalization to conform to the sense of the context in quoted source material.

> Example:
>
> [W]e cannot agree that the Fourth Amendment interests at stake in these [administrative] inspection cases are merely "peripheral." It is

> surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

c) To indicate a misspelled or misused word in the text accompanied by the word "sic."

> Example:
>
> Any person who shall commit the offense of larceny, by steeling [sic], shall be guilty of a felony . . . .

d) To function as parentheses within parentheses.

> Example:
>
> The statute (MCL 418.551[2]) provides . . . .

e) Use empty brackets [ ] to indicate deletion of a letter or letters where, for example, the plural in quoted material is to be rendered in the singular.

> Example:
>
> "actions" becomes "action[ ]."

APPENDIX A. STATE ABBREVIATIONS

Ala	Conn	Idaho
Alas	Del	Ill
Ariz	DC	Ind
Ark	Fla	Iowa
Cal	Ga	Kan
Colo	Hawaii	Ky

La	NH	SC
Mo	NJ	SD
Md	NM	Tenn
Mass	NY	Tex
Mich	NC	Utah
Minn	ND	Vt
Miss	Ohio	Va
Mo	Okla	Wash
Mont	Or	W Va
Neb	Pa	Wis
Nev	RI	Wy

APPENDIX B. COURTS NO LONGER PUBLISHING OFFICIAL REPORTS

State	**Last Volume**	**Last Year**
Alabama	295	1976
Alabama Appeals	57	1976
Alaska	17	1958
Arizona Appeals	27	1976
Colorado	200	1980
Colorado Appeals	44	1980
Delaware	59	1966
Delaware Chancery	43	1966
Florida	160	1948
Indiana	275	1981
Indiana Appeals	182	1981
Iowa	261	1968
Kentucky	314	1951
Louisiana	263	1972
Louisiana Appeals	19	1932
Maine	161	1965
Minnesota	312	1977
Mississippi	254	1966

Missouri	365	1956
Missouri Appeals	241	1955
North Dakota	79	1953
Oklahoma	208	1953
Oklahoma Criminal Appeals	97	1953
Rhode Island	122	1980
South Dakota	90	1976
Tennessee	225	1971
Tennessee Appeals	63	1971
Tennessee Civil Appeals	8	1918
Texas	163	1962
Texas Criminal Appeals	172	1963
Texas Civil Appeals	63	1911
Utah	30 Utah 2d	1974
Wyoming	80	1959

APPENDIX C. ABBREVIATIONS

Name	Abbreviation	Name	Abbreviation
Administration, Administrative	Admin	Commissioner(s)	Comm'r(s)
And	&	Company(ies)	Co(s)
Associates	Assoc	County(ies)	Cty
Association	Ass'n	Condominium	Condo
Assistant	Asst	Construction	Constr
Authority	Auth	Cooperative	Coop
Board	Bd	Corporation	Corp
Brothers	Bros	Department	Dep't
Building	Bldg	Development	Dev
Casualty	Cas	District	Dist
Center	Ctr	Division	Div
Chemical	Chem	Education, Educational	Ed
Commission	Comm	Equipment	Equip
Committee	Comm	Exchange	Exch

Federal	Fed	Mutual	Mut
General	Gen	National	Nat'l
Government	Gov't	Number	No
Heights	Hts	Organization	Org
Highway	Hwy	Property	Prop
Hospital	Hosp	Public	Pub
Incorporated	Inc	Railroad, Railway	R
Insurance	Ins	Road	Rd
International	Int'l	Savings and Loan	S&L
Limited	Ltd	System	Sys
Management	Mgt	Telephone, Telegraph	Tel
Manufacturing	Mfg	Telecommunication(s)	Telecom
Memorial	Mem	Township	Twp
Metropolitan	Metro	University	Univ
Municipal	Mun		

ADMINISTRATIVE ORDER

No. 2006-4

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 28TH CIRCUIT COURT AND THE 84TH DISTRICT COURT OF WEXFORD COUNTY

Entered April 5, 2006, effective August 1, 2006 (File No. 2004-04—REPORTER.

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

The Court hereby approves adoption of the following concurrent jurisdiction plan effective August 1, 2006:

The 28th Circuit Court and the 84th District Court

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

Amendments of concurrent jurisdiction plans may be implemented by local administrative order pursuant to MCR 8.112. Plan amendments shall conform to the requirements of Administrative Order No. 2003-1 and MCL 600.401 *et seq*.

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

AMENDED ADMINISTRATIVE ORDER No. 2004-5

EXPEDITED SUMMARY DISPOSITION DOCKET IN THE COURT OF APPEALS

Entered December 21, 2005, effective January 1, 2006, for a twelve-month period (File Nos. 2002-34, 2002-44)—REPORTER.

1. Applicability. This amended administrative order applies to appeals filed on or after January 1, 2006, arising solely from orders granting or denying motions for summary disposition under MCR 2.116. These appeals are to be placed on an expedited appeal track under which they shall generally be briefed, argued, and disposed of within six months of filing. A motion to remove is required to divert such appeals to the standard appeal track.

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

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

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

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

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

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

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

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

(3) the stipulation of the parties that the transcript has been waived.

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

5. Application for Leave—Form of Filing. An application for leave to appeal, or an answer to an application for leave to appeal, filed under this administrative order shall conform in all pertinent respects with the requirements of MCR 7.205. At the time an application or an answer is filed, the filing party must provide the

Court of Appeals with 5 copies of that party's trial court summary disposition motion or response, brief, and appendices.

6. Claim of Cross-Appeal. Subject to the filing deadline contained in section 2, a claim of cross-appeal filed under this administrative order shall conform in all other pertinent respects with the requirements of MCR 7.207.

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

(A) Time to File. A motion to remove may be filed by any party at any time. However, filing of the motion most closely in time to discovery of the basis for removal will maximize the likelihood that the motion will be granted.

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

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

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

(E) Docketing Statement. If the case is removed from the summary disposition track, a docketing statement

must be filed within 14 days after the date of certification of the order on the motion.

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

(G) Effect of Removal. If the Court of Appeals removes a case from the summary disposition track, the order shall state whether, and the deadlines by which, the parties are entitled to file briefs in accordance with the time and page limitations set forth in MCR 7.212.

8. Transcript—Production for Purposes of Appeal.

(A) Appellant.

(1) The appellant must order the transcript of the hearing(s) on the motion for summary disposition before or contemporaneously with the filing of the claim of appeal or application for leave to appeal, unless there is no record to transcribe or all parties to the appeal stipulate that the transcript is unnecessary.

(2) Evidence that the transcript was ordered must be filed with the claim of appeal or application for leave to appeal. Appropriate evidence of the ordering includes (but is not limited to) the following:

(a) a letter to the specific court reporter requesting the specific hearing dates and enclosing any required deposit; or

(b) an "Appeal Transcript, Demand, Order and Acknowledgment" form, or

(c) a court reporter or recorder's certificate.

(3) If the transcript is not timely filed, the appellant or an appellee may file an appropriate motion with the Court of Appeals at any time. Avoiding undue delay in

filing the motion under the circumstances of the case, and concisely stating the specific basis for it, will maximize the likelihood that the motion will be granted.

(4) If an appropriate motion is filed, the order disposing of such motion shall state the time for filing any outstanding brief(s).

(5) Absent an order of the Court of Appeals that resets the time, and regardless of whether the ordered transcript is timely filed, the time for filing the appellant's brief will commence on the date the claim of appeal was filed or the order granting leave was certified. In such event, the appellant's brief shall be filed within 56 days after the claim of appeal was filed or 28 days after certification of the order granting leave to appeal. See section 9(B)(1).

(B) Appellee.

(1) If the transcript has been ordered by the appellant but is not filed by the time the appellant's brief is served on an appellee, the appellee may file an appropriate motion with the Court of Appeals. Avoiding undue delay in filing the motion under the circumstances of the case, and concisely stating the specific basis for it, will maximize the likelihood that the motion will be granted.

(2) If an appropriate motion is filed, the order shall state the time for filing any outstanding appellee briefs.

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

(D) Transcript Fee. The court reporter or recorder shall be entitled to the sum of $3.00 per original page and 50 cents per page for each copy for transcripts ordered in appeals processed under the expedited docket, if the transcript is filed within 28 days after it was ordered. If the court reporter or recorder does not file the transcript within 28 days after it was ordered, the rate will remain $1.75 per original page and 30 cents per page for each transcript, as set by MCL 600.2543.

9. Briefs on Appeal.

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

(B) Time For Filing.

(1) In appeals by right, the appellant's brief shall be filed within 56 days after the claim of appeal is filed, or as ordered by the Court. In appeals by leave, the appellant's brief shall be filed within 28 days after the order granting leave is certified, or as ordered by the Court. In appeals by leave, the appellant may rely on the application for leave to appeal rather than filing a separate brief by timely filing 5 copies of the application for leave to appeal with a new cover page indicating that the appellant is relying on the application in lieu of filing a brief on appeal. The cover page should indicate whether oral argument is requested or is not requested. MCR 7.212(C)(1).

(2) The appellee's brief shall be filed within 28 days after the appellant's brief is served on the appellee, or as ordered by the Court. In appeals by leave, the appellee may rely on the answer to the application for leave to appeal rather than filing a separate brief by timely filing 5 copies of the answer to the application for leave to appeal with a new cover page indicating that the appellee is relying on the answer to the application

in lieu of filing a brief on appeal. The cover page should indicate whether oral argument is requested or is not requested. MCR 7.212(C)(1) and (D)(1).

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

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

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

At the time each brief is filed, the filing party must provide the Court of Appeals with that party's trial court summary disposition motion or response, brief, and appendices. Failure to file these documents at the time of filing the appellant's brief will not extend the time to file the appellee's brief, however. Provided such omission is noted appropriately in the appellee's brief, the appellee may omit these appendices if they were included with the appellant's brief.

(D) A reply brief may be filed within 14 days after the appellee's brief is served on the appellant, and is limited to 5 pages, double-spaced, exclusive of tables, indexes, and appendices.

10. Record on Appeal. The Court of Appeals shall request the record on appeal from the trial court or tribunal clerk 28 days after jurisdiction has been confirmed and material filing deficiencies have been corrected. The trial court or tribunal clerk shall transmit the record as directed in MCR 7.210(G).

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

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

This amended order will remain in effect until December 31, 2006, during which time the Court of Appeals Work Group will monitor the expedited docket program. If, at any time during that monitoring process, it becomes apparent to the work group that procedural aspects of the program need to be modified, the group is encouraged to seek authorization from this Court to implement modifications. The work group will provide this Court with written updates on the pilot program before the one-year and eighteen-month anniversaries of the program's implementation. At the end of the two-year pilot period, this Court will evaluate expedited processing of summary disposition appeals to determine whether the procedure will be discontinued, changed, or continued.

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

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

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

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

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

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

deadlines are converging and specify the least amount of time that would be required to file the brief. Once briefing has been completed, the case will be referred to the Court's research attorneys for an expedited review and it will then be submitted to a panel of judges for disposition.

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

Staff Comment for amended order: The amendments require an appellant to order the transcripts or the preparation of transcripts may be waived by stipulation. Evidence of ordering the transcripts must be filed with the claim of appeal or application for leave to appeal. Provisions also are added to allow appropriate motions if ordered transcripts are not timely filed. If the transcript was not filed by the time the appellant's brief was served on multiple appellees, only one appellee needs to file an appropriate motion. The order on the motion will state the deadline for filing any outstanding briefs.

The amendments identify the trial court documents that must be appended to applications for leave to appeal and answers filed in response.

A party may file a motion to remove a case from the expedited summary disposition docket at any time, not just within a narrow time period. The amendments require the order of removal to state whether, and the deadlines by which, parties may file standard briefs.

The amendments provide that an appellant's brief will be due in 56 days from the claim of appeal or 28 days from the order granting leave to appeal. An appellee's brief will be due in 28 days from service of the appellant's brief.

The amendments allow an appellee to omit appendices if the documents were appended to the appellant's brief.

The amendments delete many filing deadlines for motion practice under the rule. Instead, pertinent provisions indicate that filing a motion most closely in time to discovery of the basis for it will maximize the likelihood that it will be granted.

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

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted October 10, 2005, effective January 1, 2006 (File No. 2004-48)—REPORTER.

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

RULE 8.108. COURT REPORTERS AND RECORDERS.

(A)-(F) [Unchanged.]

(G) Certification.

(1) Certification Requirement.

(a) Only reporters, recorders, operators, or voice writers certified pursuant to this subrule may record or prepare transcripts of proceedings held in Michigan courts or of depositions taken in Michigan pursuant to these rules. This rule applies to the preparation of transcripts of videotaped courtroom proceedings or videotaped or audiotaped depositions, but not to the recording of such proceedings or depositions by means of videotaping. An operator holding a CEO certification under subrule (G)(7)(b) may record proceedings, but may not prepare transcripts.

(b) Proceedings held pursuant to MCR 6.102 or 6.104 need not be recorded by persons certified under this rule; however, transcripts of such proceedings must be

prepared by court reporters, recorders, operators, or voice writers certified pursuant to this rule.

(c)-(f) [Unchanged.]

(2) Court Reporting and Recording Board of Review.

(a) The Supreme Court shall appoint a Court Reporting and Recording Board of Review, composed of

(i) [Unchanged.]

(ii) a circuit judge;

(iii)-(ix) [Unchanged.]

(b)-(d) [Unchanged.]

(3) Certification by Testing.

(a) At least twice each year the board shall administer an examination testing knowledge and speed, and, as to a recorder, operator, or voice writer, familiarity with basic logging techniques and minor repair and maintenance procedures. The board shall determine the passing score.

(b) In order to be eligible for registration for an examination, an applicant must

(i) be at least 18 years of age,

(ii) be a high school graduate, and

(iii) not have been under sentence for a felony for a period of two years.

(c) In addition, an applicant for the certified shorthand reporter examination must have satisfactorily completed a post-high school approved, accredited, or recognized course of study in court reporting and submit documentation of same prior to testing.

(d) An applicant for the CER/CSMR/CEO examination must have satisfactorily completed a post-high school board-approved workshop or course of study, or

other board-approved curriculum and submit documentation of same prior to testing.

(e) All CERs/CSMRs/CEOs who are fully certified by December 31, 2005, are exempt from the requirements of subparagraph (d).

(f) The registration fee is $60.

(4) Reciprocal Certification. A reporter, recorder, operator, or voice writer certified in another state may apply to the board for certification based on the certification already obtained.

(5) Temporary Certification. A new reporter, recorder, operator, or voice writer may receive one temporary certification to enable him or her to work until the results of the next test are released. If the person does not take the test, the temporary certification may not be extended unless good cause is shown. If the person takes the test and fails, the board may extend the temporary certification.

(6) Renewal, Review, and Revocation of Certification.

(a) Certifications under this rule must be renewed annually. The fee for renewal is $30. Renewal applications must be filed by August 1. A renewal application filed after that date must be accompanied by an additional late fee of $30. The board may require certified reporters, recorders, operators, and voice writers to submit, as a condition of renewal, such information as the board reasonably deems necessary to determine that the reporter, recorder, operator, or voice writer has used his or her reporting or recording skills during the preceding year.

(b) The board must review the certification of a reporter, recorder, operator, or voice writer who has not used his or her skills in the preceding year, and shall determine whether the certification of such a reporter,

recorder, operator, or voice writer may be renewed without the necessity of a certification test.

(c) The board may review the certification of a reporter, recorder, operator, or voice writer and may impose sanctions, including revoking the certification, for good cause after a hearing before the board.

(d) If, after a reporter's, recorder's, operator's, or voice writer's certification is revoked or voided by the board and the reporter, recorder, operator, or voice writer applies to take the certification examination and passes, the board may issue a conditional certification for a prescribed period imposing restrictions or conditions that must be met for continued certification. At the end of the conditional period, an unconditional certification may be issued.

(7) Designations. The board shall assign an identification number to each person certified. A court reporter, recorder, operator, or voice writer must place the identification number assigned on his or her communications with the courts, including certificates, motions, affidavits, and transcripts. The board will use the following certification designations:

(a) certified electronic recorder (CER);

(b) certified electronic operator (CEO);

(c) certified shorthand reporter (CSR);

(d) certified voice writer/stenomask reporter (CSMR).

The designations are to be used only by reporters, recorders, operators, or voice writers certified by the board. A reporter, recorder, operator, or voice writer may be given more than one designation by passing different tests.

Staff Comment: The amendment of MCR 8.108(G), as recommended by the Michigan Court Reporting and Recording Board of Review,

expands the rule's coverage to include operators and voice writers and mandates completion of a board-approved course as a condition for certification of court recorders, operators, and voice writers.

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

Adopted October 10, 2005, effectively immediately (File No. 2001-10) —REPORTER.

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

RULE 8.123. COUNSEL APPOINTMENTS; PROCEDURES AND RECORDS.

(A)-(C) [Unchanged.]

(D) Required Records. At the end of each calendar year, a trial court must compile an annual electronic report of the total public funds paid to each attorney for appointments by that court.

This subrule applies to appointments of attorneys in any capacity, regardless of the indigency status of the represented party. Trial courts that contract for services to be provided by an affiliated group of attorneys may treat the group as a single entity when compiling the required records.

The records required by this subrule must be retained for the period specified by the State Court Administrative Office's General Schedule 16.

(E) [Unchanged.]

(F) Reports to State Court Administrator. A trial court must submit its annual electronic report to the state court administrator in the form specified by the state court administrator. When requested by the state court administrator, a trial court must cooperate in providing additional data on an individual attorney,

judge, or attorney group for a period specified by the request, including the number of appointments by each judge, the number of appointments received by an individual attorney or attorney group, and the public funds paid for appointments by each judge.

Staff Comment: The amendments of MCR 8.123, effective immediately, broaden the rule's reporting requirements to cover court appointments of attorneys in all capacities, regardless of the indigency status of the represented party, while also simplifying the reporting requirements for trial courts. The amendments further require trial courts to electronically submit their annual reports of counsel appointments to the State Court Administrative Office, in addition to continuing to maintain them for public inspection at the courts. Trial courts also are required to cooperate with the state court administrator by providing additional data on appointments to individual attorneys or attorney groups, and on appointments by an individual judge, without having to include this data in their annual reports.
The staff comment is not an authoritative construction by the Court.

KELLY, J., opposes the adoption of this order.

Adopted October 18, 2005, effective January 1, 2006 (File No. 2005-16)—REPORTER.

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

RULE 4.101. CIVIL INFRACTION ACTIONS.

(A) Citation; Complaint; Summons; Warrant.

(1) [Unchanged.]

(2) A violation alleged on a citation may not be amended except by the

prosecuting official for the plaintiff.

(3) [Renumbered but otherwise unchanged.]

(4) [Unchanged.]

(B) [Unchanged.]

(C) Appearance by Police Officer at Informal Hearing.

(1) If a defendant requests an informal hearing, the court shall schedule an informal hearing and notify the police officer who issued the citation to appear at the informal hearing.

(2) The attendance of the officer at the hearing may not be waived.

Except when the court is notified before the commencement of a hearing of an emergency preventing an on-duty officer from appearing, failure of the police officer to appear as required by this rule shall result in a dismissal of the case without prejudice.

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

(F) Contested Actions; Notice; Defaults.

(1) A contested action 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)–(4) [Unchanged.]

(G)-(H) [Renumbered but otherwise unchanged.]

Staff Comment: The amendment of MCR 4.101(A)(2) limits amendment of a violation on a citation filed with the court to the prosecuting official. The deletion of former subsection (A)(3) conforms to a change in MCR 6.615(A)(3), which takes effect January 1, 2006. The new subsection (C) requires the court to schedule an informal hearing when requested by the defendant, and notify the officer who issued the citation to appear, prohibits waiver of the presence of the officer at an informal hearing, and establishes procedures if the police officer fails to appear for a hearing. The amendment of relettered (F)(1) makes this section consistent with changes of MCR 6.615(D)(1), which take effect January 1, 2006.

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

CORRIGAN, J. *(dissenting).* I would not adopt MCR 4.101 as it was released to the public for notice and comment. Nor would I prohibit all waivers on a statewide basis as the current modified rule provides. Instead, I would authorize limited pilot projects in those districts willing to participate, such as are currently occurring in the 8th District Court and the 16th District Court, to test the practicality of allowing waivers of police officers' testimony at informal civil infraction hearings. Contrary to the policy judgment that the new prohibition reflects, I do not share the belief that a police officer's absence at such hearings is universally detrimental to a civil defendant; in some circumstances, a citizen may see some strategic benefit in authorizing the written testimony of a police officer. I would allow experimentation, to be followed by a report regarding the merits of the pilot program.

Adopted October 18, 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 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A)-(E) [Unchanged.]

(F) Late Appeal.

(1)-(3) [Unchanged.]

(4) The limitation provided in subrule (F)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for directed verdict of acquittal, to withdraw a plea, or to correct an invalid sentence, if the motion was filed within the 6-month period prescribed in

MCR 6.310(C), MCR 6.419(B), MCR 6.429(B), and MCR 6.431(A), or if

(a) the defendant has filed a delayed request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 12-month period,

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the delayed request for counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G)(2), and

(c) the application for leave to appeal is filed in accordance with the provisions of this rule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing or denying the appointment of counsel, the 42-day period runs from the date of that order.

A defendant who seeks to rely on one of the exceptions in subrule (F)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the docket or calendar entries, or other documentation showing that the application is filed within the time allowed.

(5) [Unchanged.]

(G) [Unchanged.]

Staff Comment: The October 18, 2005, amendment of MCR 7.205 reflects recently approved amendments of MCR 6.310, MCR 6.425, MCR 6.429, and MCR 6.431.

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

Retained October 18, 2005 (File No. 2004-33)—REPORTER.

RULE 9.221. CONFIDENTIALITY; DISCLOSURE.

By order dated June 8, 2005, this Court amended Rule 9.221 of the Michigan Court Rules, effective im-

mediately. 472 Mich ciii-cvi (2005). Notice and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the amendment of Rule 9.221 is retained.

Administrative file closed October 18, 2005 (File No. 2004-33)—REPORTER.

On order of the Court, the proposed amendment of Rule 9.221(I) of the Michigan Court Rules having been published for comment at 472 Mich 1251 (2005), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

Adopted October 25, 2005, effective January 1, 2006 (File No. 2004-40)—REPORTER.

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

RULE 3.215. DOMESTIC RELATIONS REFEREES.

(A)–(C) [Unchanged.]

(D) Conduct of Referee Hearings.

(1)-(3) [Unchanged.]

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

(a) The parties must be allowed to make contemporaneous copies of the record if the referee's recording equipment can make multiple copies simultaneously and if the parties supply the recording media. A recording made under this rule may be used solely to assist the

parties during the proceeding recorded or, at the discretion of the trial judge, in any judicial hearing following an objection to the referee's recommended order; it may not be used publicly.

(b) If ordered by the court, or if stipulated by the parties, the referee must provide a transcript, verified by oath, of each hearing held. The cost of preparing a transcript must be apportioned equally between the parties, unless otherwise ordered by the court.

(c) At least 7 days before the judicial hearing, a party who intends to offer evidence from the record of the referee hearing must provide notice to the court and each other party. If a stenographic transcript is necessary, except as provided in subrule (4)(b), the party offering the evidence must pay for the transcript.

(d) If the court on its own motion uses the record of the referee hearing to limit the judicial hearing under subrule (F), the court must make the record available to the parties and must allow the parties to file supplemental objections within 7 days of the date the record is provided to the parties. Following the judicial hearing, the court may assess the costs of preparing a transcript of the referee hearing to one or more of the parties. This subrule does not apply when a party requests the court to limit the judicial hearing under subrule (F) or when the court orders a transcript to resolve a dispute concerning what occurred at the referee hearing.

(E) Posthearing Procedures.

(1)-(2) [Unchanged.]

(3) The recommended order may be prepared using any of the following methods:

(a) the referee may draft a recommended order;

(b) the referee may approve a proposed recommended order prepared by a party and submitted to the referee at the conclusion of the referee hearing;

(c) within 7 days of the date of the referee's findings, a party may draft a proposed recommended order and have it approved by all the parties and the referee; or

(d) within 7 days after the conclusion of the referee hearing, a party may serve a copy of a proposed recommended order on all other parties with a notice to them that it will be submitted to the referee for approval if no written objections to its accuracy or completeness are filed with the court clerk within 7 days after service of the notice. The party must file with the court clerk the original of the proposed recommended order and proof of its service on the other parties.

(i) If no written objections are filed within 7 days, the clerk shall submit the proposed recommended order to the referee for approval. If the referee does not approve the proposed recommended order, the referee may notify the parties to appear on a specified date for settlement of the matter.

(ii) To object to the accuracy or completeness of a proposed recommended order, the party must within 7 days after service of the proposed order, file written objections with the court clerk that state with specificity the inaccuracy or omission in the proposed recommended order, and serve the objections on all parties as required by MCR 2.107, together with a notice of hearing and an alternative proposed recommended order. Upon conclusion of the hearing, the referee shall sign the appropriate recommended order.

(3)-(7) [Renumbered (4)-(8), but otherwise unchanged.]

(F)-(G) [Unchanged.]

Staff Comment: These amendments, effective January 1, 2006, establish how the record of a referee hearing will be provided to parties and establish a procedure for a referee to submit a recommended order. MCR 3.215(D)(4)(a) tracks the language of MCR 8.109(B).

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

KELLY, J. I would publish for comment and receive testimony at a public hearing before voting on whether to adopt this revised rule.

Adopted October 25, 2005, effective January 1, 2006 (File No. 2004-42)—REPORTER.

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

RULE 8.107. STATEMENT BY TRIAL JUDGE AS TO MATTERS UNDECIDED.

(A) Time. Matters under submission to a judge or judicial officer should be promptly determined. Short deadlines should be set for presentation of briefs and affidavits and for production of transcripts. Decisions, when possible, should be made from the bench or within a few days of submission; otherwise a decision should be rendered no later than 35 days after submission. For the purpose of this rule, the time of submission is the time the last argument or presentation in the matter was made, or the expiration of the time allowed for filing the last brief or production of transcripts, as the case may be.

(B) Report as to Matters Undecided. On the first business day of January, April, July, and October of each year, every trial judge shall file a certified statement with the chief judge in the form prescribed by the state court administrator. The statement shall provide information on all matters pending during the reporting period that were not decided within 56 days from submission. The judge shall state the reason that a decision was not made within 56 days. A report is required regardless of whether there is any case to

report. The chief judge shall sign and file, or electronically submit, the statement with the state court administrator.

8.110. CHIEF JUDGE RULE.

(A)-(B) [Unchanged.]

(C) Duties and Powers of Chief Judge.

(1) [Unchanged.]

(2) As the presiding officer of the court, a chief judge shall:

(a) call and preside over meetings of the court;

(b) appoint committees of the court;

(c) initiate policies concerning the court's internal operations and its position on external matters affecting the court;

(d) meet regularly with all chief judges whose courts are wholly or partially within the same county;

(e) represent the court in its relations with the Supreme Court, other courts, other agencies of government, the bar, the general public, and the news media, and in ceremonial functions;

(f) counsel and assist other judges in the performance of their responsibilities; and

(g) cooperate with all investigations conducted by the Judicial Tenure Commission.

(3)-(4) [Unchanged.]

(5) The chief judge of the court in which criminal proceedings are pending shall have filed with the state court administrator a monthly report setting forth the reasons for delay in the proceedings:

(a) in felony cases in which there has been a delay of more than 154 days between the order binding the defendant over to circuit court and adjudication;

(b) in misdemeanor cases and cases involving local ordinance violations that have criminal penalties in which there has been a delay of more than 91 days between the date of the defendant's first appearance on the warrant and complaint or citation and adjudication;

(c) In computing the 91-day and 154-day periods, the court shall exclude periods of delay

(1) between the time a preadjudication warrant is issued and a defendant is arraigned;

(2) between the time a defendant is referred for evaluation to determine whether he or she is competent to stand trial and the receipt of the report; or

(3) during the time a defendant is deemed incompetent to stand trial.

(6)-(7) [Unchanged.]

(D) [Unchanged.]

Staff Comment: New MCR 8.107(A) requires a judge to decide matters promptly after submission. MCR 8.107(B) requires a judge to submit quarterly reports that include information on all matters pending during the reporting period that were not decided within 56 days of submission.

The amendments of MCR 8.110(C) require monthly reports to the state court administrator in felony cases where there has been a delay of more than 154 days between the order binding a defendant over to circuit court and adjudication in felony cases, or a delay of more than 91 days between a defendant's first appearance on the warrant and complaint, or citation, and adjudication in misdemeanor cases and local ordinance violations that carry criminal penalties.

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

CAVANAGH, KELLY, and WEAVER, JJ. We oppose the amendment of the reporting deadlines in Rules 8.107 and 8.110 of the Michigan Court Rules.

Adopted November 8, 2005, effective January 1, 2006 (File No. 2004-55)—REPORTER.

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

RULE 3.211. JUDGMENTS AND ORDERS.

(A)-(B)[Unchanged.]

(C) A judgment or order awarding custody of a minor must provide that

(1) the domicile or residence of the minor may not be moved from Michigan without the approval of the judge who awarded custody or the judge's successor,

(2) the person awarded custody must promptly notify the friend of the court in writing when the minor is moved to another address, and

(3) a parent whose custody or parenting time of a child is governed by the order shall not change the legal residence of the child except in compliance with section 11 of the Child Custody Act, MCL 722.31.

(D) Uniform Support Orders [Current text deleted.]

(1) Any provisions regarding child support or spousal support must be prepared on the latest version of the Uniform Support Order drafted by the state court administrative office and approved by the Supreme Court. This order must accompany any judgment or order affecting child support or spousal support, and both documents must be signed by the judge. If only child support or spousal support is ordered, then only the Uniform Support Order must be submitted to the court for entry. The Uniform Support Order shall govern if the terms of the judgment or order conflict with the Uniform Support Order.

(2) No judgment or order concerning a minor or a spouse shall be entered unless either:

(a) the final judgment or order incorporates by reference a Uniform Support Order, or

(b) the final judgment or order states that no Uniform Support Order is required because support is reserved or spousal support is not ordered.

(3) The clerk shall charge a single judgment entry fee when a Uniform Support Order is submitted for entry along with a judgment or order that incorporates it by reference.

[Deleted.]

(E) [Relettered but otherwise unchanged.]

(F) Entry of Judgment or Order

(1) Within 21 days after the court renders an opinion or the settlement agreement is placed on the record, the moving party must submit a judgment, order, or a motion to settle the judgment or order, unless the court has granted an extension.

(2) The party submitting the first temporary order awarding child custody, parenting time, or support and the party submitting any final proposed judgment awarding child custody, parenting time, or support must:

(a) serve the friend of the court office and, unless the court orders otherwise, all other parties, with a completed copy of the latest version of the state court administrative office's domestic relations Judgment Information Form, and

(b) file a proof of service certifying that the Judgment Information Form has been provided to the friend of the court office and, unless the court orders otherwise, to all other parties.

(3) If the court modifies the proposed judgment or order before signing it, the party submitting the judgment or order must, within 7 days, submit a new Judgment Information Form if any of the information previously submitted changes as a result of the modification.

(4) Before it signs a judgment or order awarding child support or spousal support, the court must determine that:

(a) the party submitting the judgment or order has certified that the Judgment Information Form in subrule (F)(2) has been submitted to the friend of the court, and

(b) pursuant to subrule (D)(2) any judgment or order concerning a minor or a spouse is accompanied by a Uniform Support Order or explains why a Uniform Support Order is unnecessary.

(5) The Judgment Information Form must be filed in addition to the verified statement that is required by MCR 3.206.

(G) [Relettered but otherwise unchanged.]

(H) [Relettered but otherwise unchanged.]

Staff Comment: In subrule (D), the amendment effective January 1, 2006, requires that all support orders be entered on a standard form drafted by the state court administrative office. The Supreme Court shall review and approve any changes made to the Uniform Support Order by the state court administrative office because of changes in state or federal law.

In relettered subrule (F), the 2005 amendment allows personal information concerning a party to be provided to the friend of the court in a document separate from the court order, which is a public document.

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

Adopted November 10, 2005, effective January 1, 2006 (File No. 2004-53)—REPORTER.

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

RULE 9.124. PROCEDURE FOR REINSTATEMENT.

(A) [Unchanged.]

(B) Petitioner's Responsibilities.

(1) Separately from the petition for reinstatement, the petitioner must serve only upon the administrator a personal history affidavit. The affidavit is to become part of the administrator's investigative file and may not be disclosed to the public except under the provisions of MCR 9.126. The following information must be attached to or contained in the affidavit:

(a) [Unchanged.]

(b) employment history since the time of disqualification, including the nature of employment, the name and address of every employer, the duration of such employment, and the name of the petitioner's immediate supervisor at each place of employment; if requested by the grievance administrator, the petitioner must provide authorization to obtain a copy of the petitioner's personnel file from the employer;

(c)-(e) [Unchanged.]

(f) copies of the petitioner's personal and business federal, state, and local tax returns from the date of disqualification until the filing of the petition for reinstatement, and if the petitioner owes outstanding income taxes, interest, and penalties, the petitioner must provide a current statement from the taxation authority of the current amount due; if requested by the grievance administrator, the petitioner must provide a waiver granting the grievance administrator authority to obtain information from the tax authority;

[Paragraphs (f)-(j) are relettered (g)-(k) but otherwise unchanged.]

(l) whether the petitioner was a party to any civil case, including the title, docket number, and court in which such case was filed; the petitioner must provide copies of the complaints and any dispositional orders or judgments, including settlement agreements, in such cases;

(m) whether the petitioner was a defendant or a witness in any criminal case, and the title, docket number, and court in which such case was filed; the petitioner must provide copies of the indictments or complaints and any dispositional orders or judgments of conviction in cases in which the petitioner was a defendant;

(n) whether the petitioner was subject to treatment or counseling for mental or emotional impairments, or for substance abuse or gambling addictions since the time of disqualification; if so, the petitioner must provide a current statement from the petitioner's service provider setting forth an evaluative conclusion regarding the petitioner's impairment(s), the petitioner's treatment records, and prognosis for recovery.

(2)-(5) [Unchanged.]

(C) Administrator's Responsibilities. Within 14 days after the commission receives its copy of the petition for reinstatement, the administrator shall submit to the Michigan Bar Journal for publication a notice briefly describing the nature and date of the discipline, the misconduct for which the petitioner was disciplined, and the matters required to be proved for reinstatement. The administrator shall investigate the petitioner's eligibility for reinstatement before a hearing on it, report the findings in writing to the board and the hearing panel within 56 days of the date the board

assigns the petition to the hearing panel, and serve a copy on the petitioner. For good cause, the hearing panel may allow the administrator to file the report at a later date, but in no event later than 7 days before the hearing. The report must summarize the facts of all previous misconduct and the available evidence bearing on the petitioner's eligibility for reinstatement. The report is part of the record but does not restrict the parties in the presentation of relevant evidence at the hearing. Any evidence omitted from the report or received by the administrator subsequent to the filing of the report must be disclosed promptly to the hearing panel and the petitioner.

(D)-(E) [Unchanged.]

Staff Comment: The amendment of MCR 9.124(B)(1) expands the information a petitioner for reinstatement is required to include in or attach to the petitioner's personal history affidavit. The amendment of subrule (b) adds a requirement that the petitioner, at the grievance administrator's request, provide authorization for the grievance administrator to obtain a copy of the petitioner's personnel file regarding any employment held since the time of disqualification. The amendment of subrule (f) requires a petitioner to attach copies of petitioner's tax returns from the date of disqualification to the date of the petition for reinstatement. The amendment of subrule (l) adds a requirement that a petitioner provide copies of any civil complaints and judgments or dispositional orders with respect to any resolution of a civil complaint involving the petitioner. According to the amendment of subrule (m), a petitioner is required to provide copies of criminal complaints and dispositional orders or judgments of conviction for any criminal case in which the petitioner was a defendant. Subrule (n) requires a petitioner to state on his or her personal history affidavit whether, since the date of disqualification, the petitioner received treatment for mental or emotional impairments or substance abuse or gambling addictions. The amendment of MCR 9.124(C) simply codifies what already occurs in hearings on petitions for reinstatement and appeals from decisions following those hearings.

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

Adopted November 15, 2005, effective immediately (File No. 2004-54) —REPORTER.

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

RULE 5.144. ADMINISTRATIVELY CLOSED FILE.

(A) Administrative Closing. The court may administratively close a file

(1) for failure to file a notice of continuing administration as provided by MCL 700.3951(3) or

(2) for other reasons as provided by MCR 5.203(D) or, after notice and hearing, upon a finding of good cause.

In a conservatorship, the court may administratively close a file only when there are insufficient assets in the estate to employ a successor or special fiduciary, or after notice and hearing upon a finding of good cause. If the court administratively closes the conservatorship, the court shall provide notice to the state court administrative office of the closure.

(B) [Unchanged.]

RULE 5.203. FOLLOW-UP PROCEDURES.

Except in the instance of a personal representative who fails to timely comply with the requirements of MCL 700.3951(1), if it appears to the court that the fiduciary is not properly administering the estate, the court shall proceed as follows:

(A)-(C) [Unchanged.]

(D) Suspension of Fiduciary, Appointment of Special Fiduciary. If the fiduciary fails to perform the duties required within the time allowed, the court may do any of the following: suspend the powers of the dilatory

fiduciary, appoint a special fiduciary, and close the estate administration. If the court suspends the powers of the dilatory fiduciary or closes the estate administration, the court must notify the dilatory fiduciary, the attorney of record for the dilatory fiduciary, the sureties on any bond of the dilatory fiduciary that has been filed, any financial institution listed on the most recent inventory or account where the fiduciary has deposited funds, any currently serving guardian ad litem, and the interested persons at their addresses shown in the court file. This rule does not preclude contempt proceedings as provided by law.

(E) [Unchanged.]

RULE 5.207. SALE OF REAL ESTATE.

(A) Petition. Any petition to approve the sale of real estate must contain the following:

(1) the terms and purpose of the sale,

(2) the legal description of the property,

(3) the financial condition of the estate before the sale, and

(4) an appended copy of the most recent assessor statement showing the state equalized value of the property. If the court is not satisfied that the evidence provides the fair market value, a written appraisal may be ordered.

(B) [Unchanged.]

RULE 5.302. COMMENCEMENT OF DECEDENT ESTATES.

(A) Methods of Commencement. A decedent estate may be commenced by filing an application for an informal proceeding or a petition for a formal testacy proceeding. A request for supervised administration may be made in a petition for a formal testacy proceeding. When filing either an application or petition to

commence a decedent estate, a copy of the death certificate must be attached. If the death certificate is not available, the petitioner may provide alternative documentation of the decedent's death. Requiring additional documentation, such as information about the proposed personal representative, is prohibited.

(B)-(D) [Unchanged.]

RULE 5.307. REQUIREMENTS APPLICABLE TO ALL DECEDENT ESTATES.

(A) Inventory Fee. Within 91 days of the date of the letters of authority, the personal representative must submit to the court the information necessary for computation of the probate inventory fee. In calculating the inventory fee, deductions shall be allowed for secured loans on property listed on the inventory, but no other deductions shall be allowed. The inventory fee must be paid no later than the filing of the petition for an order of complete estate settlement under MCL 700.3952, the petition for settlement order under MCL 700.3953, or the sworn statement under MCL 700.3954, or one year after appointment, whichever is earlier.

(B)-(D) [Unchanged.]

RULE 5.404. GUARDIANSHIP OF MINOR.

(A) Petition for Guardianship of Minor. If the court requires the petitioner to file a social history before hearing a petition for guardianship of a minor, it shall do so on a form approved by the state court administrative office. The social history for minor guardianship is confidential, and it is not to be released, except on order of the court, to the parties or the attorneys for the parties.

[Relettered (B)-(F), but otherwise unchanged.]

RULE 5.409. REPORT OF GUARDIAN; INVENTORIES AND ACCOUNTS OF CONSERVATORS.

(A) [Unchanged.]

(B) Inventories.

(1) [Unchanged.]

(2) Filing and Service. Within 56 days after appointment, a conservator or, if ordered to do so, a guardian shall file with the court a verified inventory of the estate of the protected person, serve copies on the persons required by law or court rule to be served, and file proof of service with the court. Property the protected person owns jointly or in common with others must be listed on the inventory along with the type of ownership.

(C) Accounts.

(1) Filing, Service. A conservator must file an annual account unless ordered not to by the court. A guardian must file an annual account if ordered by the court. The account must be served on interested persons, and proof of service must be filed with the court. The copy of the account served on interested persons must include a notice that any objections to the account should be filed with the court and noticed for hearing. When required, an accounting must be filed within 56 days after the end of the accounting period.

(2)-(3) [Unchanged.]

(4) Exception, Conservatorship of Minor. Unless otherwise ordered by the court, no accounting is required in a minor conservatorship where the assets are restricted or in a conservatorship where no assets have been received by the conservator. If the assets are ordered to be placed in a restricted account, proof of the restricted account must be filed with the court within 14 days of the conservator's qualification or as other-

wise ordered by the court. The conservator must file with the court an annual verification of funds on deposit with a copy of the corresponding financial institution statement attached.

(5) Contents. The accounting is subject to the provisions of MCR 5.310(C)(2)(c) and (d), except that references to a personal representative shall be to a conservator. A copy of the corresponding financial institution statement for all liquid assets, dated within 30 days of the end of the accounting period, must be presented to the court to verify assets on hand at the end of the accounting period, unless waived by the court for good cause.

(6) Periodic Review. The court shall either review or allow accounts annually, unless no account is required under MCR 5.409(C)(1) or (C)(4). Accounts shall be set for hearing to determine whether they will be allowed at least once every three years.

(D)-(F)[Unchanged.]

Staff Comment: The amendments of MCR 5.144, 5.203, 5.207, 5.302, 5.307, 5.404, and 5.409, effective immediately, were developed as a result of the state court administrative office's statewide conservatorship case review prompted by the Performance Audit of Selected Probate Court Conservatorship Cases by the Michigan Office of the Auditor General and the State Bar of Michigan Probate and Estate Planning Section's Uniformity of Practice Committee's survey of probate court practices. The amendment of MCR 5.144(A)(2) eliminates the ability to close a conservatorship estate because of suspension of a fiduciary unless there are insufficient funds available to hire a special fiduciary, or after notice and hearing and a finding of good cause. The amendment of MCR 5.203(D) adds the financial institution and guardian ad litem to the list required to receive notice when a fiduciary is suspended. The amendment of MCR 5.207(A) allows for better court oversight when real property is sold. The amendment of MCR 5.302(A) requires that a copy of a death certificate be attached to the petition or application when commencing a decedent estate. In the event that the death certificate is not available, the petitioner may provide alternative documentation. The amendment of MCR 5.307(A) allows for the deduction of secured loans when calculating the inventory fee due. The amendment of MCR 5.404(A) creates a

new subsection that requires the use of a SCAO approved social history form when one is required to be filed with a petition for guardianship of a minor. The amendment of MCR 5.409(B)(2) requires that joint property belonging to the protected person be listed on the inventory along with the type of ownership. The amendment of MCR 5.409(C)(1) clarifies that the fiduciary must serve the account on the interested persons and file the proof of service with the court. The amendment of MCR 5.409(C)(4) provides the process for filing a proof of restricted account and annual verification of funds on deposit with the court. The amendment of MCR 5.409(C)(5) adds the requirement to present a financial institution statement to the court when filing the annual account. The amendment of MCR 5.409(C)(6) requires the court to either review or allow the account annually and to hold a hearing on the accounts at least once every three years.

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

Adopted November 23, 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 2.511. IMPANELING THE JURY.

(A)-(E)[Unchanged.]

(F) Discrimination in the Selection Process.

(1) No person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex.

(2) Discrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection.

(G)-(H) [Relettered but otherwise unchanged.]

Staff Comment: The amendment of MCR 2.511(F) is new language that states that discrimination on the basis of race, color, religion, national origin, or sex during the jury selection process is prohibited even in cases where the purpose would be to achieve balanced representation. Former subrules (F) and (G) are relettered as (G) and (H).

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

YOUNG, J. (*concurring*). I concur in the adoption of subrule (F) to MCR 2.511, which will prohibit discrimination during voir dire against specifically enumerated protected classes. The goal of our rules is to make clear what is permissible, and what is not, within our judicial system. I believe that this amendment adds clarity to what the bench and bar are permitted to consider in selecting a jury.

I write separately to address Justice KELLY's dissenting statement. Justice KELLY opines that "[t]he amendment does not further the end of eradicating discrimination from our civic institutions and does not prevent the undermining of public confidence in the fairness of our system of justice." As she provides very little support for her conclusion, I am hard-pressed to understand why the adoption of subrule (F), which specifically prohibits discrimination in the jury selection process based on "race, color, religion, national origin, or sex," does not "further the end of eradicating discrimination" in the jury selection process against those enumerated classes. Consideration of a person's race, color, religion, national origin, or sex raises fundamental constitutional questions, particularly in the context of a jury selection process. Those who advocate against a rule precluding use of such characteristics in jury selection bear a higher burden of explanation than Justice KELLY has supplied.

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

KELLY, J. (*dissenting*). I oppose the addition of subrule (F) to MCR 2.511. All of the public comment that we received urged a rejection of the amendment. The Board of Commissioners of the State Bar of Michigan pointed out that existing case law "adequately speaks to the issue of discrimination during voir dire." Challenges to jury composition, it argued, should be addressed on a case-by-case basis. The amendment does not further the end of eradicating discrimination from our civic institutions and does not prevent the undermining of public confidence in the fairness of our system of justice. The Michigan Judges Association agreed that the change is unnecessary. The Michigan Department of Civil Rights, writing also for the Michigan Civil Rights Commission, believes the amendment to be vague and ambiguous and one that will engender frequent legal challenges. Several lawyers, one with the Legal Aid & Defender Association in Detroit, opined that the amendment places a hurdle before the right of many citizens to be judged by a jury of their peers. I am influenced by the public comment and, in light of it, I oppose the amendment as unnecessary because it adds no substantive value to the case law already in existence.

CAVANAGH and WEAVER, JJ., concurred with KELLY, J.

Adopted December 6, 2005, effective January 1, 2006 (File No. 2004-56)—REPORTER.

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

RULE 3.925. OPEN PROCEEDINGS; JUDGMENTS AND ORDERS; RECORDS CONFIDENTIALITY; DESTRUCTION OF COURT FILES; SETTING ASIDE ADJUDICATIONS.

(A)-(D)[Unchanged.]

(E) Destruction of Court Files and Records. This subrule governs the destruction of court files and records.

(1) Destruction Generally; Effect. The court may at any time for good cause destroy its own files and records pertaining to an offense by or against a minor, other than an adjudicated offense described in MCL 712A.18e(2), except that the register of actions must not be destroyed. Destruction of a file does not negate, rescind, or set aside an adjudication.

(2) Delinquency Files and Records.

(a) The court must destroy the diversion record of a juvenile within 28 days after the juvenile becomes 17 years of age.

(b) The court must destroy all files of matters heard on the consent calendar within 28 days after the juvenile becomes 17 years of age or after dismissal from court supervision, whichever is later, unless the juvenile subsequently comes within the jurisdiction of the court on the formal calendar. If the case is transferred to the consent calendar and a register of actions exists, the register of actions must be maintained as a nonpublic record.

(c) Except as provided by subrules (a) and (b), the court must destroy the files and records pertaining to a person's juvenile offenses when the person becomes 30 years old.

(d) If the court destroys its files regarding a juvenile proceeding on the formal calendar, it shall retain the register of actions, and, if the information is not included in the register of actions, whether the juvenile was represented by an attorney or waived representation.

(3) [Unchanged.]

(F)-(G) [Unchanged.]

Staff Comment: The December 6, 2005, amendment of MCR 3.925(E)(2)(c) requires that the records and files of all juvenile offenses be destroyed when the person becomes 30 years old, except for the register of actions. The rule previously required that the records and files of certain adjudicated juvenile offenses be retained permanently.

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

Adopted December 13, 2005, effective January 1, 2006 (File No. 2005-16)—REPORTER.

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

RULE 4.101. CIVIL INFRACTION ACTIONS.

(A) Citation; Complaint; Summons; Warrant.

(1) [Unchanged.]

(2) A violation alleged on a citation may not be amended except by the prosecuting official or a police officer for the plaintiff.

(3)-(4) [Unchanged.]

(B)-(H) [Unchanged.]

Staff Comment: The amendment of MCR 4.101(A)(2) clarifies that those who may amend the violation on a citation are the prosecuting attorney or attorney for the political subdivision, the officer who issued the citation, or another police officer for the plaintiff.

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

Adopted December 14, 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 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(D) and (F), 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 6.006. VIDEO AND AUDIO PROCEEDINGS.

(A) Defendant in the Courtroom or 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 arraignments on the warrant or complaint, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations.

(B)-(D) [Unchanged.]

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A) [Unchanged.]

(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)-(3)[Unchanged.]

(4)-(5)[Unchanged.]

The requirements of subrules (B)(3) and (B)(5) may be satisfied by a writing on a form approved by the State Court Administrative Office. 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.

(C)-(F) [Unchanged.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(E) [Unchanged.]

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

(1) Unchanged.]

(2) Unchanged.]

(a) [Unchanged.]

(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) [Unchanged.]

(3)-(4) [Unchanged.]

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

(1) Appointment of Lawyer.

(a)-(b) [Unchanged.]

(c) In a case involving a conviction following a plea of guilty or nolo contendere, if the defendant is indigent,

the court must enter an order appointing a lawyer if the request is filed within 42 days after sentencing.

(d) [Unchanged.]

(2)-(3) [Unchanged.]

Staff Comment: The amendment of MCR 6.001 corrects a drafting error in the Court's order of July 13, 2005.

On July 13, 2005, the Court issued an order adding MCR 6.006(A) as recommended by the Committee on the Rules of Criminal Procedure. The amendment of MCR 6.006(A) clarifies the Court's order of July 13, 2005, that the rule is also applicable if the defendant is in the courtroom. The amendment also makes the language of the rule consistent with other rules.

The amendment of MCR 6.302(B) was recommended by the Committee on the Rules of Criminal Procedure after the Court issued its order of July 13, 2005. It clarifies that, in addition to the trial rights the defendant gives up if the plea is accepted, the defendant may also be advised in writing that any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right.

The amendment of MCR 6.425 was made to more accurately reflect the holding of the United States Supreme Court in *Halbert v Michigan*, 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005).

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

Adopted December 14, 2005, effective January 1, 2006 (File No. 2004-60)—REPORTER.

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

RULE 9.205. STANDARDS OF JUDICIAL CONDUCT.

(A) [Unchanged.]

(B) Grounds for Action. A judge is subject to censure, suspension with or without pay, retirement, or removal for conviction of a felony, physical or mental disability that prevents the performance of judicial duties, mis-

conduct in office, persistent failure to perform judicial duties, habitual intemperance, or conduct that is clearly prejudicial to the administration of justice. In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court.

(1)-(3) [Unchanged.]

Staff Comment: The amendment of Rule 9.205 allows the Judicial Tenure Commission to recommend and this Court to order that a disciplined judge pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint of judicial misconduct when the judge has engaged in conduct involving fraud, deceit, intentional misrepresentation, or misleading statements to the commission, the commission's investigators, the master, or the Supreme Court. Cf. *In re Noecker*, 472 Mich 1 (2005).

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

CORRIGAN, J. (*concurring*). I concur in the amendment of MCR 9.205(B) to provide for assessing costs in Judicial Tenure Commission (JTC) proceedings because our Constitution authorizes it. Const 1963, art 6, § 30(2) provides:

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

Our Constitution thus has authorized this Court to "make rules" to provide for the administration of these constitutional duties, just as our Constitution authorizes this Court to make rules governing civil procedure. Const 1963, art 6, § 5 ("The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state . . . ."). See also *In re Chrzanowski*, 465 Mich 468, 481 (2001). A decision to authorize the assessment of costs does not correspond to creating a new mode of discipline. See, e.g., MCR 2.625. Rather, assessing costs in a JTC proceeding provides a procedural mechanism to protect governmental resources, especially when a JTC investigation requires the expenditure of additional resources because of a judge's acts of misrepresentation. Accordingly, we fulfill our constitutional mandate by implementing rules pertaining to the discipline of judges under Const 1963, art 6, § 30(2).

Additionally, assessing costs does not represent a novel departure that will commence only upon this amendment of MCR 9.205(B). See *In re Thompson*, 470 Mich 1347 (2004); *In re Trudel*, 468 Mich 1243 (2003); *In re Cooley*, 454 Mich 1215 (1997). Even if those decisions involved judges who consented to costs, the constitutionality of this Court's actions (regardless of whether an opinion discussed the point) could not turn on an individual judge's choice.

Our decision to provide for assessing costs comports with both our precedents and, more importantly, our Constitution. Under Const 1963, art 6, § 30(2), we have the authority to make rules implementing the mandate to preserve the integrity of the judiciary. Thus, this amendment of MCR 9.205(B) falls within this Court's authority.

CAVANAGH, J. (*dissenting*). I dissent from the amendment of MCR 9.205(B).

WEAVER, J. (*dissenting*). I dissent from the amendment of this court rule, MCR 9.205(B), because it is unconstitutional. The Michigan Supreme Court does not have the authority to order a judge to pay "costs, fees, and expenses" incurred by the Judicial Tenure Commission in prosecuting a complaint against the judge. By enacting this order, the majority is misusing its power of interpretation and is reading into the text of the Michigan Constitution an expansion of its specifically limited disciplinary powers.

Pursuant to Const 1963, art 6, § 30(2) this Court, upon the recommendation of the Judicial Tenure Commission, may "censure, suspend with or without salary, retire or remove a judge" from office. Const 1963, art 6, § 30(2) provides:

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

When disciplining a judge for misconduct in office, this Court cannot impose additional or different forms of discipline than that which is provided for by the text of Const 1963, art 6, § 30.

It is without question that the imposition of "costs, fees and expenses" is an additional and different form of judicial discipline. The amendment singles out certain conduct–fraud, deceit, intentional misrepresentation,

and misleading statements made during judicial disciplinary proceedings–as prerequisites for the imposition of "costs, fees, and expenses." That certain conduct does, and other conduct does not, trigger the imposition of "costs, fees, and expenses" underscores the fact that their imposition is a form of discipline. Indeed, in its support for this amendment, the Judicial Tenure Commission commented:

> Sometimes it is not enough to say, "Bad judge, bad judge." Sometimes it really is a matter of putting one's money where one's mouth is, in the words of the vernacular; or, more appropriately under these circumstances, of the *Court* putting the judge's money where his mouth was. [Emphasis in original.]

Thus the concurrence's assertion that this amendment does not create a new mode of discipline is misleading and incorrect.

Further, although Const 1963, art 6, § 5 gives this Court the power to "make rules implementing" Const 1963, art 6, § 30, that provision does not give this Court the authority to impose "costs, fees and expenses" in Judicial Tenure Commission cases. Contrary to the assertion in the concurrence, the authority to "establish, modify, amend and simplify the practice and procedure" in Michigan's courts pursuant to Const 1963, art 6, § 5 is not "just" like this Court's power to "make rules implementing" Const 1963, art 6, § 30.

Const 1963, art 6, § 5 does not expand or increase the powers granted to this Court by Const 1963, art 6, § 30. The power to "implement" Const 1963, art 6, § 30 is necessarily limited by the substance of that provision.

While on the surface, imposing "costs, fees and expenses" in Judicial Tenure Commission cases may appear to be like the imposition of costs in other civil cases, in reality it is an unconstitutional creation by this

Court of additional power for this Court to discipline a judge. Const 1963, art 6, § 30 dictates the extent of this Court's judicial disciplinary powers; it permits this Court to "censure, suspend with or without salary, retire or remove a judge" from office. The provision requires this Court to "implement" its substance. To write additional substance—powers of discipline (the assessment of costs, fees and expenses)—into the Constitution in the disguise of rulemaking is an abuse of power. The majority cannot legitimately implement more power than it has been given to implement by the people who ratified the 1963 Constitution, but it has done just that with this amendment.

Nor is the imposition of "costs, fees, and expenses" a form of "censure" as argued by the Judicial Tenure Commission. The rule of "common understanding" governs the interpretation of the Constitution.[1] The common understanding of "censure" is that it is a formal expression of rebuke or disapproval. To "censure" is to express "strong disapproval" or a "condemnation of misconduct."[2] To "censure" is also defined as "a judgment involving condemnation."[3] The ratifiers of the Constitution would not have commonly understood a "censure" to be a vehicle by which the prosecutor's "costs, fees, and expenses" could be imposed on a judge.

In *In re Ferrara*,[4] this Court removed a judge from the bench, not on the basis of the actions that led to the initial charges of judicial misconduct, but on the basis of her "misleading statements to the public and the press, her attempt to commit a fraud on the Court . . . and her

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[1] *Traverse City School Dist v Attorney General,* 384 Mich 390, 405 (1971).

[2] Webster's New World College Dictionary, Third Edition (1997).

[3] Webster's Third New International Dictionary (1961).

[4] 458 Mich 350 (1998).

unprofessional and disrespectful conduct at each stage of the proceedings."[5] Similarly, in *In re Brown,*[6] this Court identified "misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case" as a "more serious" form of misconduct than mere delays in such discovery.[7] *In re Brown* and *In re Ferrara* exemplify this Court's appropriate response, a response restrained by and obedient to the text of the Michigan Constitution, and a response that effectively addresses a judge's fraud, deceit, misrepresentation, and misleading statements during judicial disciplinary proceedings.

Finally, although this Court has imposed costs in several judicial tenure cases, it has done so without any discussion whether the imposition of costs was constitutional. For example, in *In re Thompson,* 470 Mich 1347 (2004), the judge did not contest the imposition of $11,117.32 in costs. In *In re Trudel*, 468 Mich 1243 (2003), the judge resigned before $12,777.33 in costs were imposed. In *In re Cooley*, 454 Mich 1215 (1997), the judge consented to the commission's decision and recommendation, which included the assessment of $3,500 in costs. Costs were also apparently assessed in three unpublished Judicial Tenure Commission cases including, *In re Somers,*[8] *In re Edgar, and In re Blodgett.*

There may be sound policy reasons for this Court to have the ability to order a judge to pay the "costs, fees, and expenses" when a judge engages in the types of

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[5] *In re Ferrara, supra* at 372.

[6] 461 Mich 1291 (2000).

[7] *In re Brown, supra* at 1293.

[8] A censure was published in *In re Somers,* 384 Mich 320 (1971), but the censure did not include the order assessing costs.

behavior targeted by this amendment. However, the creation of any power to impose discipline in addition to or different from that expressly permitted by Const 1963, art 6, § 30(2) must be considered and adopted by the people of Michigan through a constitutional amendment. It is an abuse of this Court's power of interpretation, and a misuse of its rulemaking authority, for the majority to expand its constitutionally prescribed disciplinary powers.

This Court must, without question, protect the public from a corrupt judiciary and preserve the integrity of the courts. However, it must do so while acting within, not beyond, its own power.

For these reasons I dissent from the amendment.

Adopted December 21, 2005, effective January 1, 2006 (File No. 2004-22)—REPORTER.

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

RULE 7.203. JURISDICTION OF THE COURT OF APPEALS.

(A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) A final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6), except a judgment or order of the circuit court

(a) on appeal from any other court or tribunal;

(b) in a criminal case in which the conviction is based on a plea of guilty or nolo contendere;

An appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right.

(2) A judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule;

(B)-(G) [Unchanged.]

RULE 7.209. BOND; STAY OF PROCEEDINGS.

(A)-(D) [Unchanged.]

(E) Stay of Proceedings by Trial Court.

(1) Except as otherwise provided by law or rule, the trial court may order a stay of proceedings, with or without a bond as justice requires.

(a) When the stay is sought before an appeal is filed and a bond is required, the party seeking the stay shall file a bond, with the party in whose favor the judgment or order was entered as the obligee, by which the party promises to

(i) perform and satisfy the judgment or order stayed if it is not set aside or reversed; and

(ii) prosecute to completion any appeal subsequently taken from the judgment or order stayed and perform and satisfy the judgment or order entered by the Court of Appeals or Supreme Court.

(b) If a stay is sought after an appeal is filed, any bond must meet the requirements set forth in subrule 7.209(F).

(2) If a stay bond filed under this subrule substantially meets the requirements of subrule (F), it will be a sufficient bond to stay proceedings pending disposition of an appeal subsequently filed.

(3) The stay order must conform to any condition expressly required by the statute authorizing review.

(4) If a government party files a claim of appeal from an order described in MCR 7.202(6)(a)(v), the trial court shall stay proceedings regarding that party during the pendency of the appeal, unless the Court of Appeals directs otherwise.

(F)-(I) [Unchanged.]

Staff Comment: The amendments of MCR 7.203(A) and 7.209(D), effective January 1, 2006, recognize numbering changes in MCR 7.202.

Adopted January 10, 2006, effective May 1, 2006 (File No. 2004-32) —REPORTER.

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

RULE 9.223. FILING AND SERVICE OF DOCUMENTS BY COMMISSION

Within 21 days after entering an order recommending action with regard to a respondent, the commission must take the action required by subrules (A) and (B).

(A) Filings in Supreme Court. The commission must file in the Supreme Court:

(1) the original record arranged in chronological order and indexed and certified;

(2) 24 copies of the order; and

(3) a proof of service on the respondent;.

(B) Service on Respondent. The commission must serve the respondent with:

(1) notice of the filing under MCR 9.223(A)(1);

(2) 2 copies of the order;

(3) 2 copies of the index to the original record; and

(4) a copy of a portion of the original record not submitted by or previously furnished to the respondent.

RULE 9.224. REVIEW BY SUPREME COURT

(A) Petition by Respondent. Within 28 days after being served, a respondent may file in the Supreme Court 24 copies of

(1) [Unchanged.]

(2) an appendix presenting portions of the record that the respondent believes necessary to fairly judge the issues.

The respondent must serve the commission with 3 copies of the petition and 2 copies of the appendix and file proof of that service.

(B) Brief of Commission. Within 21 days after respondent's petition is served, the commission must file

(1) 24 copies of a brief supporting its finding, and

(2) proof that the respondent was served with 2 copies of the brief.

The commission may file 24 copies of an appendix containing portions of the record not included in the respondent's appendix that the commission believes necessary to fairly judge the issues.

(C)-(F) [Unchanged.]

Staff Comment: The amendment of MCR 9.223 eliminates the requirement that the Judicial Tenure Commission file an appendix with its recommendation for discipline against a judge.

The amendment of MCR 9.224(A) permits the respondent judge to file an appendix if the respondent files a petition to reject or modify the commission's decision. The amendment of 9.224(B) allows the Judicial Tenure Commission to file a supplemental appendix with its brief in response to a respondent judge's petition.

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

Adopted January 31, 2006, effective May 1, 2006 (File No. 2004-24) —REPORTER.

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

RULE 7.211. MOTIONS IN COURT OF APPEALS

(A)-(B) [Unchanged.]

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

(1) 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 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 amendment clarifies 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.

Adopted February 23, 2006, effective immediately (File No. 2005-17) —REPORTER.

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

RULE 7.213. CALENDAR CASES

(A)-(B) [Unchanged.]

(C) Priority on Calendar. The priority of cases on the session calendar is in accordance with the initial filing dates of the cases, except that precedence shall be given to:

(1)-(3) [Unchanged.]

(4) appeals from all cases involving election issues, including, but not limited to, recall elections and petition disputes;

(5)-(6) [Renumbered, but otherwise unchanged.]

Staff Comment: The amendment of Rule 7.213(C), effective immediately, of the Michigan Court Rules would require the Court of Appeals to give priority to appeals involving election cases.

The staff comment is not authoritative construction by the Court.

Adopted February 23, 2006, effective May 1, 2006 (File No. 2006-02) —REPORTER.

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

RULE 2.507. CONDUCT OF TRIALS

(A)-(F) [Unchanged.]

(G) [Relettered, but otherwise unchanged.]

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES

(A)-(E) [Unchanged.]

(F) Appearance and Answer; Default.

(1)-(4) [Unchanged.]

(G)-(O) [Unchanged.]

RULE 4.202. SUMMARY PROCEEDINGS; LAND CONTRACT FORFEITURE

(A)-(G) [Unchanged.]

(H) Answer; Default.

(1)-(2) [Unchanged.]

(I)-(L) [Unchanged.]

Staff Comment: The amendments of MCR 2.507(G), 4.201(F)(5), and 4.202(H)(3) reflect amendments of MCL 600.2529 and 600.5756 by 1993 PA 189.

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

Adopted February 23, 2006, effective May 1, 2006 (File No. 2006-02) —REPORTER.

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

RULE 2.602. ENTRY OF JUDGMENTS AND ORDERS

(A)-(C) [Unchanged.]

(D) Service.

(1) [Unchanged.]

(2) If a judgment for reimbursement to the state for the value of game or protected animals is entered pursuant to MCL 324.40119 or for the value of fish is entered pursuant to MCL 324.48740, the clerk shall provide a copy of the judgment to the Department of Natural Resources. The judgment may be enforced as a civil judgment.

Staff Comment: The amendment of MCR 2.602(D)(2) provides current statutory references to the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*.

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

Adopted February 23, 2006, effective May 1, 2006 (File No. 2006-02) —REPORTER.

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

RULE 2.612. RELIEF FROM JUDGMENT OR ORDER

(A) Clerical Mistakes.

(1) [Unchanged.]

(2) If a claim of appeal is filed or an appellate court grants leave to appeal, the trial court may correct errors as provided in MCR 7.208(A) and (C).

(B)-(C) [Unchanged.]

RULE 3.802. MANNER AND METHOD OF SERVICE

(A) [Unchanged.]

(B) Service When Identity or Whereabouts of Father is Unascertainable

(1) If service cannot be made under subrule (A)(2) because the identity of the father of a child born out of wedlock or the whereabouts of the identified father has not been ascertained after diligent inquiry, the petitioner must file proof, by affidavit or by declaration under MCR 2.114(B)(2), of the attempt to identify or locate the father. No further service is necessary before the hearing to identify the father and to determine or terminate his rights.

(2) [Unchanged.]

(C) [Unchanged.]

RULE 5.313. COMPENSATION OF ATTORNEYS

(A)-(E) [Unchanged.]

(F) Claims for compensation, Required Information. Except when the compensation is consented to by all the parties affected, the personal representative must append to an accounting, petition, or motion in which compensation is claimed a statement containing the information required by subrule (C).

(G) [Unchanged.]

RULE 9.113. ANSWER BY RESPONDENT

(A) [Unchanged.]

(B) Refusal or Failure to Answer.

(1) [Unchanged.]

(2) The failure of a respondent to answer within the time permitted is misconduct. See MCR 9.104(A)(7).

(3) [Unchanged.]

(C) [Unchanged.]

Staff Comment: The amendment of MCR 2.612(A)(2), 3.802(B)(1), 5.313(F), and 9.113(B)(2), effective May 1, 2006, reflect numbering changes in other rules.

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

Adopted February 23, 2006, effective May 1, 2006 (File No. 2006-02) —REPORTER.

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

RULE 3.602. ARBITRATION

(A) Applicability of Rule. This rule governs statutory arbitration under MCL 600.5001-600.5035.

(B)-(H) [Unchanged.]

(I)-(N) [Deleted.]

Staff Comment: MCR 3.602(A) is amended and subrules (I)-(N) of 3.602 are deleted because 1993 PA 78 repealed MCL 600.5040-600.5065.

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

Adopted February 23, 2006, effective May 1, 2006 (File No. 2006-02) —REPORTER.

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

RULE 7.204. FILING APPEAL OF RIGHT; APPEARANCE

(A)-(B) [Unchanged.]

(C) Other Documents. With the claim of appeal, the appellant shall file the following documents with the clerk:

(1)-(4) [Unchanged.]

(5) a copy of the register of actions of the lower court, tribunal, or agency; and

(6) [Unchanged.]

(D)-(H) [Unchanged.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL

(A) [Unchanged.]

(B) Manner of Filing. To apply for leave to appeal, the appellant shall file with the clerk:

(1) [Unchanged.]

(2) 5 copies of the judgment or order appealed from, of the register of actions of the lower court, tribunal, or agency, of the opinion or findings of the lower court, tribunal, or agency, and of any opinion or findings reviewed by the lower court, tribunal, or agency.

(3)-(7) [Unchanged.]

(C)-(E) [Unchanged.]

(F) Late Appeal.

(1)-(3) [Unchanged.]

(4) The limitation provided in subrule (F)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for judgment of acquittal, to withdraw a plea, or for resentencing, if the motion was filed within the 12-month period, or if

(a)-(b) [Unchanged.]

(c) the application for leave to appeal is filed in accordance with the provisions of this rule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing or denying the appointment of counsel, the 42-day period runs from the date of that order.

A defendant who seeks to rely on one of the exceptions in subrule (F)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the register of actions of the lower court, tribunal, or agency, or other documentation showing that the application is filed within the time allowed.

(5) [Unchanged.]

(G) [Unchanged.]

Staff Comment: The amendment of MCR 7.204(C)(5) makes the terminology consistent with current usage. See MCR 8.119(D)(1)(c). The amendment also clarifies the distinction between the lower court register of actions and the Court of Appeals docketing statement referred to in MCR 7.204(H) and 7.205(D)(3).

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

Adopted February 23, 2006, effective May 1, 2006 (File No. 2006-02) —REPORTER.

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

RULE 8.110. CHIEF JUDGE RULE

(A)-(B) [Unchanged.]

(C) Duties and Powers of Chief Judge

(1) A chief judge shall act in conformity with the Michigan Court Rules, administrative orders of the Supreme Court, and local court rules, and should freely solicit the advice and suggestions of the other judges of his or her bench and geographic jurisdiction. If a local court management council has adopted the by-laws described in AO 1998-5 the chief judge shall exercise the authority and responsibilities under this rule in conformity with the provisions of AO 1998-5.

(2)-(7) [Unchanged.]

(D) [Unchanged.]

Staff Comment: The amendment of MCR 8.110(C)(1), effective May 1, 2006, changes references to AO 1997-6, which was rescinded and replaced by AO 1998-5.

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

Adopted February 23, 2006, effective May 1, 2006 (File No. 2006-02) —REPORTER.

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

RULE 8.301. POWERS OF REGISTER OF PROBATE, DEPUTY REGISTERS, AND CLERKS

(A) [Unchanged.]

(B) Entry of Order Specifying Authority.

(1) [Unchanged.]

(2) The order of the chief judge may refer to the power

(a) to set the time and place for hearings in all matters; take acknowledgements; administer oaths; sign notices to fiduciaries, attorneys, and sureties; sign citations and subpoenas; conduct conferences with fiduciaries required to ensure prompt administration of estates; and take testimony as provided by law or court rule; and

(b) [Unchanged.]

(C) [Unchanged.]

Staff Comment: The amendment of MCR 8.301(B)(2)(a) is made to conform to the definition of "court" in MCL 710.22(m) and to the provision in MCL 710.46, which provides that the family division of the circuit court shall direct a full investigation upon the filing of an adoption petition.

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

Adopted March 28, 2006, effective May 1, 2006 (File No. 2006-02)—REPORTER.

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

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL

On order of the Court, the order of February 23, 2006 is amended to correct a clerical error, effective May 1, 2006. MCR 7.205(F)(4) is amended as follows:

(F) Late Appeal.

(1)-(3) [Unchanged.]

(4) The limitation provided in subrule (F)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for directed verdict of acquittal, to withdraw a plea, or to correct an invalid sentence, if the motion was filed within the 6-month period prescribed in MCR 6.310(C), MCR 6.419(B), MCR 6.429(B), and MCR 6.431(A), or if

(a)-(b) [Unchanged.]

(c) the application for leave to appeal is filed in accordance with the provisions of this rule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing or denying the appointment of counsel, the 42-day period runs from the date of that order.

A defendant who seeks to rely on one of the exceptions in subrule (F)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the register of actions of the lower court, tribunal, or agency, or other documentation showing that the application is filed within the time allowed.

Staff Comment: The amendment corrects the opening sentence of subrule (F)(4).

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

AMENDMENTS OF LOCAL COURT RULES

THIRD JUDICIAL CIRCUIT

Approved February 23, 2006, effective immediately (File No. 2006-02) —REPORTER.

On order of the Court, the Third Judicial Circuit Court Local Court Rule presently numbered as 3.204 is renumbered as 3.206, Local Court Rule presently numbered 3.206 is renumbered as 3.207, and Local Court Rule presently numbered 3.209 is renumbered as 3.211.

AMENDMENT OF MICHIGAN RULES OF PROFESSIONAL CONDUCT

Adopted October 18, 2005, effectively immediately (File No. 2003-19) —REPORTER.

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

RULE 1.15. SAFEKEEPING PROPERTY.

(a) Definitions.

(1) "Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable IOLTA account administrative or maintenance fee. All other fees are the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account. Fees or charges in excess of the interest or dividends earned on the account for any month or quarter shall not be taken from interest or dividends earned on other IOLTA accounts or from the principal of the account.

(2) An "eligible institution" for IOLTA accounts is a bank or savings and loan association authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal government, or is an open-end investment company registered with the Securities and Exchange Com-

mission authorized by federal or state law to do business in Michigan. The eligible institution must pay no less on an IOLTA account than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets the same minimum balance or other eligibility qualifications. Interest or dividends and fees shall be calculated in accordance with the eligible institution's standard practice, but institutions may elect to pay a higher interest or dividend rate and may elect to waive any fees on IOLTA accounts.

(3) "IOLTA account" refers to an interest- or dividend-bearing account, as defined by the Michigan State Bar Foundation, at an eligible institution from which funds may be withdrawn upon request as soon as permitted by law. An IOLTA account shall include only client or third person funds that cannot earn income for the client or third person in excess of the costs incurred to secure such income while the funds are held.

(4) "Non-IOLTA account" refers to an interest- or dividend-bearing account from which funds may be withdrawn upon request as soon as permitted by law in banks, savings and loan associations, and credit unions authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal government. Such an account shall be established as:

(A) a separate client trust account for the particular client or matter on which the net interest or dividend will be paid to the client or third person, or

(B) a pooled client trust account with subaccounting by the bank or savings and loan association or by the lawyer, which will provide for computation of net inter-

est or dividend earned by each client or third person's funds and the payment thereof to the client or third person.

(5) "Lawyer" includes a law firm or other organization with which a lawyer is professionally associated.

(b) A lawyer shall:

(1) promptly notify the client or third person when funds or property in which a client or third person has an interest is received;

(2) preserve complete records of such account funds and other property for a period of five years after termination of the representation; and

(3) promptly pay or deliver any funds or other property that the client or third person is entitled to receive, except as stated in this rule or otherwise permitted by law or by agreement with the client or third person, and, upon request by the client or third person, promptly render a full accounting regarding such property.

(c) When two or more persons (one of whom may be the lawyer) claim interest in the property, it shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(d) A lawyer shall hold property of clients or third persons in connection with a representation separate from the lawyer's own property. All client or third person funds shall be deposited in an IOLTA or non-IOLTA account. Other property shall be identified as such and appropriately safeguarded.

(e) In determining whether client or third person funds should be deposited in an IOLTA account or a non-IOLTA account, a lawyer shall consider the following factors:

(1) the amount of interest or dividends the funds would earn during the period that they are expected to be deposited in light of (a) the amount of the funds to be deposited; (b) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held; and (c) the rates of interest or yield at financial institutions where the funds are to be deposited;

(2) the cost of establishing and administering non-IOLTA accounts for the client or third person's benefit, including service charges or fees, the lawyer's services, preparation of tax reports, or other associated costs;

(3) the capability of financial institutions or lawyers to calculate and pay income to individual clients or third persons; and

(4) any other circumstances that affect the ability of the funds to earn a net return for the client or third person.

(f) A lawyer may deposit the lawyer's own funds in a client trust account only in an amount reasonably necessary to pay financial institution service charges or fees or to obtain a waiver of service charges or fees.

(g) Legal fees and expenses that have been paid in advance shall be deposited in a client trust account and may be withdrawn only as fees are earned or expenses incurred.

(h) No interest or dividends from the client trust account shall be available to the lawyer.

(i) The lawyer shall direct the eligible institution to:

(1) remit the interest and dividends from an IOLTA account, less allowable reasonable fees, if any, to the Michigan State Bar Foundation at least quarterly;

(2) transmit with each remittance a report that shall identify each lawyer for whom the remittance is sent, the amount of remittance attributable to each IOLTA account, the rate and type of interest or dividends applied, the amount of interest or dividends earned, the amount and type of fees deducted, if any, and the average account balance for the period in which the report is made; and

(3) transmit to the depositing lawyer a report in accordance with normal procedures for reporting to its depositors.

(j) A lawyer's good-faith decision regarding the deposit or holding of such funds in an IOLTA account is not reviewable by a disciplinary body. A lawyer shall review the IOLTA account at reasonable intervals to determine whether changed circumstances require the funds to be deposited prospectively in a non-IOLTA account.

Staff Comment: The amendment of MRPC 1.15 conforms with the decision in *Brown v Legal Foundation of Washington,* 538 US 216; 123 S Ct 1406; 155 L Ed 2d 376 (2003), to create interest rate parity with non-IOLTA investments consistent with changes in financial products presently available in the market, and to make other revenue-enhancing modifications to the IOLTA program.

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

AMENDMENTS OF STATE BAR RULES

Retained October 10, 2005 (File No. 2005-15)—REPORTER.

By order dated May 10, 2005, this Court adopted the amendments of Rules 2, 5, and 6 of the Rules Concerning the State Bar of Michigan with immediate effect. 472 Mich cxii-cxv (2005). Notice and an opportunity for comment at the September 29, 2005, public hearing having been provided, and consideration having been given, the amendments of Rules 2, 5, and 6 of the Rules Concerning the State Bar of Michigan are retained.

PRESENTATION OF THE PORTRAIT OF THE HONORABLE AUGUSTUS BREVOORT WOODWARD

OCTOBER 18, 2005

CHIEF JUSTICE CLIFFORD W. TAYLOR: Good afternoon. On behalf of my colleagues, I want to welcome all of you to this special session of the Michigan Supreme Court. Thank you for joining us here today as we begin the new term of Court and at the same time commemorate the creation of this Court's forerunner, the Supreme Court of the Territory of Michigan, 200 years ago.

Recently, I was called upon to provide the foreword for the soon-to-be-published *History of Michigan Law*, and, as I read the manuscript, I was reminded of these lines from Shakespeare's play, *The Tempest*: "What's past is prologue, and what comes is in your and my discharge." Antonio, the character who speaks these lines, means that past events are often felt to be insignificant compared to the business of the moment. It would be hard to not agree that all too often we fall into that same posture, getting caught up in our tempestuous present and forgetting that our predecessors lived through times quite as challenging as our own, and, thus, we insufficiently look to them for guidance. It is good, therefore, that we gather to recall our heritage and the origins of our Michigan judiciary.

Today we remember not only the territorial court, but that court's most memorable figure, Augustus B. Woodward, who was both a jurist and legislator, the friend of Jefferson, a born New Yorker and Washington,

D.C., lawyer, who laid the foundations of Michigan jurisprudence. He is a fascinating and sometimes difficult character, but deserves to be remembered far more for his contributions than discounted because of his, well, peculiar personality, as we shall hear.

I'm going to shortly call on Wallace Riley, president of the Michigan Supreme Court Historical Society to superintend this program, but before I do so, I want to thank Justice MARILYN KELLY for being the liaison to the society for this program, and it has been her efforts, along with the society's, that have made the program possible today. Mr. Riley.

Mr. WALLACE D. RILEY: Mr. Chief Justice, justices of the Michigan Supreme Court, Justice KELLY, society members and members of the bar in attendance, ladies and gentlemen.

Over the past several years, the participation of the Michigan Supreme Court Historical Society in the opening day of oral arguments has become somewhat of a tradition. Many of you here today are historical society members and are familiar with our organization and with our work. However, many members of the other branches of state government who have been invited to join us today for this special session may not be so familiar, and so let me take a few minutes just to tell you a little bit about the society's duties.

The Michigan Supreme Court Historical Society, a nonprofit 501(c)(3) corporation, was founded in 1988 by then-Chief Justice DOROTHY COMSTOCK RILEY. Our mission is to collect, preserve, and display documents, records, and memorabilia relating to the Michigan Supreme Court and the other courts of Michigan, and to promote the study of the history of Michigan's one court of justice, and to increase public awareness of Michigan's legal heritage. We sponsor and conduct

historical research, we provide speakers and educational materials for students, and we sponsor and provide publications, portraits, memorials, special events, and projects, all consistent with our mission.

Over the past 17 years we have produced several publications, including the *Michigan Supreme Court Historical Reference Guide*, which contains biographies and a picture of each of the Court's first 103 justices, and *A Brief History of the Michigan Supreme Court* booklet, which is geared toward high school students interested in the history of the Court. We produced the *Index to Special Sessions*, which includes up-to-date indices of all special sessions held by the Michigan Supreme Court since 1836 and lists the dates, the honorees, and the speakers of each of those sessions. Our high school and junior high lesson plans are provided to teachers with two-week units on the history and organization of the Michigan Supreme Court, and I'm pleased to announce that this year alone, we have distributed over 30 of these free lesson plans and packets to the teachers throughout the state of Michigan. And finally, our quarterly newsletter, *The Society Update*. We continue to distribute all of these publications, and copies are available for anyone interested in learning more about the history of the Supreme Court. In addition to the hard-copy publications, the historical society hosts a website, www.micourthistory.org, on which we post articles, vignettes, and other information about the history of the Court.

The society also holds special events, and we host them throughout the year to celebrate the Court's history. This year, in April, we hosted our annual membership luncheon in Detroit. Nearly 150 members and friends joined us to hear about the many sides of Justice JOHN VOELKER. In May, your honors hosted a

special session in this courtroom in which the portrait of the Honorable Justice THEODORE SOURIS was dedicated to the Court. You can view it; it's downstairs hanging.

In an effort to further study court history to encourage research about the Court, we have sponsored several research-related projects. The first is the COLEMAN Internship. Each year the historical society selects an undergraduate student to research a special topic related to the history of the Court. Our COLEMAN interns have produced the *Brief History of the Michigan Supreme Court* booklet, a PowerPoint presentation about the Michigan Supreme Court and its treatment of civil rights issues, and a Women and the Law project that features a list of 19 women who have made significant contributions to Michigan law, and the 2005 COLEMAN intern, Caroline Zickgraf, completed a bibliography of the research resources available to anyone interested in the history of the Court. The end result is a database of over 2,000 citations related to Michigan Supreme Court history. The Big Four Writing and Research Fellowship, which was conducted in partnership with Western Michigan University, concluded this year. Coreen Derifield completed her two-year project for her master's thesis and wrote her thesis entitled "Defining Peaceful Picketing: The Michigan Supreme Court and the Labor Injunction, 1900-1940." In cooperation with Paul Moreno, a political science professor at Hillsdale College, the historical society is selecting a list of the Michigan Supreme Court's most socially and politically significant cases. Our committee, which includes two former Michigan Supreme Court justices, hope to have the first phase of this project completed by the end of the year.

In addition to opening the Court, we're here today to recognize and celebrate an important event in the history of the Court and the Michigan judicial system, as well. It is the 200th anniversary of the creation of the Supreme Court of the Territory of Michigan. Here to tell a story of that significant event and a story of the first decade of the court is Professor David G. Chardavoyne.

Professor Chardavoyne is a lawyer, teacher, and author. He received the degrees of Bachelor of Arts from the University of Michigan in 1970 and Juris Doctor, magna cum laude, from Wayne State University Law School in 1976. Following two years as a law clerk to the Honorable James Harvey of the United States District Court for the Eastern District of Michigan, Professor Chardavoyne joined the Detroit law firm then known as Bodman, Longley & Dahling, now Bodman LLP, where he specialized in litigation and trust law. Then, after 21 years as an associate and a partner, Professor Chardavoyne left Bodman to pursue his love of history and of teaching. Since 2001 he has taught at both Wayne State University Law School and the University of Detroit-Mercy School of Law as an adjunct professor. He has written extensively on the legal history of Michigan's early years, and his study of the history of capital punishment in Michigan, *A Hanging in Detroit*, published by the Wayne State University Press, was voted a Michigan Notable Book of 2004 by the Library of Michigan Foundation. During the current semester, he is a visiting professor of law at Wayne State University. Welcome David Chardavoyne.

PROFESSOR DAVID G. CHARDAVOYNE: Chief Justice, justices, ladies and gentlemen, it is an honor for me to be here this afternoon to speak, to give a legal vignette of the creation of the Supreme Court of the Territory of

Michigan, and to tell some stories about that court and the Michigan that it was part of. And, of course, when we speak of Michigan at that time, we have to speak of a man who—the words are almost a cliché now—was brilliant but eccentric, Augustus Woodward, whose portrait we will unveil today.

The court began with the territory of Michigan in 1805. An act of Congress in January of that year created the territory of Michigan out of what was then the territory of Indiana. But, in order to understand how this came about, I need to go back with you about 20 years before that. In the 1780s, Congress was in a terrible situation. The Articles of Confederation had not been ratified or adopted, all because of one thing: the Old Northwest, the territory between the Ohio River and the Great Lakes, between Pennsylvania and the Mississippi, that Britain had ceded to the United States in the Treaty of Paris after the Revolution. Virginia claimed the entire area, all 265,000 square miles, an area larger than France. Other states, such as Pennsylvania, Massachusetts, Connecticut, and New York, claimed parts of it, whereas the other of the 13 original states were adamant that those states would not have a part of the Old Northwest. Maryland, in particular, threatened never to ratify the Articles of Confederation unless a deal was done. And a deal was done.

In 1787, Congress created the Northwest Territory. And, as we see in this map, the area that is shaded is now the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and a portion of Minnesota which is east of the Mississippi River. We see a single territory governed by officials sent from Washington, federal officials appointed by the President, but with a promise that, in time, it would become self-governing and that three to five states would be created from the Northwest Terri-

tory and join the Union. One of those states-to-be, according to the ordinance, was a state lying north of the east-west line drawn through the southerly bend or extreme of Lake Michigan to Lake Erie. If you look at the map that's on your program and you look at the bottom of Lake Michigan, you'll see one of the first problems that Michigan had, one that persisted for quite some time. This is a map—it's probably as good a map as Congress had at the time. And you'll note that the bottom of Lake Michigan—if you go east, you never reach Lake Erie. You go all the way to the Atlantic Ocean. And obviously Congress did not intend to include all of Pennsylvania and New England in the new territory of Michigan.

Another problem which came up was the western boundary of the new territory. Congress defined it as a line running through the middle of Lake Michigan to its northernmost part. I interpret that, and most scholars interpret that, to be the northernmost part of that center line running through Lake Michigan. However, there is another way to look at it, the northernmost part of Lake Michigan. And, in fact, there is a Michigan historical marker at that northernmost part in the town of Naubinway in the Upper Peninsula which states that that was the western boundary of the Michigan Territory. On this map, that western boundary would be somewhere 150 miles further west. So you can see that the boundaries of the original territory of Michigan were pretty indeterminate—a very big map—because virtually all of the 4,000 European-American people—when I speak about population today, unfortunately that's what I have to talk about. There were many Native Americans living in Michigan then and later. Nobody ever counted them. Censuses didn't count them. They were not statistically important people at that time. I can't tell you how many there were. There

were 4,000 people of European descent. Almost all of them lived around the Detroit River and the southern part of Lake St. Clair. None of them lived in the Upper Peninsula, and so where the border was up there was really of no interest to them at all.

Who were these people? Most of them were French, leftovers from the French government. They were farmers, subsistence farmers. They didn't sell anything for export. They tracked, they fished. Detroit was a fur-trading post at that time, and Detroit, Mackinaw, and Sault Ste. Marie were the only substantial towns. Sault Ste. Marie and Mackinaw were just sort of trading posts at that time. French. You also had some British citizens, who had been the merchants of the fur traders in town, who decided to set up shop in Detroit. At that time, then, the third group of people, the Americans, were not there. In 1787, even though Detroit had at least theoretically been part of the United States since 1782, along with the rest of Michigan—the rest of the northwest—there were no American citizens in what is now Michigan because the British refused to evacuate. Despite the Treaty of Paris, they decided they would hang onto the fur trading for as long as they possibly could. It took another treaty, the Jay Treaty done by Justice Jay, to convince them to leave the northwest. It took a war with the tribes of Ohio to get them to agree to allow American settlement, and it wasn't until 1796—it took nine years after the Northwest Ordinance —that the first settlers started moving north from the Ohio River. When the first American troops arrived at Detroit in July 1796, there was one U.S. citizen in the territory that was to become Michigan. A man by the name of Peter Audrain. He was the only U.S. citizen. And there were very few of the people that spoke English. When we think of Michigan as an American

place, Detroit as an American place, in 1796, it definitely was not. It was to become one over the next decade.

The government of the Northwest Territory—remember at this point we're still part of the Northwest Territory—the government of the Northwest Territory consisted of five officials, appointed by the President with the consent of the Senate. There was a governor, a secretary who served as an assistant governor, and three judges who "shall have common law jurisdiction" and whose "commissions shall continue in force during good behavior." Common-law judges.

As the Northwest Territory began to fill up, particularly Ohio, Congress in 1800 decided to split the Northwest Territory, split off Ohio, and create the Indiana Territory. And, in 1803, Ohio became the first state carved out of the Northwest Territory, and, at that point, the capital that Michigan responded to was the capital of the Indiana Territory, Vincennes. I don't know if any of you have ever been to Vincennes, down on the banks of the Wabash far away. It took weeks for people from Detroit to get to Vincennes. The route, taking canoes, was up the Miami, Fort Wayne, then down the Wabash, and from the very beginning, when they first heard about this, people in Detroit, Mackinaw, and Sault Ste. Marie were adamant that they wanted none of it. They wanted their own territory. And finally—they sent petitions to Congress, in English and French. They said, "Compel us not to wander seven hundred miles thro' inhospitable deserts," and they feared "outlawry, oppression, and anarchy, leaving murderers unpunished and creditors unpaid." Congress paid attention largely because Congress at that time was Democratic and so were most of the people in Michigan, the people who counted. An American popu-

lation had grown up. It still was a very small part of the territorial population—the French were still by far the majority—but it was building up. So in 1805, in January, Congress passed the Michigan Territory Act, which created the territory, the capital in Detroit, with the same government form as the Northwest Territory, meaning a governor, a secretary, and three judges. That was the beginning of the judicial system in Michigan.

President Jefferson had no trouble filling the two executive posts. For governor, he appointed an old Revolutionary War general, William Hull from Connecticut, and, as secretary, Stanley Griswold of New Hampshire. It's interesting that Stanley Griswold, who was heartily disliked and stayed in Detroit only a very short time, has a street named after him, while General Hull does not. And Judge Woodward named the street after himself.

The court proved much harder to fill. Finding lawyers who wanted to come to—well, not even the edge of the frontier—the middle of the frontier was difficult. The first choice of the President, Samuel Huntington, who was a justice of the Supreme Court of Ohio, turned it down. I don't know why. However, his next few choices were successful: Frederick Bates from Detroit, who was the postmaster in Detroit, and Augustus Woodward, who at that time was a lawyer in Washington, D.C.—a very successful lawyer, a good friend of Jefferson—he was on the city council of Washington, D.C.—also accepted, though we don't know exactly why. A third judge, because we needed three, proved impossible in 1805. Another Ohio Supreme Court judge, William Sprigg, was solicited. He said no as well. So when the government gathered in Detroit on June 30, 1805, there were only two judges and a governor and secretary. As Chief Justice TAYLOR pointed out, the

judges were also legislators, and so was the governor. The system was, in order to save a little money, we don't have a separate legislature. The governor and the three judges were in a majority to pass legislation, which then the governor would execute and the judges would interpret.

When Judge Woodward—justice/judge—he often used justice, most people called him Judge Woodward; I'll probably use them interchangeably, no disrespect meant to anybody—when he arrived in Detroit, he arrived the day before the territory was supposed to go into effect on June 29. If he had doubts about his choice, his career choice to come to Michigan and leave his practice in Washington, where in 1802 he made $3,000, for a job in Michigan that paid $800 a year—if he had doubts about that, they were pretty much reaffirmed when he arrived in Detroit and found the whole city in ashes. Three weeks earlier, the town of Detroit, the civilian part of Detroit that included St. Anne's Church, included the army barracks, had burned to the ground. His constituents were wandering around, building tents, building lean-tos, bunking in with friends who lived outside of town, trying to pull their lives together. And, of course, the first job of the new government was trying to find a way of helping these people. In doing so, the people of Detroit got their first example of the very interesting mind of Judge Woodward.

Judge Woodward was born in 1774 in New York City. He was only 30 when he arrived in Detroit. We think of him as an old man, but he was 30 when he arrived. He was barely 50 when he left. He graduated from Columbia College in New York City in 1793. Physically, he has been compared to Ichabod Crane. He was tall, 6'3" or 6'4", but he stooped. He was very, very thin. He had a long nose. How long? There's a caricature of him we'll

see in the museum downstairs, but the nose up here—I'm sure it's not that big. And he had sort of sallow skin. He was slovenly. His idea of cleaning himself was to go out in a rainstorm fully dressed and stand there and let the rain wash the dirt off him and his clothes. But he was very fastidious about his hair, and he was very peculiar and particular about who cut his hair. For him, his hair was the one thing he really cared about in terms of his appearance. Mentally, he was brilliant. He had broad interests in the sciences and arts. This is what attracted him to Thomas Jefferson. They very much thought the same way about learning and about knowledge. He was fluent in Greek, Latin, Spanish, and French. He was a leading member of the D.C. Bar; the bar was in Virginia at that time. But, as one of his critics later said, "Our chief Judge is a wild theorist, fitted principally for the 'extraction of sunbeams from cucumbers.' " And another—that was a future judge—Governor Hull said, "His very singular opinion of things generally would baffle any little sagacity." Very interesting man.

He decided he was going to rebuild Detroit, and rather than simply replat it in little squares, as it had been before the fire, he went to Washington and came back with a plan very much like that of Washington under Pierre Charles L'Enfant. You're all familiar with the plan of Washington; it's a grill with diagonals running into circles or "circuses." And we see here a map, an 1830 map, that shows the plan proposed by Judge Woodward. The diagonals, the grand circus, that's where Grand Circus Park comes from. A circus there is such, it means "circle." And he presented this to the city of Detroit. And they looked at it and thought, What is he thinking? This was to be the first replication. As the city grew there would be the same plan, and repeated again and again and again, as many as you

needed. But even this first replication was set up for 50,000 people. At that time Detroit had less than 1,000. Most of them lived right along the shores of the water so that they could get water, so they could communicate with other places by water, and they were destitute, homeless, wanted simply to build a house fast, as winter was coming. And here was Judge Woodward thinking about little triangular blocks and little diamond-shaped blocks and square blocks, and although Congress approved this plan and you can see it still if you go to downtown Detroit—it's still there, pretty much—it was never replicated. The rest of the city became a grid north and south, east and west. So this was their first experience of the mind of Judge Woodward.

He was also very proud of his legal scholarship. And as one of his college classmates said, he loved to show off his knowledge. This is something he kept with him all his life. There was a case called *James Grant v Thomas, the Earl of Selkirk*. It was a very simple case, very simple question. Is service of process, service of a complaint and summons, on a Sunday valid? And the attorneys came before him and they argued essentially statutory interpretation, because it was a Northwest Territory statute and it seemed to cover it, but did it apply in Michigan? We don't know. He went back and wrote an opinion which cited, among other things, among other authorities, the Apostles John, Luke, and Paul; the Byzantine emperors Theodosius, Constantine, and Anastasias; Pope Gregory; the sixth-century kings Childebert of France and Gontran of Burgundy; and the kings of England, Edward I, III, and VI, William I, Henry II, VI, and VIII, and James I and Charles II. He also went into the question of what common law are we common-law judges of, because, remember, the statute says we're common-law judges. Well, the common law changes. It's a constantly evolving body of law. Where

do we cut it off? This question was, of course, a difficult one for people in the United States, who differed. How much of English law do we accept, in other words, as a separate country? Some people thought, Well we go to the beginning of the Revolution, or go to the end of the Revolution. He had a totally different idea. For him, the common law ceased developing, as far as we were concerned, in 1189, upon the coronation of Richard the Lionhearted. Richard Coeur de Lion, as he said.

Because of his eccentricity, he came to arouse hostile feelings among the people in Detroit who had to put up with him. But they put up with him from 1805 until 1823. During all that period, he was essentially the power in Detroit. And naturally he rubbed some people the wrong way. As Hull said: "Everything in this Territory was perfectly tranquil, until his arrival. Since that time, he has been doing all in his power to create parties and excite tumult."

As I mentioned earlier there were three groups of people in Detroit already, so there's a lot of tumult going on just because of that. The Americans looked at the French as being lazy because they liked to live life, being godless because they liked to have dances and races on Sundays rather than going to church all day as the good New Englanders would do. The French referred to the Americans as "sacré cochon de bostonien," which means, literally, "sacred pig of a Bostonian," which, accurately translated, means "damn Yankee." And the English were caught in the middle, but also distrusted because their loyalty to the United States was always in question in those early years. In fact, at that time, the head of the Canadian militia and the head of the Canadian naval reserve both lived in Detroit in the United States, and sent up their orders to their

followers across the river. Everybody knew this, and so this was another thing that kept the tension in Detroit.

In 1808, getting back to Woodward, a guy by the name of John Gentle published a series of articles lampooning Woodward, and Woodward had him indicted. An army officer named John Whipple said something to Woodward in the street, and he had him indicted "for using abusive language to a judge." And an attorney by the name George McDougall in 1810, twice —George McDougall was one of the biggest attorneys in that early day, he was the founder of the bar—he twice in one week challenged Woodward to a duel. When Woodward refused to accept, McDougall wrote another letter saying: You know, if that's the way you're going to be, essentially, I'm not coming to dinner as I promised. In 1811, a fellow by the name of Whitmore Knaggs actually started beating up Woodward at a party, and, of course, he too was indicted. This is the man, then, who was the chief judge when the court began in 1805.

The other judge who was present at that time was Frederick Bates. He was born in 1777—he was 27, 28 years old—in Belmont, Virginia. He was one of 12 children of a Quaker family and was quite friendly with both President Jefferson and Secretary of State James Madison, which no doubt led him to be the only Detroiter to get a federal job when Michigan became a territory. He had no college education, but he studied law. He came to Michigan in 1797 as an army quartermaster. He owned a store in Detroit. He was the postmaster of Detroit at the time of his appointment to the court.

Over time, two more judges came to join the court. Bates did not stay very long. By the next year, by 1806, he had gotten a new job from Jefferson; he was the secretary of the new Louisiana Territory, headquar-

tered in St. Louis, and eventually he would be the governor of Missouri. Before he left, a third judge was named and did arrive, a man by the name of John Griffin. John Griffin was the same age as Woodward, born in 1774. He was born in Scotland, although his father was American. His mother was the daughter of a Scottish baron, and he always acted as if he knew that and could not forget it. His father was Cyrus Griffin, a member of the Continental Congress from Virginia, a U.S. District judge. John Griffin graduated from William and Mary College and studied law in Virginia, and in 1800 he was looking for a job. So his father's good friend, Thomas Jefferson, sent him out to the Indiana Territory to be a judge there, in Vincennes. Very quickly, he decided he didn't like Vincennes very much at all. He didn't like the climate; it wasn't good for his hypochondria. And finally, in 1806, his father prevailed on Jefferson to switch him over to the Michigan Territory. He has been described as "tasteful and polite" but "a hypochondriac," "woefully inert," and "one of the most petulantly dissatisfied office-holders of all time." During his 17 years on the bench of the Supreme Court of the Territory of Michigan, he was ceaselessly looking for another job, any job, so long as it was not in Michigan or, presumably, Indiana. He was timid and indecisive; he refused to sit alone as a judge, and he never did. He was totally in the thrall of Judge Woodward. Judge Woodward could get him to do anything he wanted, which, if you think about it, gave him tremendous power. It gave him a majority on the court whenever he wanted one; he had no worse than a tie in the legislative body of four, and so, for that reason, Woodward became the most powerful man in Michigan.

Finally in 1808—oh, by the way, Griffin and Woodward both never married, and towards the end of their time in Detroit, in the early 1820s, they became known

as the "Old Bachelors" who used to write gossipy letters to each other about girls they were interested in, but they never married any of them.

Finally, in 1808, the third member of what would become essentially the permanent court for the territory arrived, James Witherell. Although he joined the court three years after Woodward, and although he was 15 years older than Woodward and Griffin, he would be the longest serving judge in the history of the territorial supreme court, 20 years. He was born in 1759, in Massachusetts. He was by training a doctor, not a lawyer. He fought in most of the major battles of the Revolution. He was a congressman from Vermont in 1808 when President Jefferson prevailed upon him to come out to Michigan and join the court. He was said to be "a man of great originality and great force of thought," unquestioned integrity and mental independence, devoted to the Constitution, but he despised the common law—which is tough for a common-law judge —because it came from Great Britain, his enemy.

Let's go back to 1805. Those are the first four judges of the court. Those are the judges who sat through the first decade and more of the court's history. The judges were sworn in—Judges Bates and Woodward were sworn in on June 30, 1805, the first day of the territory —and July 24—obviously they were doing a lot of house building in between—the legislative board, Woodward, Bates, and Hull, met and created a statute called "An Act Concerning the Supreme Court of the Territory of Michigan," and the three-judge territorial court became officially the Supreme Court of the Territory of Michigan. It had one court term per year, beginning on the third Monday in September. At $800, you can't expect two terms. And they actually had the first meeting of the Court, in special session, on July 29, 1805. The first

session of the Supreme Court of the Territory of Michigan, "Chief Justice" Woodward and "Senior Associate Judge" Bates held at the home of James May, who was a justice of the peace. This is where Woodward was staying while the city was being rebuilt. It was on the north side of Larned between First and Second Streets, near as I can guess, about where the Lodge Freeway dips underneath Cobo Hall across from Joe Louis Arena, outside the area that had been burned, obviously. In that session, they named Peter Audrain, who had been the only U.S. citizen in town when the army arrived, as their clerk. Peter Audrain was by then 70 years old, a French native who came to Detroit by way of Philadelphia; he was not Canadian French. And he essentially became clerk of everything over the next decade; whatever body, court, administrative board, Peter Audrain was the clerk.

The next meeting was the next day on July 30, 1805, which was significant in that the first two members of the Michigan Bar were admitted to the court. Elijah Brush was a graduate of Dartmouth College, 33 years old. He had been the first American attorney in Detroit. He had followed the army up and set up his shop in Detroit. He was later territorial treasurer and attorney general. A year or so after he arrived in Detroit, he was joined by the second attorney on the bar, Solomon Sibley, who was then 36, a graduate of Rhode Island College, which is now Brown University. He joined Brush and, where Brush had struggled, they prospered, which proves the old saying: Two attorneys will feast where one attorney will starve. Sibley later was Detroit's first mayor, its first U.S. Attorney, and he was a judge of the territorial supreme court itself from 1824 to 1836.

So now we have a court, we have a clerk, we have attorneys. It's time for the first case. The court's first regular term began September 16, 1805. In those days the supreme court was principally a trial court. It was not an appellate court because there was really nothing to appeal from. But they did have the one advantage, I think: they were the last word. There was no appeal from a decision of the supreme court of the territory. Not to the Supreme Court, not to any court of appeals or federal district court. They were both the first and the last words in anything they did.

The first year there were ten cases filed in Detroit. Three of them involved absent jurors who were found in contempt. There was one murder. It was a Native American who killed another Native American, and no one was really concerned about it, so essentially he was pardoned. Two larcenies, two for debt, one compact case, and one customs case. Congress had provided the court not only with the common-law jurisdiction, but in other statutes it provided jurisdiction over all cases involving the United States. That saved them money; they didn't have to hire a separate federal judge for the territory. And so the first case was the customs case, *United States v Boards, Planks & Shingles Claimed by Isaac Bissell, Jr & Henry Fitch*. And that case produced the first opinion of the court on September 24. Justice Woodward issued the first written opinion of the court. The trial took place in the Dodemead Tavern, which is about where the Pontchartrain Hotel is now. Very often in those days the court sat in a tavern. And often they would drink; no one thought any the less of them for that at that time. If they decided they had a question that wasn't covered by the statutes, they might retire upstairs, pass a new statute, come back down, and resume court. Judge Woodward had the habit of—if he got bored and there's another judge present, he would

simply tell the court to mark him absent and he would then take a nap sitting on the bench. And one time he woke up and someone was saying something about him and he started to respond, and the guy said, "Wait a minute, you're not here." "I direct the court to mark me present, and you're in contempt."

The first term only lasted till September 30, so it only lasted about two weeks. The number of cases grew, though, over the years; 1806 there were 34, 1807 there were 46. In its entire lifetime, the court handled 2,100 cases, about 15 percent of which were these federal jurisdiction cases. There were other cases of note in those early days. I'll briefly mention one or two of them. A great international incident, we had soldiers on both sides of the river, and they tended to desert, go across the river to escape. So the soldiers decided the best thing to do was to work with the opposing soldiers to capture each other's deserters and send them back. That turned out to be something that was not acceptable to the civilians in Detroit, and one group of British officers who tried to do it were caught. They were tried for assault on their deserting soldier, and initially the captain who was in charge was fined $8,800 and given six months in jail. That represented about ten times his annual salary. It was then pointed out to Woodward and Bates that the statute that provided for assault and battery only allowed a fine of $100. So they revised the sentences, and the captain now got 2 1/2 cents plus costs.

The first decade of the court ended somewhat abruptly when Detroit was seized by the British army at the beginning of the War of 1812. There were no sessions in 1813, 1814—1814 just barely. October 7, 1814, a couple of weeks after the Americans retook Detroit, the court resumed. And it went on in much the same way as it had before, with those three judges,

Woodward, Griffin, and Witherell, until 1823. In 1823, people were getting tired of, particularly Woodward and Griffin, because they had been in charge for so long. And it was arranged so that instead of being named for life, the statute was changed so that the judges only sat for four years.

In 1824, Woodward and Griffin were not renominated, and, as this little chart points out, they were replaced by—Witherell stayed on the bench—and they were replaced by Solomon Sibley, the first or second attorney in Detroit, and John Hunt. These men were both solid Federalists. The Federalists were in power. In 1827, Hunt died, and Henry Chipman, another Federalist, took over. And, in 1828, Judge Witherell finally gave up the bench. He switched with William Woodbrige, who had been the territorial secretary since the War of 1812, and now Woodridge became a judge, until 1832. In 1828, the nomination of Woodridge came just in time, because at the end of 1828 and the election, Andrew Jackson became President. And we all know he liked the spoil system. So the first chance he had in 1832, he named new judges. He kept Solomon Sibley, but he brought in two of his followers, Ross Wilkins and GEORGE MORELL. And they served—the three of them, Sibley, Wilkins, and MORELL—until the end of the court in 1836. Michigan became a state officially in 1837, but the state's government actually took over in 1836. When the court ended and the Supreme Court of Michigan began, Sibley was in his seventies; he retired. MORELL accepted a position on the new court. Wilkins was offered the position, but he took the job as the first district judge of Detroit, and WILLIAM ASA FLETCHER took over as the chief judge of the first Supreme Court of the state of Michigan. And the Court has continued in one form or another, obviously, up until today. I think that the ten men who sat on the court in the territorial

period provided a basis for the rule of justice and the rule of law which is still a part of our state, and it's good for us today to be talking about them and thinking about them. Thank you very much.

MR. RILEY: Thank you, Professor Chardavoyne. Chief Justice Augustus Woodward, of course, is the central character in any story behind the early history of the Court. And although his many eccentricities gave him a questionable reputation, his grasp of legal proceedings and of the law itself was most notable. Woodward was known for many things, including the early publications regarding the rights of citizens in the territory of Columbia, his work on the territorial supreme court, the establishment of the University of Michigan, and his plan to redesign and rebuild the city of Detroit. Recognizing his many contributions, a young man named John Fedynsky first approached the historical society about a year ago. And John had the idea that we should commission a statue of Woodward to be placed in downtown Detroit.

Recognizing that Woodward did indeed deserve to be honored, the historical society instead decided to commission a portrait of Justice Woodward to be presented here to the Court. The only problem was that there was only one picture of Woodward that was known to exist, and it was a crude line drawing that is rumored to be a caricature with a big nose. So using this and a few scattered verbal descriptions of the justice, our artist would have to craft a historically accurate picture of Woodward almost from scratch.

Recognizing the difficulty of this project, the historical society sought an experienced artist with an awareness of the importance of the historical context. Robert Maniscalco, a Detroit-based portrait artist, was a logical choice. As you can read in his biography in your

program, you'll see that he's an expert painter, a conscientious presenter, an expert in the arts, and having worked with him on several other portrait projects, including the posthumous portraits of Justice BLACK, Justice MOODY, Justice REID, and Justice SHARPE, we selected Robert to paint this important portrait. And so now, to unveil the 86th portrait to be added to the Court's collection, let me welcome Robert Maniscalco and John Fedynsky. After unveiling the portrait, Robert will take a few minutes to tell you about the process of creating this difficult thing out of whole cloth, and about the specific historical moments that he researched to enable him to present what you will now look at.

[Portrait is unveiled.]

MR. ROBERT MANISCALCO: Mr. Chief Justice, justices of the Supreme Court, and distinguished guests, and Wally Riley, thank you. It is my great honor to present my portrayal of Judge Augustus B. Woodward. May it please the Court—for many years to come. I have been asked to share the most unusual story in my bringing this portrait into existence. I would mention at this time that you are all invited to view a short PowerPoint presentation illustrating the process following these proceedings, in the reception area out there, where my father's portraits are on display, as well. I would also like to take a moment to acknowledge a couple of important people who have always been there for me and are here for me today: my sister Betsy and her two children, Marcus and Nicky. And my wife, of course, Amanda, and Mary, our youngest. And Danny couldn't be here because he had an appointment with his grandmother. And, of course, my father, Joe Maniscalco, with whom I hang in the Hall of Justice here. I feel very proud. I'm lucky to have been the son of a great artist.

Now with regard to this painting in front of you, as with every portrait I paint, it's an exquisite adventure, a labor of love. To accomplish this particular result, however, I needed more than a flair with a brush. I had to become something of a historian. The project came about after the esteemed Justice THOMAS BRENNAN presented what he called a "word portrait" to this Court to mark the 300th anniversary of city of Detroit, focusing on Woodward's plan for Detroit, as well as his appointment as Michigan's first territorial judge 200 years ago, making him the father of this great institution. In Justice BRENNAN's word portrait, he noted the conspicuous absence of the real thing. Well, justice called out in response, and I am deeply honored to have been selected for this singular challenge, and the rest is, as they say, history. We made history.

As the Court's unofficial posthumous portrait painter, I have been commissioned many times over the years to fill in the blanks of the impressive portrait collection held within these walls. I paint dead people. Who knows, maybe someday I'll have the honor of being asked to paint a real live Michigan Supreme Court justice. But I digress. Suffice it to say that as a result of the dedication of the Michigan Supreme Court Historical Society, our state can proudly boast of having one of the most impressive and comprehensive portrait collections of any state supreme court in America.

My historical quest to find the real Judge Woodward began with Justice BRENNAN's eloquent word portrait and ended in a place where Federalist architecture is exceptionally well-preserved, and that is in Charleston, South Carolina. As an amateur historian, I embarked on several failed attempts at finagling myself into some of the great historic homes in Charleston. In one case, I had to call upon the aid of Angela Bergman, our

esteemed executive director, who helped me gain access to the Charleston Museum collections, only to be disappointed when the period wasn't exactly right and the conditions of my using the location where too limiting. In other words, in order to get what I needed, I would have to actually handle some very precious antiques with my sticky, oily, paint-covered fingers, and this was, you know, not to be the case.

So for weeks I visited museums and law firms, fraternities, schools, plantation homes, restaurants, inns, antique stores, tour homes—if anyone needs a recommendation of where to go in Charleston, just let me know—until I finally stumbled upon the perfect setting. The Thomas Elfe House on Queens Street in the main peninsula of Charleston, built around 1770, was one of the oldest homes in Charleston. And the proprietor, Bill Ward, a prominent collector of antiques from the period, was more than happy to assist me in putting together an authentic setting, the authentic setting seen before you. All I had to do was wash my hands!

Meanwhile, I had to find the right person to play Woodward, and after staging several impromptu lineups in grocery stores and at parties, several women suggested their ex-husbands as perfect for the part. Eventually, I found my man. Dr. Patrick O'Neill, is the director of the weight management center of MUSC [Medical University of South Carolina], someone thin enough to fill the shoes. He happened to be the same height and build as Woodward. He is also a famous career bachelor like Woodward, but, most importantly, he was willing to play dress up with me. He towered over the desk and was perfect for the part, all decked out in a period costume provided by Bruce Bryson of Theatrics Unlimited.

I took digital photos, paying careful attention to the lighting. I wanted to get the glow of the candlelight and the oil lamps used at the time, the sort of sootiness of that period. The rooms from that period were also usually cramped, and the front room of the Elfe House was no exception. I put my unwitting model through the ringer, experimenting with every conceivable pose I could imagine Woodward ever might strike, and ended up with this simple, confident pose which I believe evokes Woodward's complexity and stature. Though he was known for his poor posture, I imagine he would have stood tall for his own portrait.

Alone in my studio, then, I faced this most intriguing challenge of how to combine my historically accurate reference photos with an unflattering caricature, which you'll see later, a political cartoon really, that happened to be the only known visual depiction of Judge Woodward. If it please the Court, I believe my charge as a portrait painter is to find the greatness in my subjects, not advertise their flaws. On the other hand, I believe there is power and grace in the naked truth, which should always be the goal of any artist. So, then, what was I to do in this case with the limited visual information available? How could I get to the truth hiding beneath this lampoon? The written descriptions, though detailed and evocative, were no less critical. So I set out to capture the slight scowl of the original drawing and bring a warmer, more naturalistic depiction of this enigmatic figure, adjusting for some of the original artist's obvious sarcasm and, how shall we say, lack of technique. I gave him a more determined gaze and slightly less protuberant nose. In the case of my depiction of Augustus Woodward, I hope any artistic purist will forgive me for erring on the side of his strength and nobility.

The painting features a number of significant artifacts that I'd like to touch on. All the furnishings and props included in the painting are authentic antiques from the Colonial and Federalist periods, or what they call "Adamsesque" in the South. The background is a built-in cabinet and mantel made by Thomas Elfe himself, a contemporary of Chippendale, and his cabinetry and furniture are considered some of the finest of the period. A desk from 1790 anchors the composition and sets the stage for a number of historically significant features. Piles of books, a period quill, a pewter ink fountain, indicia, wax, and sander helped to create a sense of his characteristic clutter. A notebook, which sits at his fingertips there, he always carried with him. An authentic wine bottle and glass suggest the less formal judicial proceedings of the day. And the fire spills (used to light fires, candles, and things like that) in a container on top of the desk, right below that lamp, represent the fire of Detroit. Woodward's solution to the Detroit fire of 1805, his controversial spoked-street plan for Detroit, is framed above the desk. And, of course, the lamp of knowledge, resting atop blue and gold books on the mantle over Woodward's left shoulder, is the symbol taken from the first seal of the University of Michigan, which he cofounded in 1817.

It is my sincere hope that this portrait helps connect us with our past as it carries forward the story of this iconic, enigmatic Augustus Woodward, whose powerful contribution to our state, our country, our destiny, secured his place in our history. I want to personally thank and congratulate the Court and the society and all of you who helped bring these portraits into being. It is because of your generosity that our history lives on to inform us in the future. Thank you very much.

CHIEF JUSTICE TAYLOR: Thank you, Mr. Maniscalco for another fine portrait, and thank you Mr. Chardavoyne for that fascinating glimpse into Michigan's territorial history. I never see one of the many justices' portraits that adorn the Hall of Justice without remembering how close we were to losing many of them and saying a silent thank you to Justice DOROTHY COMSTOCK RILEY, of happy memory, and to you, Wally, for preserving these artworks through the efforts of the Michigan Supreme Court Historical Society.

When I was asked to close today's ceremony, it was suggested that I contrast the territorial court of 1805 with the Supreme Court of today. There are many obvious differences, of course. Judges Woodward, Bates, and Griffin took office a little more than 20 years after the end of the Revolutionary War in a turbulent territory of a brand new nation. That same fledgling country is now the dominant power in the world. The Michigan territorial court imported much of their precedent from English common law and the decisions of New England courts. My colleagues, while we still on occasion look to such sources, have inherited generations of Michigan-crafted precedent and are the beneficiaries of this collected learning. Also, unlike Augustus Woodward, my fellow justices and I have never arrived in town on the heels of a major fire and been charged with helping to rebuild the city. Moreover, we do not, as the first Michigan judges apparently did, serve as both jurists and legislators, a fact that surely is the source of immense relief to our citizens. We today serve under a state constitution; they did not. For better or worse, this Court does not hold proceedings in taverns, and I think it's safe to say that it has been years since any of my colleagues or our predecessors have been challenged to a duel. I'm not counting teenage children here.

I could go on, but it seems to me the more challenging and important question is whether the territorial court of 1805 has any lessons for us today. In that regard, I'd like to draw your attention to a guest editorial that appeared in the *Wall Street Journal* last week. It's entitled, "The Finest Court in the Nation." This is a title that will, of course, live in the annals of understatement, and I'm sure it caused jaws to drop from Escanaba to Niles. This description may come as a complete surprise, even nightmare, to many of you and even to some of the justices here today, but this piece is actually about this Court. It was written by one of our former commissioners, which some would say explains why the piece is so laudatory. That aside, I think there is one line in particular that captures both this Court's work and its heritage from Justice Woodward.

The writer, Patrick Wright, states that "[u]nder public scrutiny, the Michigan Supreme Court has developed a body of generally consistent legal interpretations of key relationships between the judiciary, the legislature and Michigan citizens." I think that line nicely sums up the charge shared by this Court and the territorial court of 1805. It is a challenging enough task even now to sort out the relationships among branches of government, with the risk always present when doing so that to incorrectly handle it may disrupt the balance of powers of this most successful form of government yet devised by man. This balancing could be seen recently in *Wayne Co v Hathcock* [471 Mich 445 (2004)], where it was our duty to articulate the boundary between the private ownership of land and when, if ever, the government can brush aside those rights for the benefit of the community. How much more challenging must it have been 200 years ago to define these and other thorny governmental relationships in a country, and indeed on the frontier of that country, initiating a

yet untried federal system. Further, the Constitution itself had been in place for a little over a decade, and the type of government it envisioned was largely unprecedented. So it isn't surprising, for instance, to see Judge Woodward, while struggling mightily with such seemingly pedestrian issues as whether the common law allows service of process on Sundays, to also focus on constitutional matters. We who are the successors of Augustus Woodward, and of all the other justices who followed him, are properly humbled by what they did. As the first in the long line of jurists of this Court, his is properly understood as a life worthy of study. It is unmistakable that Augustus Woodward antagonized many of his contemporaries, not least by his flamboyant and sometimes prickly personality. It is uncontroverted that he became the focus of much hostility because in Michigan he was the de facto sole political decision maker. With Judge Griffin's support, Judge Woodward enjoyed a majority on the three-judge court and no worse than a tie on the legislative board. We are told that nothing happened without his approval and that he was not inclined to compromise. This is the sort of power that can make any person, even one with charm school manners, controversial.

Ultimately Woodward's unpopularity and great power led to his being shunted off by President Madison to the territorial court of Florida. In doing so, it should be noted, he became the first of many seniors in Michigan to succumb to the attractions of Florida. In any event, his actions also prompted a successful push for a legislative council that would be independent of the judiciary so as to not have a supreme court whose judges used their dual roles to pass laws, especially when those laws ensured better judicial working conditions as well as a lighter workload. Perhaps the memory of that first court's blurring of the line between legis-

lating and judging and the resulting issues of power prompted the great care that Justice COOLEY and the other Big Four Justices brought to the task of delineating relationships among the three branches. These writings are among the most thoughtful in nineteenth-century jurisprudence and still enlighten today. They are part of this Court's proud patrimony, and maybe we owe that in no small part to this interesting man with grandiose notions and an almost legendary uncomfortable personality. In conclusion then, there is no escaping what Woodward was. He was cantankerous, stubborn, and, yes, an oddball, and he made his share of mistakes, as he was bound to do. But his mistakes and shortcomings are also part of his legacy to us. It is our duty and those who come after us to consider well efforts such as his and properly integrate them into our understanding of this state's history and jurisprudence.

Two announcements before we adjourn. Everyone is invited to join the justices and members of the historical society for the reception outside, where I understand there is a birthday cake, which we can all pray does not have 200 candles. Also, the learning center on the first floor is open to anyone who wants to take a tour. The historical society has set up a display commemorating the 200th anniversary of the territorial court, and I encourage you to see it before you go. Thank you, very much. Gentlemen, again thank you. We are adjourned.

SUPREME COURT CASES

MAYBERRY v GENERAL ORTHOPEDICS, PC

Docket No. 126136. Decided October 4, 2005. On application by the plaintiffs for leave to appeal, the Supreme Court, after hearing oral argument on whether to grant the application or take other peremptory action. In an opinion per curiam, reversed the judgment of the Court of Appeals and remanded the matter to the trial court for further proceedings.

Keith W. and Joanna Mayberry brought an action in the Oakland Circuit Court against General Orthopedics, P.C., and William H. Kohen, M.D., alleging medical malpractice. The defendants moved for summary disposition, alleging that the complaint was filed after the period of limitations expired. The plaintiffs responded by alleging that the 182-day tolling period authorized by MCL 600.5856(d) extended the limitations period and therefore their complaint was timely. The trial court, John J. McDonald, J., granted the defendants' motion on the basis that § 5856(d) did not apply in this matter because only the plaintiffs' first notice of intent to file this malpractice action, which was filed sufficiently early in the limitations period so that no tolling was initiated under § 5856(d), was eligible to toll the limitations period under § 5856(d) and therefore the second notice of intent to sue filed by the plaintiffs with less than 182 days remaining in the limitations period could not initiate the tolling provision of § 5856(d). The Court of Appeals, SCHUETTE, P.J., and METER and OWENS, JJ., in an unpublished memorandum opinion, issued February 17, 2004 (Docket No. 244162), affirmed on the basis that MCL 600.2912b(6) prevented the "tacking" of additional or successive tolling periods, even if the first notice of intent to sue did not initiate tolling under § 5856(d). The plaintiff sought leave to appeal in the Supreme Court, which ordered oral argument on the application. 471 Mich 931 (2004).

In a unanimous opinion per curiam, the Supreme Court *held*:

The prohibition in § 2912b(6) against tacking only precludes a plaintiff from enjoying the benefit of multiple tolling periods. It does not, as was held by the Court of Appeals in *Ashby v Byrnes*, 251 Mich App 537 (2002), and relied on by the Court of Appeals in this case, restrict the application of the tolling provision in § 5856(d) to the initial notice of intent to sue if the tolling provision of § 5856(d) did not apply to the initial notice of intent to

sue. The part of the opinion in *Ashby* that is inconsistent with the Supreme Court holding in this matter must be overruled. As a result of the application of the tolling provision with regard to the second notice of intent to sue, the claims against the defendants were filed within the limitations period. The plaintiffs did not seek to tack or add successive tolling periods; therefore, § 2912b(6) poses no bar to the plaintiffs' ability to invoke tolling under § 5856(d). The judgment of the Court of Appeals must be reversed and the matter must be remanded to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

LIMITATION OF ACTIONS — MEDICAL MALPRACTICE — NOTICES OF INTENT TO SUE.

The prohibition in MCL 600.2912b(6) against the "tacking" of additional or successive 182-day tolling periods prevents a plaintiff in a medical malpractice action from enjoying the benefit of multiple tolling periods; the prohibition in § 2912b(6) does not prevent a plaintiff, who filed a first notice of intent to sue sufficiently early in the limitations period so that no tolling was initiated under MCL 600.5856(d), from sending a second notice of intent to sue with fewer than 182 days remaining in the limitations period and relying on that second notice to initiate tolling under § 5856(d).

Joseph J. Ceglarek, *II*, and *Joseph L. Konheim* for the plaintiffs.

James M. Pidgeon, P.C. (by *James M. Pidgeon*), for the defendants.

PER CURIAM. We are presented with the question whether a second notice of intent to sue for medical malpractice tolls the period of limitations when an earlier notice was sent with more than 182 days remaining in the limitations period. We hold that it does. In *Omelenchuk v City of Warren*,[1] we held that a notice of intent to sue for medical malpractice, filed with fewer than 182 days remaining in the limitations period,

[1] 461 Mich 567, 574-575; 609 NW2d 177 (2000), overruled in part on other grounds *Waltz v Wyse*, 469 Mich 642, 655; 677 NW2d 813 (2004).

initiates the 182-day tolling period of MCL 600.5856(d).[2] This case takes the next step, asking whether a plaintiff, who filed a notice of intent to sue sufficiently early in the limitations period that no tolling began, can send a second notice of intent to sue to a defendant with fewer than 182 days remaining in the limitations period and rely on that second notice to initiate tolling under § 5856(d). Or does this violate the prohibition in MCL 600.2912b(6) against "the tacking or addition of successive 182-day periods" after initial notice is given to a defendant?

We conclude that a second notice of intent to sue, sent with fewer than 182 days remaining in the limitations period, can initiate tolling under § 5856(d) as long as the first notice of intent to sue did not initiate such tolling. Section 2912b(6) prohibits a plaintiff from giving presuit notice to a defendant multiple times in order to initiate multiple tolling periods that repeatedly extend the period of limitations. This did not occur here. Instead, plaintiffs filed only one notice of intent to sue that initiated a tolling period. Because plaintiffs filed their claims against both defendants within the limitations period, as tolled by § 5856(d), we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Plaintiffs claim that Dr. William H. Kohen negligently operated on Keith Mayberry's wrist on November 22, 1999. Among other things, plaintiffs allege that Dr. Kohen negligently cut a nerve, resulting in Keith

[2] We note that recent amendments of § 5856 caused § 5856(d) to be redesignated as § 5856(c). For the sake of clarity, in this opinion, we refer to the statute in effect at the time of the lower court proceedings.

Mayberry's losing at least some of the use of his wrist. The parties agree that plaintiffs' malpractice claim accrued on November 22, 1999. Accordingly, in the absence of any tolling, the two-year period of limitations applicable to medical malpractice actions, MCL 600.5805(6), would have expired on November 22, 2001.

On June 21, 2000, plaintiffs mailed to Dr. Kohen a notice of intent to sue. This notice is required of a plaintiff who intends to file a medical malpractice lawsuit. MCL 600.2912b. A plaintiff generally may not file a medical malpractice complaint any earlier than 182 days after this notice has been given, although a complaint may be filed after 154 days if the defendant does not respond to the notice or even sooner if the defendant gives notice that it will not settle. MCL 600.2912b(1),(8), and (9).

Plaintiffs mailed a second notice of intent to sue on October 12, 2001—approximately one month before the limitations period expired. This notice again named Dr. Kohen, and set forth additional allegations relating to his treatment of Keith Mayberry. It also added a new defendant, Dr. Kohen's professional corporation, General Orthopedics, P.C. Plaintiffs then filed their complaint against both defendants on March 19, 2002, 158 days after the second notice of intent to sue was mailed.[3]

Defendants filed a motion for summary disposition, arguing that plaintiffs' complaint was filed after the limitations period expired. Plaintiffs responded that the 182-day tolling period authorized by § 5856(d) extended

[3] Plaintiffs asserted in the trial court that they were obligated to wait only 154 days before bringing suit, as opposed to 182 days, because defendants failed to respond to the notice of intent to sue. See MCL 600.2912d(8). Defendants have not challenged plaintiffs' assertion in this Court, and we do not address this issue, which was not raised on appeal.

the limitations period, and that their complaint, filed on March 19, 2002, was timely.[4] The trial court determined that § 5856(d) did not apply in this case because only plaintiffs' first notice of intent to sue was eligible to toll the limitations period, and it granted defendants' motion. The Court of Appeals affirmed.[5]

Plaintiffs seek leave to appeal in this Court. We ordered oral argument on the application, 471 Mich 931 (2004), and we now reverse.

II. STANDARD OF REVIEW

We review de novo a trial court's grant of summary disposition based on a statute of limitations. *Waltz v Wyse,* 469 Mich 642, 647-648; 677 NW2d 813 (2004). Questions of statutory interpretation are also reviewed de novo. *Burton v Reed City Hosp Corp*, 471 Mich 745, 751; 691 NW2d 424 (2005).

III. DISCUSSION

As we have previously explained, if the mandatory notice of intent to sue is given in such a manner that the period of limitations would expire during the 182-day notice period, § 5856(d) operates to toll the limitations period for 182 days from the date notice is given. *Omelenchuk*, *supra* at 575.[6]

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[4] If the limitations period would expire during the notice period, the period is tolled for the number of days in the notice period. MCL 600.5856(d); *Omelenchuk*, *supra* at 574-575. By our count, if the limitations period was tolled for 182 days, plaintiffs had until May 23, 2002, to file their complaint.

[5] Unpublished memorandum opinion of the Court of Appeals, issued February 17, 2004 (Docket No. 244162).

[6] MCL 600.5856 provided, in pertinent part:

> The statutes of limitations or repose are tolled:

But we have not addressed how a plaintiff's decision to send a party multiple notices of intent to sue affects tolling under § 5856(d). When multiple notices are sent to a party, the otherwise straightforward application of § 5856(d) may be affected by MCL 600.2912b(6), which states:

> After the initial notice is given to a health professional or health facility under this section, the tacking or addition of successive 182-day periods is not allowed, irrespective of how many additional notices are subsequently filed for that claim and irrespective of the number of health professionals or health facilities notified.

The Court of Appeals considered the interplay between § 5856(d) and § 2912b(6) in *Ashby v Byrnes*, 251 Mich App 537, 544-545; 651 NW2d 922 (2002), a decision relied on by the Court of Appeals in the instant case. In *Ashby*, as here, the plaintiffs mailed a second notice of intent to sue within the last 182 days of the limitations period. The plaintiffs argued that this second notice of intent to sue initiated tolling under § 5856(d), and that their complaint was timely filed. The Court of Appeals disagreed, concluding that "only 'the initial notice' results in a tolling of the limitation period 'irrespective of how many additional notices are subsequently filed.' " *Ashby, supra* at 545. This is true, the Court concluded, even if the first notice of intent to sue did not initiate tolling under § 5856(d) because § 2912b(6) "nowhere suggests that this limiting lan-

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* * *

> (d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

guage applies only when the first notice filing tolled the period of limitation." *Ashby, supra* at 545.

We respectfully disagree. Section 2912b(6) prohibits "the tacking or addition of successive 182-day periods . . . ." When considering the meaning of this language, *Ashby* failed to recognize that "tacking" is a legal term of art, and that § 2912b(6) must be interpreted in a manner that is consistent with the acquired meaning of the word "tacking." See MCL 8.3a ("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"), and *People v Law,* 459 Mich 419, 425 n 8; 591 NW2d 20 (1999). Indeed, tacking is a familiar concept in cases involving statutes of limitations. It generally refers to adding time periods together to affect the running of a limitations period.[7]

With this definition in mind, we find that the reference to "tacking" in § 2912b(6) is to the tacking of limitations periods that have actually been initiated pursuant to § 5856(d); the Legislature's concern about tacking successive 182-day periods is meaningful only to the extent that such an action affects the expiration of the limitations period. As a result, the prohibition in § 2912b(6) against tacking only precludes a plaintiff from enjoying the benefit of multiple tolling periods. It does not, as *Ashby* held, restrict the application of the tolling provision in § 5856(d) to the initial notice of intent to sue if the tolling provision in § 5856(d) did not

[7] See Black's Law Dictionary (8th ed), p 1492, noting that tacking can be a reference to the joining of consecutive periods of possession to satisfy a statutory limitations period for adverse possession; see also Black's Law Dictionary (6th ed), p 1452, noting that tacking can also be used "to avoid the bar of a statute of limitations."

even apply to the initial notice of intent to sue.[8] Stated otherwise, if the initial notice did not toll the statute of limitations period, there would be no problem of "successive 182-day periods" that § 2912b(6) prohibits.

Applying this analysis to the undisputed facts shows that plaintiffs' claims against both General Orthopedics and Dr. Kohen were filed within the limitations period. Plaintiffs gave only one notice to General Orthopedics, on October 12, 2001, 42 days before the period of limitations expired. Because only one notice was given, the prohibition in § 2912b(6) against "the tacking or addition of successive 182-day periods" does not apply. The timeliness of this claim depends only on whether tolling under § 5856(d) was initiated. And, as *Omelenchuk* makes clear, this initial notice initiated tolling under § 5856(d) because it was filed within the last 182 days of the limitations period. As a result, the period of limitations for plaintiffs' claim against General Orthopedics was tolled for 182 days, or until April 12, 2002, and then ran for 42 more days, expiring on May 23, 2002. Plaintiffs' March 19, 2002, complaint, presenting their claim against General Orthopedics, was filed within the limitations period.

Plaintiffs sent two notices of intent to sue to Dr. Kohen, but did not sue him within two years of the alleged malpractice; therefore, for their claim against Dr. Kohen to be timely, plaintiffs must show that one of the two notices tolled the limitations period. The first notice was sent to Dr. Kohen only seven months into the two-year limitations period. Because the presuit notice period begun by this notice of intent to sue expired before the period of limitations expired, the tolling

[8] Accordingly, we overrule that part of *Ashby* that is inconsistent with this opinion.

provision of § 5856(d) did not come into play.[9] As a result, the timeliness of plaintiffs' claim against Dr. Kohen depends on whether their second notice initiated tolling under § 5856(d).

The Court of Appeals considered plaintiffs' second notice of intent to sue, and concluded that it did not initiate tolling under § 5856(d) because § 2912b(6) prevented plaintiffs from "obtaining the benefit of *another* 182-day tolling period based on the filing of multiple notices of intent." (Emphasis added.)

We agree with this description of the scope of § 2912b(6), but not with its application to these facts. As stated earlier, plaintiffs' first notice did not initiate tolling under § 5856(d). It is not accurate, therefore, to state that plaintiffs sought to obtain the benefit of "another" tolling period by sending Dr. Kohen a second notice of intent to sue. Rather, plaintiffs' second notice, sent with fewer than 182 days remaining in the limitations period, was the first one eligible to initiate tolling under § 5856(d). Because plaintiffs only invoked the tolling provision of § 5856 once, and filed their complaint before the period of limitations expired, their complaint was timely. In the language of § 2912b(6), plaintiffs are not "tacking . . . successive 182-day periods" to make their complaint timely. Nothing in § 2912b(6) prevents plaintiffs from deriving the benefit of a single tolling period of 182 days as a result of a

[9] As we noted in *Omelenchuk, supra* at 574:

> [I]f the interval when a potential plaintiff is not allowed to sue ends before the limitation period ends (i.e., if notice is given more than one hundred eighty-two days before the end of the limitation period), then MCL 600.5856(d); MSA 27A.5856(d) is of no consequence. In that circumstance, the limitation period is unaffected by the fact that, during that period, there occurs an interval when a potential plaintiff cannot file suit.

timely given notice of intent to sue, as long as the notice otherwise complies with the requirements of § 2912b.

IV. CONCLUSION

Section 2912b(6) prohibits the tacking of successive notice periods to create multiple tolling periods. In this case, § 2912b(6) poses no bar to plaintiffs' ability to invoke tolling under § 5856(d) because plaintiffs did not seek to tack or add successive 182-day periods in order to reap the benefits of multiple tolling periods. Because plaintiffs filed their claims against both Dr. Kohen and General Orthopedics within the limitations period, as tolled by § 5856(d), we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

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

COUNTY ROAD ASSOCIATION OF MICHIGAN v GOVERNOR

Docket No. 125665. Decided November 8, 2005. On application by the intervening plaintiffs for leave to appeal, the Supreme Court granted oral argument on whether the application should be granted, affirmed the judgment of the Court of Appeals and remanded the case to the circuit court for entry of a judgment in favor of the defendants on the merits. In all other respects, leave to appeal was denied.

The County Road Association of Michigan and the Chippewa County Road Commission brought an action in the Ingham Circuit Court, William E. Collette, J., against the Governor and others, challenging the constitutionality of Executive Order No. 2001-9, which for the fiscal year ending September 30, 2002, reduced the Legislature's allocation of general sales taxes to the Comprehensive Transportation Fund (CTF) and transferred the amount reduced to the state's general fund. The Michigan Public Transit Association and others intervened as plaintiffs and successfully moved for a preliminary injunction preventing the transfer of funds on the basis that the general sales tax revenues allocated to the CTF are constitutionally dedicated funds within the meaning of Const 1963, art 9, § 9, and therefore immune to the Governor's power to balance the budget under Const 1963, art 5, § 20. The defendants appealed by leave granted and the Court of Appeals, TALBOT, P.J., and OWENS and FORT HOOD, JJ., vacated the preliminary injunction and remanded the matter to the circuit court for entry of a judgment in favor of the defendants on the merits. 260 Mich App 299 (2004). The intervening plaintiffs sought leave to appeal in the Supreme Court, which ordered oral argument on the application. 471 Mich 887 (2004).

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

The Court of Appeals correctly held that the revenues at issue are not constitutionally dedicated and that the Governor has the authority to reduce the Legislature's allocation of general sales tax revenues to the CTF in the executive order. The Court of Appeals erred, however, in finding that art 9, § 9 is ambiguous. The provision limits the amount of general sales taxes that the Legislature can allocate to comprehensive transportation and places a ceiling on the amount of general sales tax revenues that can be

used exclusively for comprehensive transportation purposes. The provision does not dedicate any specific amount of general sales taxes to be used for comprehensive transportation purposes. The general sales tax revenues described in art 9, § 9 are not constitutionally dedicated funds. The judgment of the Court of Appeals must be affirmed and the matter must be remanded to the circuit court for entry of a judgment in favor of the defendants on the merits.

Justice CAVANAGH concurred in the result only.

Justice WEAVER, concurring, agreed with the result of the opinion per curiam on the bases that the revenues at issue are not constitutionally dedicated, the Governor had the authority to reduce the Legislature's allocation of general sales tax revenues to the Comprehensive Transportation Fund, and Const 1963, art 9, § 9 is not ambiguous. Justice WEAVER wrote separately so as not to join some of the principles of constitutional interpretation articulated and applied in the opinion per curiam, including the section regarding the standard of review. Although the Court of Appeals erred in concluding that art 9, § 9 is ambiguous, the Court of Appeals should not be excessively criticized for considering the history and purpose of the amendment.

Justice KELLY, concurring in the result only, stated that, for the reasons stated in the Court of Appeals opinion, general sales tax revenues are not constitutionally dedicated funds and the Governor has the authority to reduce the Legislature's allocation of general sales tax revenues to the Comprehensive Transportation Fund. The Court of Appeals correctly held that Const 1963, art 9, § 9 is ambiguous because it reasonably has several possible meanings or interpretations. The Court of Appeals did not err in looking outside the text to the history and purpose of the section to determine which of the several possible meanings of the text was intended. It is proper for a court to consider the history and purpose of an ambiguous constitutional provision it is interpreting.

Affirmed and remanded to the circuit court.

CONSTITUTIONAL LAW — TAXATION — GENERAL SALES TAX — MOTOR VEHICLES — COMPREHENSIVE TRANSPORTATION.

Const 1963, art 9, § 9 is unambiguous and it does not dedicate any specific amount of general sales tax revenues to be used for comprehensive transportation purposes; the general sales tax revenues described in art 9, § 9 are not constitutionally dedicated funds and may be diverted to the state general fund by executive order of the Governor (Const 1963, art 5, § 20).

Fraser Trebilcock Davis & Dunlap, P.C. (by *Michael C. Levine* and *Ryan K. Kauffman)*, for the plaintiffs.

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich* and *Angela M. Brown*) for the intervening plaintiffs.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Patrick F. Isom*, Assistant Attorney General, for the defendants.

Amici Curiae:

Loomis, Ewert, Parsley, Davis & Gotting, P.C. (by *David M. Lick, Jeffrey W. Bracken,* and *Ronald W. Bloomberg*), for Michigan Infrastructure and Transportation Association, Inc.

Plunkett & Cooney, P.C. (by *Mary Massaron Ross* and *Christine D. Oldani*), for Michigan Municipal League.

PER CURIAM. This case involves the authority of the Governor, exercised in Executive Order No. 2001-9, to reduce the Legislature's allocation of general sales taxes to the Comprehensive Transportation Fund (CTF) by $12,750,000 for the fiscal year ending September 30, 2002, and to transfer those revenues to the state's general fund. Appellants claim that the general sales tax revenues allocated to the CTF are "constitutionally dedicated" funds within the meaning of Const 1963, art 9, § 9, and therefore immune to the Governor's power to balance the budget, Const 1963, art 5, § 20.

The Court of Appeals concluded that art 9, § 9, which it found to be ambiguous, does not dedicate any portion of the general sales tax revenues for comprehensive transportation purposes. 260 Mich App 299; 677 NW2d

340 (2004). We agree with the Court of Appeals that the revenues at issue are not constitutionally dedicated and that the Governor had the authority to reduce the Legislature's allocation of general sales tax revenues to the CTF in EO 2001-9. We disagree, however, that art 9, § 9 is ambiguous. In affirming the Court of Appeals, we rely on the plain meaning of the constitutional provision.

I. FACTS AND PROCEDURAL HISTORY

To alleviate a budget shortfall for the fiscal year ending September 30, 2002, the Governor implemented EO 2001-9. The order transferred $12,750,000 in general sales tax revenues from the CTF to the general fund.

Plaintiffs sought and obtained a preliminary injunction from the Ingham Circuit Court to enjoin the transfer. Plaintiffs maintained that the general sales tax revenues allocated to the CTF were "constitutionally dedicated" within the meaning of Const 1963, art 9, § 9 and immune to the Governor's power to reduce the expenditure and balance the budget under Const 1963, art 5, § 20.

In a published decision, the Court of Appeals reversed. 260 Mich App 299; 677 NW2d 340 (2004). The Court of Appeals found the language of the constitutional provision ambiguous, and examined the historical development of art 9, § 9 in determining whether the allocation to the CTF was "constitutionally dedicated." We granted oral argument on the application. 471 Mich 887 (2004).

II. STANDARD OF REVIEW

Constitutional issues are reviewed de novo. *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

Our first inquiry, when interpreting constitutional provisions, "is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Id.* at 468. This is accomplished by "applying each term's plain meaning at the time of ratification." *Id.* at 468-469. See also *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 375; 663 NW2d 436 (2003).

III. ANALYSIS

The Governor's authority to reduce state expenditures is found in art 5, § 20, which states:

> No appropriation shall be a mandate to spend. The governor, with the approval of the appropriating committees of the house and senate, shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based. Reductions in expenditures shall be made in accordance with procedures prescribed by law. *The governor may not reduce expenditures of the legislative and judicial branches or from funds constitutionally dedicated for specific purposes*. [Emphasis added.]

The disputed issue in this case is whether the general sales tax revenues that the Legislature allocated to the CTF are "constitutionally dedicated for specific purposes," and therefore immune from the Governor's authority to reduce expenditures. The answer to this question is found in art 9, § 9, which states, in relevant part:

> All specific taxes, *except general sales and use taxes and regulatory fees*, imposed directly or indirectly on fuels sold or used to propel motor vehicles upon highways and to propel aircraft and on registered motor vehicles and air-

> craft shall, after the payment of necessary collection expenses, be used exclusively for transportation purposes as set forth in this section.
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> * * *
>
> Amount used for transportation purposes. The balance, if any, of the specific taxes, *except general sales and use taxes and regulatory fees*, imposed directly or indirectly on fuels sold or used to propel motor vehicles upon highways and on registered motor vehicles, after the payment of necessary collection expenses; . . . and *not more than 25 percent of the general sales taxes*, imposed directly or indirectly on fuel sold to propel motor vehicles upon highways, on the sale of motor vehicles, and on the sale of the parts and accessories of motor vehicles . . . *shall be used exclusively for the transportation purposes of comprehensive transportation purposes as defined by law*. [Emphasis added.] [1]

While construing the wording of art 9, § 9 might require effort, the provision's meaning is clear. The provision limits the amount of general sales taxes that the Legislature can allocate to comprehensive transportation to "not more than 25 percent of the general sales taxes . . . ." In doing so, it places a ceiling on the amount of general sales tax revenues that can be used "exclusively for . . . comprehensive transportation purposes . . . ," but does not dedicate any specific amount of general sales taxes to be used for comprehensive transportation purposes. The only conclusion that can be drawn from art 9, § 9 is that the general sales tax revenues described in that provision are not constitutionally dedicated funds.

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[1] The manner in which any funds allocated under this provision to "comprehensive transportation purposes" will be distributed is set forth in the General Sales Tax Act, MCL 205.51 *et seq*. For fiscal year 2001-2002, MCL 205.75(4) apportioned only 27.9 percent of the 25 percent of revenues to the CTF. The balance of the general sales tax revenues described in art 9, § 9 was directed to the state general fund.

When construing art 9, § 9, the Court of Appeals mistakenly found that the constitutional provision was subject to alternative interpretations, and then unnecessarily considered its history and purpose and the circumstances under which it was written and later amended. See 260 Mich App 307-311. As described above, the Court should have looked no further than the plain language of art 9, § 9 to determine that the general sales tax revenues allocated by the Legislature to the CTF were not constitutionally dedicated funds. Our obligation is to give the words of our Constitution a reasonable interpretation consistent with the plain meaning understood by the ratifiers. *Hathcock*, 471 Mich at 468-469. Text that may require reasonable effort to parse is not for that reason ambiguous.

IV

In sum, we conclude that art 9, § 9 is unambiguous, and we agree with the Court of Appeals that, with respect to the reduction of the general sales tax revenues allocated to the CTF by EO 2001-9, the executive order was a lawful exercise of the Governor's constitutional authority under art 5, § 20.

We therefore affirm the Court of Appeals resolution of this issue in favor of the defendants. In all other respects, leave to appeal is denied because we are not persuaded that the remaining questions should be reviewed by this Court. This case is remanded to the trial court for entry of a judgment in favor of defendants on the merits.

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

CAVANAGH, J., concurred in the result only.

WEAVER, J. (*concurring*). I concur in the result of the opinion per curiam because I agree that the revenues at issue are not constitutionally dedicated and that the Governor had the authority to reduce the Legislature's allocation of general sales tax revenues to the Comprehensive Transportation Fund. As noted by the majority opinion, Const 1963, art 9, § 9 places a ceiling on the amount of general sales tax revenues that can be used for comprehensive transportation purposes, but it does not dedicate any specific amount of general sales tax revenues to be used for comprehensive transportation purposes. I also agree with the majority that art 9, § 9 is not ambiguous.

I write separately because I cannot join some of the principles of constitutional interpretation, as they are articulated and applied in the opinion per curiam, including the standard of review section of the opinion, which relies on cases in which I concurred in part and dissented in part. See *Wayne Co v Hathcock*, 471 Mich 445, 485; 684 NW2d 765 (2004) (WEAVER, J., concurring in part and dissenting in part), and *Silver Creek Drain Dist v Extrusions Div, Inc,* 468 Mich 367, 382; 663 NW2d 436 (2003) (WEAVER, J., concurring in part and dissenting in part). In each of these cases, I disagreed with the method by which the majority attempted to carry out our mandate that we interpret a constitutional provision according to the "common understanding" that the people would give it.[1]

[1] As described by Justice COOLEY, the rule of "common understanding" means:

> "A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.* 'For

Further, although I agree that the Court of Appeals was wrong to conclude that art 9, § 9 is ambiguous, I would not be unduly critical of the Court of Appeals for considering the history and purpose of the amendment. *Ante* at 17. A court may "also consider the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished by it" when the common understanding of the provision is questioned. *Wayne Co, supra* at 487 (citing *Traverse City School Dist, supra* at 405). Moreover, when interpreting a constitution, "the technical rules of statutory construction do not apply." *Traverse City School Dist, supra* at 405.

For these reasons, I concur in the result of the opinion per curiam.

KELLY, J. (*concurring in the result only*). I concur with the majority that general sales tax revenues are not constitutionally dedicated funds for the reasons stated in the Court of Appeals opinion. The Governor has the authority to reduce the Legislature's allocation of general sales tax revenues to the Comprehensive Transportation Fund.

I write separately because, unlike the majority on this Court, I agree with the Court of Appeals that Const 1963, art 9, § 9 is ambiguous. It is ambiguous because it

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as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people,* and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding,* and ratified the instrument in the belief that that was the sense designed to be conveyed.' " [*Traverse City School Dist v Attorney General,* 384 Mich 390, 405; 185 NW2d 9 (1971), quoting Cooley's Const Lim 81 (emphasis in *Traverse City School Dist*).]

reasonably has "several possible meanings or interpretations."[1]

The Court of Appeals panel accurately explains the nature of the ambiguity:

> [The section] unequivocally exempts *all* general sales taxes from the restrictions imposed on specific taxes but then simultaneously subjects *up to twenty-five percent* of general sales taxes to the very same restrictions. [260 Mich App 299, 306; 677 NW2d 340 (2004) (emphasis in original).]

When interpreting an ambiguous constitutional provision, it is proper for a court to consider its history and purpose. The Court of Appeals did not err when it looked outside the text to the section's history and purpose to determine which of the text's several possible meanings was intended. The majority's criticism of this approach is misplaced.

For these reasons, I concur only in the result of the majority opinion.

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[1] This is the first definition of "ambiguous" found in the *Random House Webster's College Dictionary* (2001).

MITAN v CAMPBELL

Docket No. 126451. Decided December 6, 2005. On application by the defendant for leave to appeal, the Supreme Court, in lieu of granting leave to appeal, ordered oral argument on whether to grant the application. Following oral argument, the Supreme Court entered an opinion per curiam reversing the judgment of the Court of Appeals and reinstating the circuit court's judgment of summary disposition in favor of the defendant.

Kenneth Mitan brought an action in the Ingham Circuit Court against Maura Campbell, the public relations director of the Department of Consumer and Industry Services, alleging defamation as a result of a statement made by the defendant in an interview with a television reporter regarding employment claims made by the plaintiff's employees. The action was filed more than one year after the statement was made but within a year from the date it was republished by the television station. The circuit court, William E. Collette, J., granted summary disposition in favor of the defendant on the basis that the one-year limitations period began to run from the date that the statement was made to the reporter and, therefore, the action was barred by the statute of limitations. The Court of Appeals, JANSEN, P.J., and MARKEY and GAGE, JJ., reversed and remanded, holding that the defendant could be liable on the basis of the republication if the broadcast was the natural, and possibly intended, result of the interview. Unpublished opinion per curiam, issued May 20, 2004 (Docket No. 242486). The Supreme Court, in lieu of granting leave to appeal, ordered oral argument on whether to grant the application. 471 Mich 938 (2004).

In a unanimous opinion per curiam, the Supreme Court *held*:

A defamation claim must be filed within one year from the date the claim first accrued. A claim first accrues when the statement is made. Accrual of the claim is not extended on the basis of republication, regardless of whether the republication was intended by the speaker. In this case, the plaintiff's claim is untimely because it was filed more than one year after it first accrued.

Reversed; judgment of the circuit court reinstated.

LIBEL AND SLANDER — DEFAMATION — LIMITATION OF ACTIONS.

A defamation claim accrues when the wrong upon which the claim is based is done, regardless of when damage results; a defamation claim first accrues when the alleged defamatory statement is made and the applicable one-year period of limitations begins to run from that date and is not extended on the basis of the republication of the statement, regardless of whether the republication was intended by the speaker (MCL 600.5805[1], [9]).

Mitan & Associates, P.C. (by *Keith J. Mitan*), for the plaintiff.

Michael A. Cox, Attorney General, *Thomas L. Casey,* Solicitor General, and *Patrick J. O'Brien* and *Mark E. Donnelly*, Assistant Attorneys General, for the defendant.

PER CURIAM. The question before us in this defamation case is whether the period of limitations[1] runs from the date of the alleged defamatory statement made by defendant or the date the statement was republished by a third party. We conclude that the limitations period ran from the date of the original alleged defamatory statement. Therefore, we reverse the judgment of the Court of Appeals and reinstate the circuit court's judgment of summary disposition.

I. FACTS AND PROCEDURAL HISTORY

Defendant was the public relations director of the Department of Consumer and Industry Services. On February 22, 2000, she was interviewed by a reporter from WXYZ-TV regarding employment claims made by plaintiff's employees. During the interview, defendant stated that plaintiff was a "bad egg," a statement that

[1] Currently the statute of limitations is MCL 600.5805(9). Amendments to MCL 600.5805 since the alleged defamation occurred in this case have no effect on this case.

plaintiff claims was defamatory. The statement was broadcast by WXYZ-TV on February 25, 2000. Plaintiff filed a defamation complaint on February 26, 2001 (February 25 was a Sunday), more than a year after defendant made her statement but within a year from the date it was republished by WXYZ-TV.

The limitations period for a defamation claim is one year. MCL 600.5805(9). The circuit court granted defendant summary disposition based on the statute of limitations, MCR 2.116(C)(7), ruling that defendant's statement to the reporter started the limitations period running, and that defendant could not be held responsible for the republication by WXYZ-TV. The Court of Appeals reversed and remanded.[2] It concluded that defendant could be liable on the basis of the republication because it was plausible that the broadcast was the natural, and possibly intended, result of the interview. The Court found this was a factual issue to be considered on remand.

Defendant applied for leave to appeal to this Court. In lieu of granting leave to appeal, the Court heard oral argument on the application for leave to appeal pursuant to MCR 7.302(G)(1).[3]

II. STANDARD OF REVIEW

We review a summary disposition ruling de novo to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). Questions of statutory construction are also reviewed de novo. *Roberts v Mecosta Co Gen Hosp,* 466 Mich 57, 62; 642 NW2d

[2] *Mitan v Campbell,* unpublished opinion per curiam, issued May 20, 2004 (Docket No. 242486).

[3] 471 Mich 938 (2004).

663 (2002). In construing a statute, courts are to effect the intent of the Legislature, and if a statute is clear and unambiguous it should be enforced as written. *Id.* at 63.

III. ANALYSIS

The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. *Rouch v Enquirer & News of Battle Creek (After Remand),* 440 Mich 238, 251; 487 NW2d 205 (1992) (libel); *Ledl v Quik Pik Food Stores, Inc,* 133 Mich App 583, 589; 349 NW2d 529 (1984) (defamation).

The one-year limitations period for defamation claims is found in MCL 600.5805(1), (9):

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, *after the claim first accrued* to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> * * *
>
> (9) The period of limitations is 1 year for an action charging libel or slander. [Emphasis added.]

A defamation claim accrues when "the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827.

MCL 600.5805(1) and (9) are clear and unambiguous. Our Legislature has clearly provided that a defamation

claim must be filed within one year from the date the claim *first* accrued. The claim first accrued when the defamatory statement was made on February 22, 2000. The statute does not contemplate extending the accrual of the claim on the basis of republication, regardless of whether the republication was intended by the speaker.[4] Because plaintiff filed suit against defendant more than a year after his claim first accrued, his cause of action is barred by the statute of limitations.

The plain language of MCL 600.5805 is inconsistent with plaintiff's claim that a third party's expected republication of a defamatory statement affects the running of the limitations period for the initial statement. The statute provides a relatively short limitations period of one year; there is nothing in the statute suggesting that the period can effectively be lengthened where republication is anticipated. Rather than a rule of *first* accrual, the reasoning of the Court of Appeals changes the statute to a rule of *last* accrual. Such reasoning undermines the principles of finality and certainty behind a statute of limitations. See *Stephens v Dixon,* 449 Mich 531; 536 NW2d 755 (1995).[5]

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[4] The republisher of the statement, WXYZ-TV, is not a party to this action. We are concerned only with defendant's liability for WXYZ-TV's republication of her statement.

[5] The Court of Appeals relied on *Tumbarella v Kroger Co*, 85 Mich App 482, 496; 271 NW2d 284 (1978), for the proposition that the "general rule is that one who publishes a defamatory statement is liable for the injurious consequences of its repetition where the repetition is the natural and probable result of the original publication." We neither accept nor reject that proposition because plaintiff neither alleged nor claimed damages for natural and probable consequences in his complaint. His sole allegation was that an injurious, defamatory statement was published on February 25, 2000, the date of the broadcast. Further, even if we were to accept the natural and probable consequences rule, no case from our jurisdiction has held that the rule extends the one-year period

IV. CONCLUSION

The judgment of the Court of Appeals is reversed and the circuit court's judgment of summary disposition is reinstated.[6]

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

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of limitations. The *Tumbarella* Court held merely that the original publisher was liable for the natural and probable consequences of his remarks. Because the Court of Appeals misinterpreted *Tumbarella* as extending the period of limitations, its reliance on *Tumbarella* was misplaced.

[6] Our decision renders moot the remaining arguments raised by plaintiff.

MILLER v MILLER

Docket No. 127767. Decided December 28, 2005. On application by the defendant for leave to appeal, the Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals and reinstated the circuit court's judgment of divorce and arbitration award.

Debra L. Miller sought a divorce from John T. Miller in the Wayne Circuit Court. Following unsuccessful efforts to settle the case, the court, Mary Beth Kelly, J., entered a stipulated order for binding arbitration under the domestic relations arbitration act (DRAA), MCL 600.5070 *et seq*. The arbitrator put the parties in separate rooms during the arbitration proceedings and shuttled between them to gather the necessary information and to hear their respective arguments, as the parties had agreed. After the arbitrator presented a final, binding arbitration award, the plaintiff moved to set it aside, claiming that there was no agreement for binding arbitration and that the arbitrator failed to conduct a hearing. The court denied the motion and entered a judgment of divorce that incorporated the arbitration award. The plaintiff appealed. The Court of Appeals, SMOLENSKI, P.J., and SAAD, J. (KELLY, J., dissenting), reversed the trial court's judgment of divorce and remanded the matter to the trial court for further proceedings. 264 Mich App 497 (2004). The defendant sought leave to appeal.

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

The DRAA shows a legislative intent not to require specific procedures in arbitration proceedings. The parties, by contract, shape the parameters and procedures of the proceeding. The DRAA does not impose procedural formalities that restrict this freedom to contract. Here, the parties specifically agreed regarding how the arbitrator was to conduct the hearing. The procedures followed in this case allowed the parties to present evidence and respond to each other's presentations and provided the arbitrator the procedural means to determine the matters at issue.

The parties entered into a written agreement satisfying the requirements of the DRAA for a written arbitration agreement setting out the subject of the arbitration and the arbitrator's powers when they stipulated the entry of the particularized order for binding arbitration that the trial court entered. The DRAA does not mandate that there be an agreement separate from a stipulated order that meets the minimal requirements of MCL 600.5071 and 600.5072(1)(e). The judgment of the Court of Appeals must be reversed and the arbitration award and judgment of divorce must be reinstated.

Justice CAVANAGH, concurring, concurred in the result reached by the majority for the reasons set forth in *Renny v Port Huron Hosp*, 427 Mich 415, 437 (1986).

Reversed; arbitration award and circuit court judgment reinstated.

1. ARBITRATION — DOMESTIC RELATIONS — HEARINGS.

The domestic relations arbitration act does not require that the formality of a hearing in arbitration proceedings approximate that of a hearing in court; the appropriate structure for an arbitration hearing is best decided by the parties and the arbitrator (MCL 600.5070 *et seq*.).

2. ARBITRATION — DOMESTIC RELATIONS — AGREEMENTS TO ARBITRATE.

No written agreement beyond an order for binding arbitration is required under the domestic relations arbitration act where the parties stipulate the entry of the order and the order meets the criteria of MCL 600.5071 and MCL 600.5072(1)(e) and where the parties satisfy the requirements of MCL 600.5072(1)(a) to (d) on the record.

Donald M. Fulkerson for the plaintiff.

Gentry Law Offices, P.C. (by *Kevin S. Gentry*), for the defendant.

PER CURIAM. This case presents the question whether the domestic relations arbitration act (DRAA)[1] requires a formal hearing during arbitration comparable to that which occurs in traditional trial proceedings. We conclude that it does not.

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[1] MCL 600.5070 *et seq*.

Also at issue is whether a court order to which the parties have stipulated in writing can satisfy the act's requirement of a written agreement to arbitrate. We conclude that it can. Therefore, we reverse the judgment of the Court of Appeals, which ruled to the contrary on both issues, and we reinstate the arbitration award and the judgment of divorce.

THE FACTUAL AND PROCEDURAL HISTORY

Plaintiff filed for divorce in January 2001. After failed settlement conferences in the circuit court, on December 4, 2001, both parties stipulated in writing to entry of an order sending all issues in the case to binding arbitration.

The arbitrator put the parties in separate rooms during the arbitration proceedings. He shuttled between them, gathering the necessary information and hearing the respective arguments. Both parties agreed to this procedure.

At the end of the day, plaintiff asked the arbitrator for additional sessions. He denied the request, expressly noting in his written award that plaintiff had failed to raise anything new to justify further proceedings. When plaintiff made a second request, the arbitrator gave her three days to provide an outline of what she would present at the additional proceedings. She supplied, instead, voluminous material. Rather than schedule more hearings, the arbitrator reviewed plaintiff's material, modified the award, and issued the final binding arbitration award.

Plaintiff filed a motion in court to set aside the arbitration award on the basis that the arbitrator had failed to conduct a "hearing" as required by the DRAA. She also claimed that no arbitration agreement existed. The court rejected plaintiff's claims and entered a

judgment of divorce. In a split published decision, the Court of Appeals reversed the judgment of the circuit court and vacated the arbitration award. It held that the DRAA required a formal hearing and that none occurred during the arbitration. *Miller v Miller*, 264 Mich App 497; 691 NW2d 788 (2004).

THE APPROPRIATE STANDARD OF REVIEW

The two issues on appeal are matters of statutory interpretation that we review de novo. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004). When interpreting a statute, our goal is to give effect to the Legislature's intent as determined from a review of the language of the statute. *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002).

Defendant asks us to review the Court of Appeals decision not to enforce the arbitration award. We review such decisions de novo to determine whether the arbitrators exceeded their powers. See *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 496-497; 475 NW2d 704 (1991). Arbitrators exceed their powers whenever they act beyond the material terms of the contract from which they draw their authority or in contravention of controlling law. *DAIIE v Gavin*, 416 Mich 407, 433-434; 331 NW2d 418 (1982).

WHAT CONSTITUTES A HEARING UNDER THE DRAA

MCL 600.5081 is the statutory provision that governs vacation and modification of arbitration awards under the DRAA. MCL 600.5081(2) provides:

> If a party applies under this section, the court shall vacate an award under any of the following circumstances:
>
> (a) The award was procured by corruption, fraud, or other undue means.

> (b) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights.
>
> (c) The arbitrator exceeded his or her powers.
>
> (d) The arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

The Court of Appeals concluded that the arbitrator violated MCL 600.5081(2)(d). It reasoned that the informality of the hearing prejudiced plaintiff's rights. The question is whether, in proceedings under the DRAA, the statute precludes hearings being conducted as the hearing was conducted in this case.

In reaching its decision, the Court of Appeals majority relied primarily on MCL 600.5074(1), which provides:

> An arbitrator appointed under this chapter *shall hear* and make an award on each issue submitted for arbitration under the arbitration agreement subject to the provisions of the agreement. [Emphasis added.]

The DRAA does not define the term "hear" or "hearing." Moreover, it sets no procedural requirements for arbitration. Rather, it specifically eschews them. For example, MCL 600.5077 requires, with certain exceptions, that the arbitrator not make an official record of most arbitration proceedings.[2] This purpose-

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[2] MCL 600.5077 provides:

> (1) Except as provided by this section, court rule, or the arbitration agreement, a record shall not be made of an arbitration hearing under this chapter. If a record is not required, an arbitrator may make a record to be used only by the arbitrator to aid in reaching the decision. The parties may provide in the arbitration agreement that a record be made of those portions of a hearing related to 1 or more issues subject to arbitration.

ful requirement of little or no record shows that the Legislature intended not to require specific procedures in arbitration proceedings. Without a record, reviewing courts cannot assess what procedures have been followed.

The Legislature's failure to provide specific arbitration procedures is consistent also with tradition. Historically, judicial review of arbitration awards is highly limited. *Gavin*, 416 Mich 433-434. This Court has characterized arbitration procedures as "informal and sometimes unorthodox . . . ." *Id*. at 429. Consequently, courts should not speculate why an arbitrator ruled in one particular manner. *Id*.

Rather than employ the formality required in courts, parties in arbitration are able to shape the parameters and procedures of the proceeding. The DRAA requires that they first sign an agreement for binding arbitration delineating the powers and duties of the arbitrator. MCL 600.5072(1)(e).

The act also contemplates that the parties will discuss with the arbitrator the scope of the issues and how information necessary for their resolution will be produced. MCL 600.5076. The act contemplates that the parties will decide what is best for their case. Nowhere in the DRAA are procedural formalities imposed that restrict this freedom.

This Court has consistently held that arbitration is a matter of contract. "It is the agreement that dictates the authority of the arbitrators[.]" *Rowry v Univ of Michigan*, 441 Mich 1, 10; 490 NW2d 305 (1992). In this case, the Court of Appeals decision infringes on the

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(2) A record shall be made of that portion of a hearing that concerns child support, custody, or parenting time in the same manner required by the Michigan court rules for the record of a witness's testimony in a deposition.

parties' recognized freedom to contract for binding arbitration.

It restricts the parties' freedom to decide how the arbitration hearing should be conducted.[3] Plaintiff presents no convincing argument that the Legislature intended all DRAA hearings to approximate traditional court hearings. We know of none.[4] It is inappropriate for a court to read into a statute something that was not intended. *AFSCME v Detroit*, 468 Mich 388, 412; 662 NW2d 695 (2003).

Significantly, in this case, the parties specifically agreed to allow the arbitrator to conduct the hearing in two separate rooms. If the parties and the arbitrator thought that this was the best way to hold their hearing, they were at liberty to make that agreement. Because it is the agreement of the parties that dictates arbitration, the Court of Appeals should not have altered the agreement. *Rowry*, 441 Mich 10.

THE SUFFICIENCY OF THE PARTIES' WRITTEN ARBITRATION AGREEMENT

Plaintiff argued below that no written arbitration agreement existed in this case. Defendant disagreed.

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[3] The language in US Const, art I, § 3, cl 6, stating that the Senate shall "*try* all Impeachments," does not constitute an "implied limitation on the method by which the Senate might proceed in trying impeachments," *Nixon v United States,* 506 US 224, 230; 113 S Ct 732; 122 L Ed 2d 1 (1993). Similarly, the language in MCL 600.5074(1), stating that the arbitrator "shall *hear* and make an award on each issue submitted for arbitration," does not constitute an implied limitation on the method by which the arbitrator might proceed in *hearing* the issues. (Emphasis added.)

[4] Court of Appeals Judge KIRSTEN FRANK KELLY correctly noted in her dissent: "[A]lthough the majority refers to the process [used in this arbitration] as mediation, the process was still binding; binding mediation is equivalent to arbitration and subject to the same judicial limitations on review. *Frain v Frain*, 213 Mich App 509, 511-513; 540 NW2d 741 (1995)." *Miller*, 264 Mich App 517-518.

Although the Court of Appeals majority did not reach this issue directly, it listed as alternative grounds for possible relief that the stipulated order did not constitute a written arbitration agreement. *Miller*, 264 Mich App 507 n 12. We disagree.

As we noted earlier, the DRAA requires a written arbitration agreement setting out the subject of the arbitration and the arbitrator's powers. MCL 600.5071 and MCL 600.5072(1)(e). Here, the parties entered into a written agreement satisfying these requirements when they stipulated to entry of the particularized order for binding arbitration that the court in due course entered.

The order lists the issues for arbitration. It clearly delineates the arbitrator's powers and duties. Accordingly, it is sufficient to satisfy the requirements of MCL 600.5071 and MCL 600.5072(1)(e).[5]

Nothing in the DRAA mandates that there be an agreement separate from the stipulated order. This is consistent with the informal and sometimes unorthodox nature of arbitration. *Gavin*, 416 Mich 429. As long as the parties agree to some document that meets the

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[5] In addition, but not relevant here, the parties must satisfy MCL 600.5072(1)(a) to (d), which provide:

> The court shall not order a party to participate in arbitration unless each party to the domestic relations matter acknowledges, in writing or on the record, that he or she has been informed in plain language of all of the following:
>
> (a) Arbitration is voluntary.
>
> (b) Arbitration is binding and the right of appeal is limited.
>
> (c) Arbitration is not recommended for cases involving domestic violence.
>
> (d) Arbitration may not be appropriate in all cases.

minimal requirements of MCL 600.5071 and MCL 600.5072(1)(e), the agreement is sufficient. Therefore, we reverse the decision of the Court of Appeals that reached the contrary conclusion.

CONCLUSION

We hold that the domestic relations arbitration act does not require that the formality of a hearing in arbitration proceedings approximate that of a hearing in court. Arbitration is by its nature informal. The appropriate structure for an arbitration hearing is best decided by the parties and the arbitrator. A procedure by which the arbitrator shuttles between the parties in separate rooms questioning and listening to them satisfies the act's requirement of a hearing.

We also hold that no written agreement beyond the order for binding arbitration is required (1) if the parties stipulate to entry of the order and the order meets the criteria of MCL 600.5071 and MCL 600.5072(1)(e), and (2) if the parties satisfy MCL 600.5072(1)(a) to (d) on the record.

Therefore, we reverse the judgment of the Court of Appeals and reinstate the arbitration award and the judgment of divorce.

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

CAVANAGH, J. *(concurring)*. I concur in the result reached by the majority for the reasons set forth in *Renny v Port Huron Hosp*, 427 Mich 415, 437; 398 NW2d 327 (1986).

OSTROTH v WARREN REGENCY, GP, LLC

Docket No. 126859. Argued October 19, 2005 (Calendar No. 4). Decided February 1, 2006.

Ellen M. and Thane Ostroth and Jennifer L. and Brian D. Hudock brought an action in the Macomb Circuit Court against Warren Regency, G.P., L.L.C.; Edward Schulak, Hobbs & Black, Inc.; and others, seeking damages for personal injuries sustained by Ellen Ostroth and Jennifer Hudock from environmental hazards arising from a renovation project at their workplace. The project was designed by the Edward Schulak architectural firm. Edward Schulak moved for summary disposition, asserting that the two-year period of limitations for professional malpractice, MCL 600.5805(6), barred the plaintiffs' action. The court, Mark S. Switalski, J., granted summary disposition in favor of Edward Schulak, holding that § 5805(6) applied rather than MCL 600.5839(1), which sets forth a six-year period of limitations for claims against architects. The Hudocks appealed from that order. The Court of Appeals, SMOLENSKI, P.J., and WHITE and KELLY, JJ., affirmed in part, reversed in part, and remanded the matter to the circuit court, holding that the six-year period of limitations of § 5839(1), rather than § 5805(6), applied with regard to the action against Edward Schulak. 263 Mich App 1 (2004). Edward Schulak appealed by leave granted. 472 Mich 898 (2005).

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

The Court of Appeals properly held that the six-year period of limitations provided by MCL 600.5839(1) applies in this action. The judgment of the Court of Appeals must be affirmed and the matter must be remanded to the circuit court.

1. MCL 600.5805(14) provides that the period of limitations for an action against a state-licensed architect based on an improvement to real property is as provided in § 5839. Section 5839(1) provides that the period within which the plaintiffs can maintain their action against the defendant architectural firm is six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

2. MCL 600.5839(1) is both a statute of repose and a statute of limitations. The plaintiffs' action for damages against the defendant architectural firm is not barred by the applicable statute of limitations.

3. To the extent that the Court of Appeals decision in *Witherspoon v Guilford,* 203 Mich App 240 (1994), is inconsistent with the opinion of the Supreme Court in this matter, it must be overruled.

Justice KELLY, concurring, wrote separately to explain that when she wrote her concurring opinion in *Stanislawski v Calculus Constr Co, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 7, 1994 (Docket No. 145467), she was bound by MCR 7.215(J)(1) to follow *Witherspoon v Gilford*, 203 Mich App 240 (1994). She joins in the decision reached by the Court in this matter.

Affirmed and remanded to the circuit court.

1. LIMITATION OF ACTIONS — ARCHITECTS, ENGINEERS, AND CONTRACTORS.

The period of limitations applicable to an action against a state-licensed architect based on an improvement to real property is six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement (MCL 600.5805[14], 600.5839[1]).

2. LIMITATION OF ACTIONS — ARCHITECTS, ENGINEERS, AND CONTRACTORS.

The provisions in MCL 600.5839(1) regarding the time within which to bring an action against a state-licensed architect based on an improvement to real property provide both a statute of repose and a statute of limitations.

Donnelly W. Hadden, P.C. (by *Donnelly W. Hadden*), and *Ball & Ball, LLP* (by *Bettie K. Ball*), for Jennifer L. and Brian D. Hudock.

Sullivan, Ward, Asher & Patton, P.C. (by *Ronald S. Lederman*), for Edward Schulak, Hobbs & Black, Inc.

Amici Curiae:

Thomas M. Keranen & Associates, P.C. (by *Frederick F. Butters*), for American Institute of Architects, Michigan.

Kerr, Russell and Weber, PLC (by *James R. Case, Joanne Geha Swanson*, and *Michael A. Sneyd*), for ACEC/Michigan, Inc.; Southeastern Michigan Chapter NECA, Inc.; Michigan Roofing Contractors Association, Inc.; and Southeastern Michigan Roofing Contractors Association, Inc.

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

Thomas M. Keranen & Associates, P.C. (by *Gary D. Quesada*), for Integrated Designs, Inc.

Floyd E. Allen & Associates (by *Corey D. Grandmaison*) for Ecorse Board of Education.

Sullivan, Ward, Asher & Patton, P.C. (by *Michael J. Asher*), for the Construction Association of Michigan, Sheet Metal & Air Conditioning Contractors National Association, Great Lakes Fabricators and Erectors Association, and Plumbing and Mechanical Contractors of Detroit.

Sullivan, Ward, Asher & Patton, P.C. (by *Christopher B. McMahon*), and *Thomas M. Keranen & Associates, P.C.* (by *Gary D. Quesada*), for GMB Architects-Engineers, Inc.

WEAVER, J. This architectural malpractice case poses the issue whether MCL 600.5839 is only a statute of repose, in which case MCL 600.5805(6) or (10) supplies a shorter limitations period, or is itself both a statute of repose and a statute of limitations. The Court of Appeals concluded that § 5839 is both a statute of repose

and a statute of limitations and thus the plaintiff's cause of action is not time-barred.[1] We agree and accordingly affirm that decision and remand the matter to the circuit court.

FACTS

In April 1998, defendant Edward Schulak, Hobbs & Black, Inc., architects and consultants, was the architect in a renovation project, designing renovations for office spaces at 12222 East Thirteen Mile Road in Warren, Michigan. Plaintiff Jennifer L. Hudock worked in the offices from April 24, 1998, through August 24, 1998. Plaintiff alleges that during that time she was exposed to environmental hazards such as fungus, mold, bacteria, formaldehyde, and carbon dioxide as a result of the renovations to the building's heating, cooling, ventilation, and plumbing systems. She claims that she sustained personal injuries as a result of environmental hazards arising from the renovation of her workplace.[2]

Plaintiff initiated this action for damages on May 10, 2000. In her first amended complaint filed November 14, 2000, plaintiff alleged that defendant-architect negligently exposed plaintiff to a hazardous environment that caused injury and increased the risk of injury in the future. Defendant first moved for summary disposition, challenging the merits of plaintiff's claim. The circuit court then allowed defendant to amend its affirmative defenses to include the claim that plaintiff's suit was time-barred by the two-year limitations period of MCL 600.5805(6).

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[1] 263 Mich App 1; 687 NW2d 309 (2004).

[2] Plaintiff's husband's claim is derivative. The other plaintiffs in this case, Ellen M. and Thane Ostroth, and two other defendants, Warren Regency, G.P., L.L.C.; and Warren Regency Limited Partnership, are not parties to this appeal.

The circuit court granted defendant's motion for summary disposition, holding that the two-year limitations period for malpractice claims of MCL 600.5805(6) applied. However, the Court of Appeals affirmed in part, reversed in part, and remanded the matter to the circuit court, holding that the six-year limitations period of MCL 600.5839(1) applies to plaintiff's action for damages.

We granted defendant's application for leave to appeal and directed that the parties include among the issues to be briefed

> (1) whether MCL 600.5839(1) precludes application of the statutes of limitations prescribed by MCL 600.5805 and, if not, (2) which statute of limitations, MCL 600.5805(6) or MCL 600.5805(10), is applicable to the claim asserted against defendant Edward Schulak, Hobbs & Black, Inc., in this case.[3]

STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). This case involves a question of statutory interpretation, which this Court also reviews de novo. *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 250-251; 632 NW2d 126 (2001).

ANALYSIS

A person cannot commence an action for damages for injuries to a person or property unless the complaint is filed within the periods prescribed by MCL 600.5805. *Gladych v New Family Homes, Inc,* 468 Mich 594, 598; 664 NW2d 705 (2003). MCL 600.5805(1) provides:

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[3] 472 Mich 898 (2005).

> A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

The several subsections of MCL 600.5805 define periods of limitations for various types of actions to recover damages for injuries to persons or property.

Relevant to this case, MCL 600.5805(6) provides for a two-year period of limitations for actions charging malpractice, MCL 600.5805(10) provides a three-year period of limitations for general negligence actions, and MCL 600.5805(14) addresses the period of limitations for an action for damages involving a state-licensed architect and an improvement to real property.[4] The parties dispute the effect and proper interpretation of MCL 600.5805(14) and MCL 600.5839(1).

When interpreting statutes, "we presume that the Legislature intended the meaning clearly expressed . . . ." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). Judicial construction is not required or permitted if the text of the statute is unambiguous. *Id.*

MCL 600.5805(14) was added to MCL 600.5805 in 1988.[5] Subsection 5805(14) provides:

> The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in section 5839.

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[4] MCL 600.5805 has been amended several times: the current subsection 6 was formerly subsection 4; the current subsection 10 was formerly subsection 8; and, the current subsection 14 was formerly subsection 10.

[5] 1988 PA 115.

MCL 600.5839(1) in turn specifies a six-year period of limitations that begins to run "after the time of occupancy of the completed improvement, use, or acceptance of the improvement . . . ."

MCL 600.5839(1) was enacted twenty years before MCL 600.5805(14).[6] MCL 600.5839(1) currently provides in full:

> No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

Defendant contends that the six-year period of MCL 600.5839(1) is a statute of repose that operates in addition to the shorter periods of limitations in MCL 600.5805(6) and (10).[7] In other words, defendant claims

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[6] 1967 PA 203. As originally enacted, MCL 600.5839(1) did not provide a one-year discovery provision or the final ten-year period for gross negligence claims. These provisions were added by 1985 PA 188 at the same time the statute was expressly expanded to include contractors.

[7] " 'A statute of repose limits the liability of a party by setting a fixed time after . . . which the party will not be held liable for . . . injury or

that when an action arises within the six-year period specified by MCL 600.5839(1), the periods of limitations in MCL 600.5805 still apply. The Court of Appeals disagreed, however, holding that MCL 600.5839(1) is both a statute of limitations and a statute of repose so that an action for damages involving architects can be filed at any time within six years of the occupancy of the completed improvement.

This Court first addressed MCL 600.5839(1) in *O'Brien v Hazelet & Erdal*, 410 Mich 1; 299 NW2d 336 (1980). In *O'Brien,* this Court upheld the constitutionality of MCL 600.5839(1) and described the statute's operation as follows:

> [T]he instant statute is both one of limitation and one of repose. For actions which accrue within six years from occupancy, use, or acceptance of the completed improvement, the statute prescribes the time within which such actions may be brought and thus acts as a statute of limitations. When more than six years from such time have elapsed before an injury is sustained, the statute prevents a cause of action from ever accruing.[8]

Regarding the purpose of the statute, *O'Brien* stated: "The Legislature chose to limit the liability of architects and engineers in order to relieve them of the potential burden of defending claims brought long after completion of the improvement . . . ."[9]

Despite *O'Brien's* statement[10] that MCL 600.5839(1) "acts as a statute of limitations" for claims arising

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damage . . . . Unlike a statute of limitations, a statute of repose may bar a claim before an injury or damage occurs.' " *Frankenmuth Mut Ins Co v Marlette Homes, Inc,* 456 Mich 511, 513 n 3; 573 NW2d 611 (1998)(citation omitted).

[8] *O'Brien*, *supra* at 15.

[9] *Id.* at 14.

[10] *Id.* at 15.

within "six years from occupancy, use, or acceptance of the completed improvement," defendant argues that the six-year period provided by MCL 600.5839(1) is merely a statute of repose that does not inhibit the application of the two-year period of limitations for malpractice claims or the three-year period of limitations for negligence actions of MCL 600.5805 (6) and (10).

For this argument, defendant relies on *Witherspoon v Guilford*, 203 Mich App 240; 511 NW2d 720 (1994). *Witherspoon* addressed whether the six-year period under MCL 600.5839(1) precludes the application of the three-year period of limitations of the current MCL 600.5805(10) "where the cause of action arises within six years after the use or acceptance of the improvement."[11] *Witherspoon* concluded that subsection 14 was added to MCL 600.5805 merely to "underscore [the Legislature's] intent to grant § 5839 primacy over other arguably applicable periods of limitation, running from the time of discovery, whose effect would defeat the repose aspect of § 5839."[12] *Witherspoon* further concluded that to apply MCL 600.5839(1) exclusively of the shorter periods of limitations in MCL 600.5805 would render portions of MCL 600.5805 nugatory.

Although *Witherspoon*[13] correctly recognized that the current MCL 600.5805(14) and MCL 600.5839 "set forth an emphatic legislative intent to protect architects, engineers, and contractors from stale claims," we find no evidence that through the enactment of MCL 600.5805(14) the Legislature intended MCL 600.5839(1) to merely serve as a statute of repose. Regarding which period of limitations applies to renovations to real property and the liability of a state-

[11] *Witherspoon*, *supra* at 246.

[12] *Id.*

[13] *Id.* at 247.

licensed architect who furnished the design for the renovations, there is no ambiguity in the language of either MCL 600.5805(14) or MCL 600.5839(1).[14] MCL 600.5805(14) unambiguously provides that "[t]he period of limitations for an action against a state licensed architect . . . shall be as provided in section 5839."

Because defendant is a state-licensed architect that furnished the design for the improvements to the real property that allegedly caused plaintiff's injury, under MCL 600.5839(1) the period within which plaintiff can "maintain any action to recover damages for . . . bodily injury" is six years "after the time of occupancy of the completed improvement, use, or acceptance of the improvement . . . ."

Moreover, it does not render any portion of MCL 600.5805 nugatory to hold that MCL 600.5839(1) is, as it plainly appears on its face, both a statute of repose and a statute of limitations. The periods of limitations of MCL 600.5805 for malpractice and general negligence actions remain applicable to any claim that does not involve "a state licensed architect, professional engineer, land surveyor, or contractor" and that is not "based on an improvement to real property . . . ." MCL 600.5805(14).

Finally, our interpretation is not in conflict with the policies underlying MCL 600.5839(1) that this Court identified in *O'Brien, supra* at 16:

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[14] Cf. *Michigan Millers Mut Ins Co v West Detroit Bldg Co, Inc,* 196 Mich App 367; 494 NW2d 1 (1992), concluding that the effect of MCL 600.5805(14) on MCL 600.5839(1) was ambiguous on a different question than that presented by this appeal. *Michigan Millers* concluded that MCL 600.5805(14) was ambiguous regarding whether the Legislature intended that the six-year period of MCL 600.5839(1) be applied to all actions based on improvements to real property, both third-party actions and actions for professional malpractice. The panel examined the legislative history and held that the Legislature intended that MCL 600.5839(1) did apply to both types of claims.

> By enacting a statute which grants architects and engineers complete repose after six years rather than abrogating the described causes of action *in toto*, the Legislature struck what it perceived to be a balance between eliminating altogether the tort liability of these professions and placing no restriction other than general statutes of limitations upon the ability of injured plaintiffs to bring tort actions against architects and engineers. The Legislature could reasonably have concluded that allowing suits against architects and engineers to be maintained within six years from the time of occupancy, use, or acceptance of an improvement would allow sufficient time for most meritorious claims to accrue and would permit suit against those guilty of the most serious lapses in their professional endeavors.

As stated in *O'Brien,* "[t]he power of the Legislature to determine the conditions under which a right may accrue and the period within which a right may be asserted is undoubted." *Id*. at 14.

CONCLUSION

We hold that MCL 600.5805(14) unambiguously directs that the period of limitations for actions against architects is provided by MCL 600.5839(1). Moreover, the six-year period of MCL 600.5839(1) operates as both a statute of limitations and a statute of repose. Therefore, plaintiff's action for damages, brought well within this time period, is not time-barred. The Court of Appeals decision is affirmed and this case is remanded to the circuit court for further proceedings. To the extent that the Court of Appeals decision in *Witherspoon, supra*, is inconsistent with this opinion, it is overruled.[15]

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[15] We note that *Witherspoon* appears to have been the "first out" under MCR 7.215(J)(1) on the precise question of statutory interpretation

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

KELLY, J. (*concurring*). I concur with the majority in this case that the applicable limitations period is six years as stated in MCL 600.5839(1). I write separately to explain the difference between my decision in this case and my concurrence in *Stanislawski v Calculus Constr Co, Inc,* unpublished opinion per curiam of the Court of Appeals, issued April 7, 1994 (Docket No. 145467).

When I penned my concurrence in *Stanislawski* I was bound by *Witherspoon v Guilford,* 203 Mich App 240; 511 NW2d 720 (1994). See MCR 7.215(J)(1). Now that I am in the position to overturn *Witherspoon* and see the wisdom of doing so, I join in the decision reached by the Court in this case.

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presented in this case. However, our decision to overrule *Witherspoon* to the extent that it is inconsistent with our decision resolves any conflict on the question.

PEOPLE v MONACO

Docket No. 126852. Decided February 1, 2006. On application by the defendant for leave to appeal, the Supreme Court, in lieu of granting leave to appeal, in an opinion per curiam, affirmed in part and reversed in part the judgment of the Court of Appeals and remanded the matter to the circuit court for entry of an order granting the defendant's motion to dismiss the charge. Rehearing denied 475 Mich 1222.

Vito Monaco was charged in the Macomb Circuit Court with the felony of failing to pay court-ordered child support more than eight years after his support obligation ended. MCL 750.165(1). The defendant moved to dismiss the charge, arguing that the action was barred under the six-year period of limitations in MCL 767.24(5). The court, Antonio P. Viviano, J., denied the motion on the basis that the ten-year period of limitations in MCL 600.5809(4) governed the action. The Court of Appeals, NEFF, P.J., and WILDER and KELLY, JJ., affirmed on different grounds, holding that the six-year period of limitations in MCL 767.24(5) governed the action, that the failure to pay the child support constitutes a continuing violation of MCL 750.165(1), and that the period of limitations never began to run under the continuing violations theory. 262 Mich App 596 (2004). The defendant sought leave to appeal in the Supreme Court.

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

The Court of Appeals properly found that the felony-nonsupport charge is subject to the six-year period of limitations in MCL 767.24(5). The Court of Appeals erred in concluding that a violation of MCL 750.165(1) is a continuing offense. The judgment of the Court of Appeals must be affirmed in part and reversed in part, and the matter must be remanded to the circuit court for entry of an order granting the defendant's motion to dismiss the charge.

1. MCL 767.24 generally identifies different limitations periods for different crime categories. Because a violation of MCL 750.165(1) is not identified in the other subsections of MCL

767.24, it necessarily falls under subsection 5, the catchall subsection providing a six-year period of limitations.

2. The Legislature did not intend a violation of MCL 750.165(1) to be an offense that continues until an individual's monetary support obligation is fully discharged. Under the plain language of MCL 750.165(1), the crime of felony nonsupport is complete when an individual fails to pay support in the amount ordered at the time ordered. An individual may be guilty of felony nonsupport if the individual either pays the full ordered amount after the due date or pays an amount less than the ordered amount before the due date and the due date passes without the individual making full payment. Anyone who fails to pay the full ordered amount at the time ordered may be prosecuted even if that individual later becomes current on the obligation. The Legislature did not specify having a support arrearage as a way in which an individual can violate MCL 750.165(1).

3. The opinion of the Court of Appeals in *People v Westman*, 262 Mich App 184 (2004), which held that a violation of MCL 750.165 is a continuing offense, must be overruled to the extent that it is inconsistent with this decision.

Justice KELLY, joined by Justice WEAVER, concurring in part and dissenting in part, concurred with the majority's affirmance of the Court of Appeals holding that the appropriate period of limitations applicable to a violation of MCL 750.165(1) is the six-year period provided in MCL 767.24(5), but dissented with regard to part IV of the majority opinion and the conclusion of the majority opinion.

Affirmed in part, reversed in part, and remanded to the circuit court for entry of an order of dismissal.

1. CRIMINAL LAW — LIMITATION OF ACTIONS — FAILURE TO PAY COURT-ORDERED SUPPORT.

A charge of felony nonsupport of a former or current spouse or of a child is subject to a six-year period of limitations (MCL 750.165[1], 767.24[5]).

2. CRIMINAL LAW — FAILURE TO PAY COURT-ORDERED SUPPORT.

The crime of nonsupport of a former or current spouse or of a child is complete at the time that an individual fails to pay support in the amount ordered at the time ordered; a violation of the statute does not constitute an offense that continues until an individual's monetary support obligation is fully discharged (MCL 750.165[1]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Carl J. Marlinga*, Prosecuting Attorney, *Robert Berlin*, Chief Appellate Lawyer, and *Jennifer Frustaci Adlhoch*, Assistant Prosecuting Attorney, for the people.

Law Offices of James T. Simmons, P.C. (by *James T. Simmons*), for the defendant.

PER CURIAM. In this case, we are asked to decide whether a violation of the statute that makes it a felony to refuse to pay court-ordered support for a former or current spouse or for a child, MCL 750.165(1), is subject to the ten-year period of limitations in MCL 600.5809(4) or the six-year "catch-all" period of limitations in MCL 767.24(5). We are also asked to decide whether a violation of this statute constitutes a continuing offense.

We affirm the Court of Appeals conclusion that a charge of felony nonsupport is subject to the six-year period of limitations of MCL 767.24(5).[1] We reject the Court of Appeals conclusion that a violation of MCL 750.165(1) is a continuing offense. We thus overrule *People v Westman*, 262 Mich App 184; 685 NW2d 423 (2004),[2] to the extent that it is inconsistent with our decision in this case.

Defendant was charged with criminal nonsupport well after the six-year limitations period expired. The Court of Appeals thus erred in affirming the trial court's denial of defendant's motion to dismiss the

[1] The Court of Appeals opinion cites MCL 767.24(4) as the "catch-all" provision. In 2004, the Legislature redesignated subsections 4, 5, and 6. MCL 767.24(5) now provides the catchall limitations period.

[2] In *Westman, supra* at 188-189, the Court of Appeals held that a violation of MCL 750.165 is a continuing offense. The defendant in *Westman* did not file an application for leave to appeal in this Court.

charge. Accordingly, we affirm in part and reverse in part the Court of Appeals judgment. *People v Monaco,* 262 Mich App 596; 686 NW2d 790 (2004). We remand this case to the trial court for entry of an order granting defendant's motion to dismiss the charge.

I

On August 20, 1984, defendant was ordered to pay child support for his two minor children under a default judgment of divorce. The order required

> that the Defendant shall pay to the Friend of the Court for the County of Macomb to be transmitted to the Plaintiff for the support and maintenance of the minor children of the parties, the sum of $43.44 per week per child, for each of the two (2) minor children . . . until each of the said children have attained the age of eighteen or until further Order of this Court.

Defendant's youngest child turned eighteen in March 1994. In December 2002, defendant was charged with violating MCL 750.165(1), which provides[3]:

> If the court orders an individual to pay support for the individual's former or current spouse, or for a child of the individual, and the individual *does not pay the support in the amount or at the time stated in the order*, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both. [Emphasis supplied.]

The statute does not contain an express limitation of actions provision.

At defendant's preliminary examination, the pros-

[3] MCL 750.165(1) was amended by the Legislature effective November 3, 1999. "Under the amended version of MCL 750.165, evidence that an individual refused or neglected to pay child support and left the state is no longer necessary to establish felony failure to pay child support." *Westman, supra* at 187.

ecution presented testimony that defendant's child support arrearage amounted to $57,556.31, and that defendant had made no payments on the account since November 2001. Defendant's arrearage included both unpaid child support and Family Independence Agency (FIA) surcharges. Commencing in January 1996, a biannual surcharge also attached to defendant's delinquent account. The trial court bound defendant over, concluding that the judgment was "subject to the enforcement of the criminal sanctions."

Defendant moved to dismiss the charge or quash the bindover, arguing that the criminal nonsupport charge was time-barred under the six-year limitations period contained in MCL 767.24(5), the catchall statute of limitations for crimes not otherwise specifically provided for in MCL 767.24. Defendant also argued that his prosecution under the amended statute violates the ex post facto clauses of the United States and Michigan constitutions. US Const, art I, § 10, cl 1; Const 1963, art 1, § 10.

The trial court denied defendant's motion. The court ruled that the charge was not time-barred, relying on the ten-year period of limitations in MCL 600.5809(4). That statute provides:

> For an action to enforce a support order that is enforceable under the support and parenting time enforcement act, Act No. 295 of the Public Acts of 1982, being sections 552.601 to 552.650 of the Michigan Compiled Laws, the period of limitations is 10 years from the date that the last support payment is due under the support order regardless of whether or not the last payment is made.

The Court of Appeals affirmed the trial court's decision on different grounds. The panel held that the trial court erred in concluding that the matter was governed

by the ten-year limitations period found in MCL 600.5809(4) because that statute pertains to civil actions for collection on monetary obligations, not to criminal actions. Instead, the panel concluded that the crime of felony nonsupport is subject to the six-year period of limitations found in MCL 767.24(5).

The panel then held that defendant's failure to pay the arrearage of his court-ordered child support constitutes a continuing violation of MCL 750.165(1), because the court-ordered amount is both increased and reaffirmed every six months when the surcharge for nonpayment is added to the support arrearage. Expanding on the ruling in *Westman, supra,* in which the Court held that a violation of MCL 750.165(1) constitutes a continuing crime, the panel held:

> [A] violation may be continuing under either the "amount owed theory" or the "time ordered theory." Under the "amount owed theory," the violation continues as long as an ordered support goes unpaid. The amount ordered is at the same time increased and reaffirmed each time the surcharge is added. For this reason, an "amount owed" violation may continue even beyond the child's eighteenth birthday. Under the "time ordered theory," the defendant violates MCL 750.165 when he fails to make the weekly support payment. The defendant also violates MCL 750.165 at the time each surcharge is added to the account and, at the same time, becomes due and owing. [*Monaco, supra* at 606-607.]

Applying an "amount owed" continuing violation theory, the Court of Appeals held that the statutory period of limitations on the felony-nonsupport charge against defendant never began to run because of defendant's arrearage. The panel thus affirmed the trial court's denial of defendant's motion to dismiss the felony-nonsupport charge or quash the bindover.

II

"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." *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005).

III

The first issue is the limitations period applicable to violations of MCL 750.165(1). We concur with the Court of Appeals that the appropriate limitations period for violations of MCL 750.165 is contained in MCL 767.24(5)[4] and adopt its analysis appearing at 262 Mich App 601-603:

> MCL 600.5809(4) more specifically addresses support orders:
>
> "For an action to enforce a support order that is enforceable under the support and parenting time enforcement act, Act No. 295 of the Public Acts of 1982, being sections 552.601 to 552.650 of the Michigan Compiled Laws, the period of limitations is 10 years from the date that the last support payment is due under the support order regardless of whether or not the last payment is made."
>
> But the statute as a whole clearly applies only to civil actions, not criminal charges. If the language of a statute is clear, no further analysis is necessary or allowed to expand what the Legislature clearly intended to cover. *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). MCL

[4] Our conclusion that the six-year period of limitations in MCL 767.24(5) applies to violations of MCL 750.165 is in no way intended to alter or weaken the ten-year period of limitations in MCL 600.5809(4), because, as stated, the latter statute applies to civil claims for collection on monetary obligations, not to criminal actions.

600.5809 sets forth a ten-year period of limitations for civil claims seeking enforcement and collection of a noncontractual money obligation. It does not identify any criminal charges whatsoever. Even MCL 600.5809(2), which applies in the criminal context, applies only to civil forfeiture actions based on a penal statute. MCL 600.5809(4) clearly identifies actions brought under the support and parenting time act and makes no reference at all to criminal charges, let alone the charge of felony nonsupport. Further, although the felony-nonsupport charge is related to an order of support pursuant to the support and parenting time act, it is a distinct criminal action that is not covered by MCL 600.5809.

The appropriate statutory limitations period is set forth in MCL 767.24[(5)]. MCL 767.24 generally identifies . . . different limitations periods for . . . different crime categories:

* * *

"[(5)] *All other indictments* shall be found and filed within 6 years after the offense is committed. [Emphasis added.]"

Because MCL 750.165 is not identified in [other subsections of the statute], it necessarily falls under subsection [5], which unambiguously identifies "all other indictments." It is a settled rule of statutory construction that, unless otherwise defined in a statute, statutory words or phrases are given their plain and ordinary meanings. MCL 8.3a; *People v Libbett*, 251 Mich App 353, 365-366; 650 NW2d 407 (2002). "There is no broader classification than the word 'all.' In its ordinary and natural meaning, the word 'all' leaves no room for exceptions." *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 619; 513 NW2d 428 (1994).

IV

Defendant was charged with criminal nonsupport under MCL 750.165(1) more than eight years after his court-ordered support obligation ended. Defendant's

prosecution is, therefore, time-barred unless a violation of MCL 750.165(1) constitutes an offense that continues until an individual has fully satisfied the monetary support obligation, i.e., until the individual no longer has a support arrearage.

The Court of Appeals held that a violation of MCL 750.165(1) is a continuing offense because the FIA's biannual surcharge led to a biannual violation of the statute by defendant. Under the Court of Appeals reasoning, that violation continues for as long as a payer owes any amount. We reject the conclusion that a violation of MCL 750.165(1) is a continuing offense.

The relevant question in this case is whether the Legislature intended a violation of MCL 750.165 to be a continuing offense. We review the statutory text to discern legislative intent. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004).

An individual is guilty of felony nonsupport under MCL 750.165(1) if the individual "does not pay the support in the amount or at the time stated in the order . . . ." The word "or," when read in context ("does not pay"), indicates that the statute is violated if the individual neither pays the ordered amount nor pays that amount when it is due. Thus, the plain language of MCL 750.165(1) directs that the crime of felony nonsupport is complete when an individual fails to pay support in the amount ordered at the time ordered. In other words, an individual may be guilty of felony nonsupport if the individual either pays the full ordered amount after the due date or pays an amount less than the ordered amount before the due date and the due date passes without the individual making full payment. Thus, anyone who fails to pay the full ordered amount at the time ordered may be prosecuted under MCL 750.165(1) even if that individual later becomes

current on the obligation. The Legislature did not specify carrying a support arrearage as a means by which an individual could violate MCL 750.165(1). Because a person is subject to conviction and punishment each time the statute is violated, separate violations of the statute cannot constitute a single continuing offense.[5]

Our conclusion finds further support when MCL 750.165(1) is compared to MCL 750.161. In MCL 750.161(6), the Legislature expressly provided:

> Desertion, abandonment, or refusal or neglect to provide necessary and proper shelter, food, care, and clothing as provided in this section *shall be considered to be a continuing offense* and may be so set out in any complaint or information. [Emphasis supplied.]

Thus, in this statute, the Legislature expressly provided that these acts constitute continuing offenses. By con-

[5] We reject the dissent's contention that our reading of the statute is contrary to its plain language. Contrary to what the dissent believes, our reading of the statute does not ignore the word "or" or replace the word "or" with the word "and," but merely follows the context of the sentence in the statute. The dissent would ignore the context and hold that the statute can be violated by meeting just one of the two conditions listed in the statute. Such an interpretation would clearly fail to comply with the Legislature's intent, as expressed in the unambiguous words of the statute. Under the dissent's interpretation, an individual would violate the statute by failing to pay support in the required amount *even if the payment was not yet due.* We do not believe that the words of the statute show an intent by the Legislature to hold an individual criminally liable for failing to pay the ordered support amount without also considering the date the support payment was due. Further, the dissent's interpretation would also allow an individual ordered to pay support to avoid satisfying the second condition (failure to pay at the time stated in the court order) by paying a negligible amount before the due date. Under such an interpretation, an individual could pay *any amount* to satisfy the requirement that payment be made at the time stated in the court order. We believe that under the unambiguous words of the statute, the amount of the support order must be considered together with the date it is due in determining whether a violation occurred.

trast, no such language appears in MCL 750.165(1). "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute . . . ." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).[6]

We conclude that the Legislature did not intend that a violation of MCL 750.165(1) continue until an individual's monetary support obligation is fully discharged.

V

In summary, the crime of nonsupport under MCL 750.165(1) is complete at the time that an individual fails to pay the ordered amount at the ordered time. Under the limitations period of MCL 767.24(5), a prosecutor has six years from that point in which to charge such violations. Here, because the six-year period of limitations expired before defendant was charged with criminal nonsupport, we need not reach defendant's remaining argument that his prosecution violates constitutional ex post facto prohibitions. Accordingly, we reverse the portion of the Court of Appeals opinion that is inconsistent with our ruling and remand for entry of an order granting defendant's motion to dismiss the charge.

Affirmed in part, reversed in part, and remanded to the trial court.

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[6] We disagree with the dissent's statement that the Legislature did not need to include such language in MCL 750.165 because the nature of felony nonsupport is such that the Legislature must assuredly have intended that it be treated as a continuing offense. The plain language of MCL 750.165(1) indicates that a violation occurs as soon as the due date passes without the individual paying the amount required. Thus, each violation of the felony-nonsupport statute has a distinct date. If the Legislature had meant for a violation of MCL 750.165(1) to be a continuing offense, it would have so stated.

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

KELLY, J. (*concurring in part and dissenting in part*). I concur in the majority's affirmance of the Court of Appeals decision regarding the appropriate statute of limitations. A violation of the felony-nonsupport statute, MCL 750.165(1), does not fall under the ten-year period of limitations in MCL 600.5809(4). Instead, as the Court of Appeals and the majority recognized, it falls under the six-year "catch all" provision of MCL 767.24(5).

I dissent from part IV and the conclusion of the majority opinion because I believe that the Court of Appeals was correct when it found that felony nonsupport is a continuing violation. Consequently, I would affirm the conclusions of the Court of Appeals. Also, I would leave unmolested *People v Westman*,[1] upon which the continuing violations theory relies.

CONTINUING VIOLATIONS ARE DISFAVORED

Statutes of limitations serve important purposes in our criminal justice system. Not only do they protect defendants from having to defend against stale claims, they pressure law enforcement officials to act promptly. The public is served by them in that wrongdoers are brought to justice more quickly. Also, an accused is less likely to be deprived of evidence or witnesses lost through the passage of time.

It is apparent that statutes of limitations find their base in equitable concerns. This fact has led the United States Supreme Court to direct that criminal limitations statutes "be liberally interpreted in favor of repose[.]" *United States v Habig*, 390 US 222, 227; 88 S Ct

[1] 262 Mich App 184; 685 NW2d 423 (2004).

926; 19 L Ed 2d 1055 (1968), quoting *United States v Scharton*, 285 US 518, 522; 52 S Ct 416; 76 L Ed 917 (1932) (internal quotation marks omitted).

In *Toussie v United States*,[2] the Supreme Court recognized that the doctrine of continuing offenses could contradict the very goals and purposes of statutes of limitations. The tension between the two is clear. Limitation statutes restrict an accused's exposure to legal proceedings. A continuing violation perpetuates it, decreeing that each day an accused does not eliminate his violation of a statute, he violates it again. *Toussie v United States*, 397 US 112, 114-115; 90 S Ct 858; 25 L Ed 2d 156 (1970).

Courts should not resolve this tension by never viewing an offense as a continuing violation. Rather, they must exercise particular diligence before deciding that the intent of the legislature was that an offense constitutes a continuing violation. The Supreme Court gave us this guidance in *Toussie*:

> [A conclusion that a violation is a continuing violation should not be made] unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one. [*Id*. at 115.]

THE LEGISLATURE INTENDED A CONTINUING OFFENSE IN MCL 750.165(1)

Whether a continuing violation exists is a matter of statutory interpretation. As in all such matters, our

[2] 397 US 112; 90 S Ct 858; 25 L Ed 2d 156 (1970). This case dealt with the failure to register for the draft. The Supreme Court concluded that the failure to register is not a continuing offense. Congress disagreed and superseded the Court's ruling by statute. 50 USC Appx 462(d). Under the statute, a person who never registers can be prosecuted for failing to register up to the age of 31. See *United States v Kerley*, 838 F2d 932, 935 (CA 7, 1988).

goal is to give effect to the Legislature's intent in enacting the statute. *People v Tombs*, 472 Mich 446, 451; 697 NW2d 494 (2005). Our starting point is the language that it chose.

MCL 750.165(1) provides:

> If the court orders an individual to pay support for the individual's former or current spouse, or for a child of the individual, and the individual does not pay the support *in the amount or at the time stated* in the order, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both. [Emphasis added.]

Here, the Legislature has created two distinct ways of committing the crime: (1) failing to pay support in the required amount *or* (2) failing to pay at the time stated in a court order. I believe that the "or" used in this statute is significant. The Legislature intentionally placed it there to create two separate ways of committing the offense.

Wherever possible, every word of a statute should be given meaning, and no word should be treated as surplusage or made nugatory by court interpretation. *People v Warren*, 462 Mich 415, 429 n 24; 615 NW2d 691 (2000). By reading MCL 750.165(1) as not providing for the possibility of a continuing violation, the majority has rendered the Legislature's use of the word "or" nugatory. The majority interprets the statute as if it reads: "the individual does not pay the support in the amount at the time stated in the order[.]" But this changes its meaning.

The majority has replaced the two ways to commit the offense of felony nonsupport with one. As the majority reads the statute, a person is guilty of the offense whenever that person fails to pay the full amount ordered at the time ordered. It does not matter

if the defendant pays a partial amount or nothing at all. All that matters is that the failure to pay occurs at the time for payment stated in the support order.

The majority acknowledges that the Legislature intended two separate ways to violate the statute. But its analysis strays from its acknowledgement. Because the Legislature intended two separate ways to commit the offense, "or" cannot be read out of the statute as the majority has done.

The majority's reading effectively replaces "or" with "and." "[T]he individual does not pay the support in the amount *and* at the time stated in the order[.]" Again, I cannot agree with departing from the language of the statute as the majority has done. "And" is conjunctive. "Or" is disjunctive. They do not mean the same thing. Nothing in the text of the statute indicates that the Legislature intended "and" but inadvertently used "or" in its place. The choice appears intentional. The Legislature sought to create two means of committing felony nonsupport, and it did so by use of the disjunctive "or."

Without good cause to conclude otherwise, we must assume that the Legislature chose the words of the statute purposely and intentionally. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931). Because nothing in the statute contradicts the conclusion that the choice was intentional, the Court should honor the Legislature's use of "or" in MCL 750.165(1).

The first way to violate the statute is by failing to pay the amount ordered. There is no limitation in the statute on when the failure to pay must occur. Therefore, nothing prevents it from continuing past the date for payment specified in the order. In fact, an individual, such as defendant in this case, fails to pay support "in the amount" ordered not only each pay period but each day he is in arrears. In this case,

defendant continuously failed to pay the amount he owed as his arrearage mounted. Thus, he continued to commit the crime of felony nonsupport. Accordingly, the amount-owed part of MCL 750.165(1) should be read as providing for a continuing offense.

The majority points to MCL 750.161 as evidence that the Legislature did not have that intention. In MCL 750.161(6),[3] the Legislature indicates that violation of MCL 750.161(1) is a continuing offense. The majority argues that the failure to include a provision similar to MCL 750.161(6) in the felony-nonsupport statute demonstrates an intent not to create a continuing violation. I disagree.

By enacting MCL 750.161(6), the Legislature indicated that each and every offense contained in MCL 750.161(1) is a continuing offense. This is despite the fact that, by their nature, certain of the offenses could be interpreted otherwise. For instance, without the instruction to view it as a continuing offense, desertion[4] normally would be a one-time event. While a person may repeatedly abandon his or her spouse or children, the act is not continuous. The Legislature's inclusion of MCL 750.161(6) changes this noncontinuous event into a continuous event.

By contrast, the failure to pay support is by its nature continuous. Applying *Toussie* and given the nature of felony nonsupport, the Legislature must assuredly have

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[3] MCL 750.161(6) provides:

> Desertion, abandonment, or refusal or neglect to provide necessary and proper shelter, food, care, and clothing as provided in this section *shall be considered to be a continuing offense* and may be so set out in any complaint or information. [Emphasis added.]

[4] *Random House Webster's College Dictionary* (2001) defines "desert" as "to leave (a person, place, etc.) without intending to return[.]"

intended that it be treated as a continuing crime. As correctly pointed out by the Court of Appeals, even a single unsatisfied child support payment will grow because the court periodically adds a surcharge to it. For these reasons, the Legislature may not have seen the need to include a section such as MCL 750.161(6) in order to tell us that felony nonsupport is a continuing offense. In any event, the language of the "amount owed" portion of the statute speaks for itself. I would allow it to do so in this case.

Here, defendant did not pay court-ordered support continuing over a period of years and resulting in an accumulated arrearage of over $57,000. The Court of Appeals was right when it found that it was because of defendant's continuing failure to pay support that the lower court correctly bound defendant over for trial.

I do not make this finding of a continuing violation lightly. I recognize the extra scrutiny required under *Toussie*. But I believe that the explicit language of the substantive criminal statute compels this conclusion. *Toussie*, 397 US 115. In MCL 750.165(1), the Legislature explicitly and intentionally used the word "or." In so doing, it created an "amount owed" offense that, by its nature, constitutes a continuing offense. By effectuating the intent of the Legislature, my interpretation meets the requirements articulated by the Supreme Court in *Toussie*.

THE EX POST FACTO CLAUSES WERE NOT VIOLATED

Defendant points out that MCL 750.165 was substantively amended effective November 3, 1999, whereas his failure to pay child support occurred between 1984 and 1994. Hence, he asserts, the charge should have been

dismissed as a violation of the ex post facto clauses of the state and federal constitutions. Const 1963, art 1, § 10; US Const, art I, § 10.

I agree with the Court of Appeals that no ex post facto violation of law occurred in this case. Because defendant's failure to pay overdue child support is an ongoing violation of MCL 750.165, and because it continued after November 3, 1999, the felony-nonsupport charge against defendant does not violate ex post facto prohibitions.

CONCLUSION

I concur in the majority's decision that a violation of MCL 750.165(1) is subject to the six-year period of limitations provided in MCL 767.24(5). I dissent from its determination that a violation of the statute does not constitute a continuing offense. The Legislature evidenced a clear intent to make the failure to pay court-ordered support a continuing offense. Therefore, I would affirm the decision of the Court of Appeals.

WEAVER, J., concurred with KELLY, J.

HOERSTMAN GENERAL CONTRACTING, INC v HAHN

Docket No. 126958. Argued November 8, 2005 (Calendar No. 2). Decided March 23, 2006.

Hoerstman General Contracting, Inc., brought an action in the Cass Circuit Court against Juanita Rems Hahn, C. Ronald Hahn, and Teachers Credit Union, seeking damages and foreclosure of a construction lien with regard to the plaintiff's remodeling and reconstruction of the Hahns' residence. The Hahns counterclaimed for amounts they allegedly overpaid and asserted in their answer to the complaint the affirmative defense of accord and satisfaction. The court, Michael E. Dodge, J., entered a judgment and award for the plaintiff after setting off an amount on the Hahns' counterclaim. The court did not explicitly rule on the issue of accord and satisfaction. The plaintiff and the Hahns appealed. The Court of Appeals, CAVANAGH, P.J., and MURPHY and SMOLENSKI, JJ., affirmed in part, reversed in part, and remanded the matter to the trial court, holding that the words "final payment" on the Hahns' check were not sufficient to inform the plaintiff that acceptance of the check discharged the entire claim. Unpublished opinion per curiam, issued June 15, 2004 (Docket No. 244507). The Supreme Court granted the Hahns' application for leave to appeal, limited to the issue whether an accord and satisfaction occurred in this case. 472 Mich 898 (2005).

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

1. Article 3 of the Uniform Commercial Code, MCL 440.3101 *et seq*., is comprehensive and intended to apply to nearly every situation involving negotiable instruments.

2. The language in § 3311, MCL 440.3311, completely covers the details of accord and satisfaction, leaving no doubt that the Legislature intended it to abrogate the common law in this area. Section 3311, not the common law, applies to an accord and satisfaction involving a negotiable instrument such as a check. Section 3111(1)(*i*)-(*iii*), MCL 440.3311(1)(*i*)-(*iii*), requires a good-faith tender to the claimant as full satisfaction of the claim, a claim that is unliquidated or subject to a bona fide dispute, and a claimant obtaining payment of the instrument. Once these re-

quirements are satisfied, the question becomes whether the claim was discharged. Under § 3311(2), MCL 440.3311(2), a claim is discharged if the instrument, or an accompanying written communication, contains a conspicuous statement that the tender is in full satisfaction of the claim. Alternatively, under § 3311(4), MCL 440.3311(4), a claim is discharged if the claimant, or an agent of the claimant, knew that the payor tendered the instrument in full satisfaction of the claim.

3. Applying § 3311 to this case, the Hahns' tender of the check satisfied all the requirements of § 3311(1)(*i*)-(*iii*) and (4). An accord and satisfaction occurred and the plaintiff's acceptance of the check discharged its claim. The judgment of the Court of Appeals must be reversed and the matter must be remanded to the circuit court for entry of a judgment in favor of the defendants.

Reversed and remanded to the circuit court.

NEGOTIABLE INSTRUMENTS — ACCORD AND SATISFACTION — UNIFORM COMMERCIAL CODE.

An accord and satisfaction involving a negotiable instrument is governed by § 3311 of the Uniform Commercial Code in derogation of the common law (MCL 440.3311).

Hadsell, Landgraf, Lynch & Drew, LLP (by *Christopher J. Lynch* and *Brian Paul Hess*), for the plaintiff.

Jones Obenchain, LLP (by *Timothy W. Woods*), for Juanita Rems Hahn and C. Ronald Hahn.

KELLY, J. This case calls on us to decide whether an accord and satisfaction existed between the parties. The Court of Appeals found that it did not. We disagree and rule that the parties reached an accord and satisfaction. Therefore, we reverse the decision of the Court of Appeals and remand the case to the trial court for entry of judgment in favor of defendants.

SUBSTANTIVE FACTS AND PROCEDURAL HISTORY

This case centers on a contract to remodel and reconstruct a lakeside residence in Edwardsburg,

Michigan,[1] made between plaintiff, Hoerstman General Contracting, Inc., and defendants Juanita and Ronald Hahn, the owners. Unfortunately, several unforeseen events during construction caused significant delay and cost overruns. When plaintiff did not meet the expected deadline to complete the work, Ronald Hahn informed plaintiff's owner that he wanted the job finished no matter the expense. Plaintiff agreed to work under these conditions if Ronald agreed to pay the extra costs. Ronald made it clear that he was not concerned with the price.

Plaintiff followed Ronald's oral instructions on changes to the project. These were not minor modifications. They included moving walls and tearing up concrete floors. According to plaintiff, a later-compiled written list of the oral changes to the contract covered over ten pages. Despite these significant alterations, Ronald refused to agree in writing to any changes to the existing contract.

Defendants acknowledged that they owed more than the original bid price and paid plaintiff $125,000. But plaintiff claimed defendants owed an additional $32,750. In an apparent attempt to settle the dispute, plaintiff sent a letter to defendants asking for $16,910.79. Plaintiff indicated that it would provide the lien waiver and close the account in exchange for payment of the amount requested.

Defendants did not pay the $16,910.79. Instead, they replied with a letter in which they calculated the balance due at $5,144.79. They included with the letter their check for that amount. They wrote "final payment" on the check. In the letter, they indicated that

[1] Originally, the residence belonged solely to Juanita Rems. Juanita married during the course of construction and added her husband, C. Ronald Hahn, to the title.

they believed that their payment of $5,144.79 closed the account. The letter provided:

> If we send you a check for $5144.79 we will consider this account closed and will not expect discussion of the other * items.[2] We will then expect the lein [sic] waiver to be sent. If this is not acceptable, we will have to resort to arbitration per attorney [sic].

Plaintiff sought legal advice. Its attorney crossed out the words "final payment" on the check and advised plaintiff to deposit it. Plaintiff followed this advice, credited defendants' account in the amount of $5,144.79, and did not close the account.

When defendants made no additional payments, plaintiff brought suit seeking damages and foreclosure of its construction lien. Defendants counterclaimed for amounts they believed they had overpaid. In their answer to plaintiff's complaint, defendants asserted the affirmative defense of accord and satisfaction. After a bench trial, the court awarded plaintiff approximately $26,000 after setting off $5,800 on defendants' counterclaim. The court did not explicitly rule on the issue of accord and satisfaction.

Both parties appealed to the Court of Appeals. The Court of Appeals ruled that the words "final payment" on the check were not sufficient to inform plaintiff that acceptance of the check discharged the entire claim. *Hoerstman Gen Contracting, Inc v Hahn*, unpublished opinion per curiam of the Court of Appeals, issued June 15, 2004 (Docket No. 244507). This Court granted leave to appeal limited to whether an accord and satisfaction occurred in this case. 472 Mich 898 (2005).

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[2] The "* items" refers to a list of disputed charges for changes made in the project.

STANDARD OF REVIEW

The existence of an accord and satisfaction may be decided as a question of law if the facts of the case are undisputed and not open to opposing inferences. *Urben v Pub Bank*, 365 Mich 279, 286; 112 NW2d 444 (1961). During oral argument, the parties conceded that the relevant facts here are not in dispute. Therefore, the case presents a question of law which we review de novo. *Anzaldua v Band*, 457 Mich 530, 533; 578 NW2d 306 (1998).

ACCORD AND SATISFACTIONS

An accord and satisfaction is an affirmative defense[3] grounded in contract principles. An accord is a contract and requires a meeting of the minds of those who enter into it. *Fritz v Marantette*, 404 Mich 329, 334; 273 NW2d 425 (1978), quoting *Gitre v Kessler Products Co*,

[3] MCR 2.111(F)(3) provides:

> *Affirmative Defenses*. Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118. Under a separate and distinct heading, a party must state the facts constituting:
>
> (a) an affirmative defense, such as contributory negligence; the existence of an agreement to arbitrate; assumption of risk; payment; release; satisfaction; discharge; license; fraud; duress; estoppel; statute of frauds; statute of limitations; immunity granted by law; want or failure of consideration; or that an instrument or transaction is void, voidable, or cannot be recovered on by reason of statute or nondelivery;
>
> (b) a defense that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part;
>
> (c) a ground of defense that, if not raised in the pleading, would be likely to take the adverse party by surprise.

387 Mich 619, 624; 198 NW2d 405 (1972). A satisfaction is the discharge of the debt occurring after acceptance of the accord.[4]

Cases in which an accord and satisfaction defense is relevant involve a good-faith dispute about an unliquidated amount owing under a contract. One party makes a tender in satisfaction of the claim (an accord). The other accepts or rejects the accord. If the second party accepts the tender, there is both an accord and a satisfaction. See *Nationwide Mut Ins Co v Quality Builders, Inc*, 192 Mich App 643, 647; 482 NW2d 474 (1992), citing *Shaw v United Motors Products Co*, 239 Mich 194; 214 NW 100 (1927).

In this Court's handling of common-law accord and satisfaction, two lines of cases developed. The first holds that whether there was a sufficient meeting of the minds for an accord and satisfaction is a question for the jury.[5] The second holds that the required meeting of the minds is implied as a matter of law by the acceptance of the offer. The fact that the recipient altered or crossed out the accord is irrelevant.[6]

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[4] Black's Law Dictionary (7th ed) provides a useful definition of "accord and satisfaction":

> An agreement to substitute for an existing debt some alternative form of discharging that debt, coupled with the actual discharge of the debt by the substituted performance. The new agreement is called the *accord*, and the discharge is called the *satisfaction*. [Emphasis in original.]

[5] See *Fritz*, 404 Mich 329; *Gitre*, 387 Mich 619; *Urben*, 365 Mich 279; *Hoey v Ross*, 189 Mich 193; 155 NW 375 (1915); *Stevens v Michigan Soap Works*, 134 Mich 350; 96 NW 435 (1903); *Cleveland v Rothschild*, 132 Mich 625; 94 NW 184 (1903); *Block v Crawford*, 114 Mich 608; 72 NW 602 (1897); *Mortlock v Williams*, 76 Mich 568; 43 NW 592 (1889).

[6] See *Lehaney v New York Life Ins Co*, 307 Mich 125; 11 NW2d 830 (1943); *Eisenberg v CF Battenfeld Oil Co*, 251 Mich 654; 232 NW 386

As in this case, the affirmative defense of accord and satisfaction often involves the use of a check. A check is a negotiable instrument entered into between the maker and the payee. *Huler v Nasser*, 322 Mich 1, 6; 33 NW2d 637 (1948). As will be demonstrated later, when the Legislature enacted MCL 440.3311, it followed the second line of cases. This effectively repudiates any application of the first line of cases to accord and satisfactions involving negotiable instruments, leaving MCL 440.3311 to control all accord and satisfactions involving negotiable instruments.

UCC PREEMPTION IN CASES INVOLVING NEGOTIABLE INSTRUMENTS

In 1964, the Michigan Legislature enacted the Uniform Commercial Code. In 1993, the Legislature added to Article 3 of the UCC a provision governing accord and satisfaction. Article 3 is known as the "Uniform Commercial Code-Negotiable Instruments." MCL 440.3101. It is compendious and by its terms is intended to apply to all negotiable instruments with limited exceptions not relevant here.[7]

(1930); *Deuches v Grand Rapids Brass Co*, 240 Mich 266; 215 NW2d 392 (1927); *Shaw*, 239 Mich 194; *Stone v Steil*, 230 Mich 249; 202 NW 982 (1925).

[7] MCL 440.3102 specifically provides:

> (1) This article applies to negotiable instruments. It does not apply to money, to payment orders governed by article 4a, or to securities governed by article 8.
>
> (2) If there is conflict between this article and article 4 or 9, articles 4 and 9 govern.
>
> (3) Regulations of the board of governors of the federal reserve system and operating circulars of the federal reserve banks supersede any inconsistent provision of this article to the extent of the inconsistency.

MCL 440.3311 of Article 3 provides:

(1) If a person against whom a claim is asserted proves that (*i*) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (*ii*) the amount of the claim was unliquidated or subject to a bona fide dispute, and (*iii*) the claimant obtained payment of the instrument, the following subsections apply.

(2) Unless subsection (3) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(3) Subject to subsection (4), a claim is not discharged under subsection (2) if either of the following applies:

(a) The claimant, if an organization, proves that (*i*) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (*ii*) the instrument or accompanying communication was not received by that designated person, office, or place.

(b) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This subdivision does not apply if the claimant is an organization that sent a statement complying with subdivision (a)(*i*).

(4) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

Whether a statutory scheme such as MCL 440.3311 preempts the common law is a question of legislative intent. *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987).

> In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter. [*Id*., citing 2A Sands, Sutherland Statutory Construction (4th ed), § 50.05, pp 440-441.]

The Legislature has the authority to abrogate the common law. *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 507-508; 309 NW2d 163 (1981). When it does so, it should speak in no uncertain terms. *Marquis v Hartford Accident & Indemnity* (*After Remand*), 444 Mich 638, 652 n 17; 513 NW2d 799 (1994), quoting *Bandfield v Bandfield*, 117 Mich 80, 82; 75 NW 287 (1898).

As already noted, Article 3 of the UCC is comprehensive. It is intended to apply to nearly every situation involving negotiable instruments. See MCL 440.3102. The language contained in MCL 440.3311 completely covers the details of accord and satisfactions.

MCL 440.3311(3) and (4) contain exceptions or conditions. Their enumeration eliminates the possibility of their being other exceptions under the legal maxim *expressio unius est exclusio 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

[8] "The expression of one thing is the exclusion of another." Black's Law Dictionary (7th ed), p 1635.

Sands, Sutherland Statutory Construction (4th ed), § 47.24, p 203. This Court long ago stated that no maxim is more uniformly used to properly construe statutes. *Taylor v Michigan Public Utilities Comm*, 217 Mich 400, 403; 186 NW 485 (1922).

Therefore, the language of the statute shows that the Legislature covered the entire area of accord and satisfactions involving negotiable instruments. It clearly intended that the statute would abrogate the common law on this subject.[9]

Our conclusion is buoyed by the UCC comment to MCL 440.3311. It notes that conflict existed previously over whether the common law was modified by the predecessor of MCL 440.3311, former section 1-207. By updating Article 3, it informs us, the Legislature intended to alleviate these conflicts and update the law of accord and satisfaction. Specifically, the comment provides:

> As part of the revision of Article 3, Section 1-207 has been amended to add subsection (2) stating that Section 1-207 "does not apply to an accord and satisfaction." Because of that amendment and revised Article 3, Section 3-311 governs full satisfaction checks. Section 3-311 follows the common law rule with some minor variations to reflect modern business conditions. [MCLA 440.3311, comment 3.]

These comments support a finding of preemption. They demonstrate the Legislature's intent to modify and update the common law. Therefore, we hold that MCL 440.3311, not the common law, applies to an

[9] We note that this conclusion does not eliminate common-law accord and satisfactions entirely. An accord and satisfaction can exist without the use of a negotiable instrument. For instance, the parties could use cash or goods to satisfy a debt rather than a check. MCL 440.3311 would not apply in those situations.

accord and satisfaction involving a negotiable instrument such as a check. And we apply this statute to the case at hand.

APPLYING MCL 440.3311 OF THE UCC TO THIS CASE

The first requirement of an accord and satisfaction is a good-faith tender to the claimant as full satisfaction of the claim. MCL 440.3311(1)(*i*). Article 3 contains an internal definition of "good faith": " 'Good faith' means honesty in fact and the observance of reasonable commercial standards of fair dealing." MCL 440.3103(1)(d).

Defendants demonstrated "honesty" in their settlement offer to plaintiff. They offered plaintiff what defendants thought was a fair deal. In their letter to plaintiff, as part of the accord, defendants went through the various additions to the construction contract. They estimated what each cost and listed each disputed item. Juanita Rems Hahn gave a full explanation of why defendants thought they should not have to pay for the disputed items. Defendants' accounting also included a detailed list of all payments made. In total, the accounting covers several pages.

After adding their estimation of all costs and subtracting all the payments, defendants arrived at $5,144.79 as the amount of the accord and tendered it to plaintiff. Given that this tender was made in such detail and with clear explanations of its reasoning, we conclude that defendants' tender was made in "good faith" as required by MCL 440.3311(1)(*i*).

The second requirement of an accord and satisfaction involving a negotiable instrument is that the claim be unliquidated or subject to a bona fide dispute. MCL 440.3311(1)(*ii*). Black's Law Dictionary (7th ed) defines

an "unliquidated claim" as "a claim in which the liability of the party or the amount of the claim is in dispute."[10]

Plaintiff performed extra work without an agreement regarding the amount to be paid. Because the cost of the changes and overruns were left unspecified and are in dispute, the claim for them is unliquidated.

Plaintiff argues the contrary. It asserts that, to the extent that defendants conceded that they owed part of the disputed debt, that portion of the debt was liquidated. This Court previously rejected this argument:

> "The fact that part of the claim was conceded did not divide the liability into two liquidated claims. Whatever the rule in other jurisdictions, this court holds that such a claim is unliquidated and payment of the conceded amount furnishes consideration for settlement of the whole." [*Lehaney v New York Life Ins Co*, 307 Mich 125, 131; 11 NW2d 830 (1943), quoting *Long v Aetna Life Ins Co*, 259 Mich 206, 209; 242 NW 889 (1932).]

See also *Tanner v Merrill*, 108 Mich 58; 65 NW 664 (1895). Defendants' concession of part of the debt has no effect on the question whether the claim was liquidated.

The third requirement contained in MCL 440.3311(1) is that the claimant must obtain payment of the instrument. MCL 440.3311(1)(*iii*). The requirement was satisfied here because plaintiff negotiated defendants' check by depositing it.

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[10] The claim must be in dispute at the time of the accord. Contract principles apply to it. *Fritz*, 404 Mich 334. The unliquidated nature of the claim allows for consideration on both sides and a meeting of the minds. "[T]he compromise agreement of one party became the supporting consideration for that of the other." *Empire Industries, Inc v Northern Assurance Co, Ltd*, 342 Mich 425, 430; 70 NW2d 769 (1955).

Once the first three requirements are satisfied, the question becomes whether the claim was discharged. Under the statute, there are two ways to discharge a claim. According to MCL 440.3311(2), a claim is discharged if the instrument, or an accompanying written communication, contains a conspicuous statement that the tender is in full satisfaction of the claim.[11] Second, under MCL 440.3311(4), a claim is discharged if the claimant, or the claimant's agent, knew that the defendant tendered the instrument in full satisfaction of the claim.

MCL 440.3311(4) controls this case. Plaintiff's president testified that he knew defendants' intention in sending the letter and check. He stated that defendants intended the check as a final payment. He claimed merely that he believed that defendants' attempt to establish an accord did not satisfy Michigan law. Plaintiff's president consulted an attorney on this question, and counsel erroneously informed him that the accord would be valid only in Indiana, not in Michigan.

MCL 440.3311(4) contains no exception for a mistaken understanding of the law. It requires only that a claimant know "that the instrument was tendered in full satisfaction of the claim." Plaintiff knew that defendants intended the payment to be final and in full satisfaction of the claim. Therefore, an accord and satisfaction exists, despite plaintiff's mistake of law.

Even if we did not find a discharge of the debt under MCL 440.3311(4), we would find one under MCL 440.3311(2). That subsection provides:

> Unless subsection (3) applies, the claim is discharged if the person against whom the claim is asserted proves that

[11] MCL 440.3311(3) contains two exceptions to MCL 440.3311(2). Neither is applicable here.

> the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim. [MCL 440.3311(2).]

MCL 440.1201(10) defines "conspicuous":

> "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: non-negotiable bill of lading) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

The Uniform Commercial Code comment further discusses the meaning of "conspicuous." Comment 4 of MCL 440.3311 opines: "If the claimant can reasonably be expected to examine the check, almost any statement on the check should be noticed and is therefore conspicuous."

In this case, defendants wrote the words "final payment" on the comment line of the check. They were in capital letters and not obfuscated in any way. They meet the definition of "conspicuous" because they were written so that someone would notice them. MCL 440.1201(10). Therefore, inclusion of "final payment" on the check satisfied the requirements of MCL 440.3311(2).

The letter sent with the check also contains a conspicuous statement that the check discharges the claim. Specifically, the letter provided:

> If we send you a check for $5144.79 we will consider this account closed and will not expect discussion of the other * items. We will then expect the lein [sic] waiver to be sent. If this is not acceptable, we will have to resort to arbitration per attorney [sic].

This statement was the concluding paragraph, directly above the signature line. It was not placed in a footnote or other location that plaintiff might skip over while reading. Therefore, it too was a "conspicuous" statement that the check was tendered as full satisfaction of the claim, and that the claim was discharged.[12]

Two exceptions to MCL 440.3311(2) exist in MCL 440.3311(3). Neither applies to this case. Defendants' tender satisfied all the requirements of MCL 440.3311. Therefore, an accord and satisfaction occurred. Plaintiff's acceptance of the check discharged the claim.

CONCLUSION

We find that by enacting MCL 440.3311 of the Uniform Commercial Code, the Legislature intended to preempt the common law on accord and satisfactions in the area of negotiable instruments.

Therefore, the trial court erred in not applying the UCC to this case. The Legislature used clear language to describe in detail a course of conduct to pursue in

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[12] Plaintiff failed to note the existence of MCL 440.3311 even on appeal. Therefore, it argued that the tender must be so clear that it is not susceptible to any other interpretations. It argued that use of the word "expect" and reference to arbitration meant that the tender did not meet this mark.

We first note that, despite what the common law may state, MCL 440.3311 of the UCC contains no such requirement. Regardless, we find plaintiff's argument unconvincing. The statement contained in the letter specifically provides that the account will be closed and no further discussion will occur. Moreover, defendants state that they expect to receive the lien waiver from plaintiff. Plaintiff admits that lien waivers issue only after final payment. The reference to arbitration does not detract from this. Defendants were simply informing plaintiff what would happen if it chose not to accept the check. Any other reading of the reference to arbitration would violate common sense. Therefore, the statement in the letter was sufficient to inform plaintiff of the meaning of the tender.

order to accomplish an accord and satisfaction. It designated specific limitations and exceptions to the rule.

Applying MCL 440.3311, we find that defendants sufficiently met their burden of proof on the affirmative defense of accord and satisfaction. Therefore, we reverse the decision of the Court of Appeals and remand the case to the circuit court for entry of judgment in favor of defendants.

Reversed and remanded to the circuit court.

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

PEOPLE v FRANCISCO

Docket No. 129035. Decided March 23, 2006. On application by the defendant for leave to appeal, the Supreme Court directed the clerk to schedule oral argument on whether to grant the application or take other peremptory action. Following oral argument, the Supreme Court issued an opinion that determined that the trial court erred in scoring the sentencing guidelines range and remanded the matter to the trial court for resentencing. Leave to appeal with regard to the remaining appellate issues raised by the defendant was denied.

Charles W. Francisco was convicted by a jury in the Oakland Circuit Court, Rudy J. Nichols, J., of first-degree home invasion, MCL 750.110a(2), and was sentenced to 102 to 480 months in prison as a third-offense habitual offender. The Court of Appeals, SAAD, P.J., and ZAHRA and SCHUETTE, JJ., affirmed in an unpublished opinion per curiam, issued May 26, 2005 (Docket No. 252188). On the defendant's application for leave to appeal in the Supreme Court, the Court directed the clerk to schedule oral argument on whether to grant the defendant's application for leave to appeal or take other peremptory action. 474 Mich 946 (2005). Following oral argument, the Supreme Court, in lieu of granting leave to appeal, issued an opinion that held that the trial court erred in scoring offense variable (OV) 13 and that remanded the matter to the trial court for resentencing. The application for leave to appeal with regard to the remaining issues raised by the defendant was denied.

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

1. Twenty-five points are to be scored under OV 13 where the sentencing offense is "part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). A "pattern" is defined as three or more crimes committed "within a five-year period, *including the sentencing offense*." MCL 777.43(2)(a)(emphasis added). Because MCL 777.43(2)(a) states that the sentencing offense "shall" be included within the five-year period, the statute precludes consideration of a five-year period that does not include the sentencing offense. OV 13 was improperly scored in this case because the sentencing offense is not within the same five-year period as the other offenses.

2. A defendant is entitled to be sentenced by a trial court on the basis of accurate information. Where a sentence is within the appropriate guidelines sentence range, it is appealable if there was a scoring error or if inaccurate information was relied on in determining the sentence. Here, there was a scoring error that altered the appropriate guidelines range. The defendant is entitled to be resentenced because his sentence was based on an inaccurate calculation of the guidelines range. Leave to appeal with regard to the other issues raised on appeal must be denied.

Remanded to the trial court.

Justice CORRIGAN, joined by Justices WEAVER and YOUNG, dissenting, would deny leave to appeal in this matter. MCL 769.34(10) permits, but does not require, a remand to correct an error in scoring the sentencing guidelines. Consistent with the "harmless error" rule, a remand for resentencing is not required where, as in this matter, an original sentence still falls within the sentencing guidelines range upon rescoring.

1. SENTENCES — OFFENSE VARIABLES — WORDS AND PHRASES — PATTERN.

Offense Variable 13 mandates that 25 points be scored where the sentencing offense is part of a pattern of felonious criminal activity involving three or more felonies against a person; and a "pattern" is defined as three or more crimes committed within a five-year period, including the sentencing offense. To constitute part of this pattern, a sentencing offense must be within the same five-year period as the other crimes constituting the pattern; a five-year period that does not include the sentencing offense may not be considered (MCL 777.43).

2. SENTENCES — SENTENCING GUIDELINES — INACCURATE INFORMATION.

A defendant is entitled to be sentenced by a trial court on the basis of accurate information; even where a minimum sentence is within the appropriate guidelines sentence range, a defendant is entitled to be resentenced if there was a scoring error or if inaccurate information was relied upon in determining the defendant's sentence.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, *Joyce F. Todd*, Chief, Appellate Division, and *Robert C. Williams*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jacqueline J. McCann* and *Anne Yantus*) for the defendant.

MARKMAN, J. At issue is whether the trial court erred in scoring offense variable 13 (OV 13) and, if so, whether defendant is entitled to be resentenced. Because we conclude that the trial court did err in scoring OV 13, and because this error affected the statutory sentencing guidelines range, we remand to the trial court for resentencing.

I. FACTS AND PROCEDURAL HISTORY

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2).[1] At the sentencing hearing, defendant unsuccessfully challenged the scoring of points under offense variables 9 and 13. The statutory sentencing guidelines, as scored by the trial court, called for a minimum sentence range of 87 to 217 months, and defendant was sentenced to 102 to 480 months as a third-offense habitual offender. Defendant filed an appeal as of right. The Court of Appeals affirmed, unpublished opinion per curiam, issued May 26, 2005 (Docket No. 252188), and defendant applied for leave to appeal in this Court. After directing the parties to address certain issues,[2] we heard oral

[1] Defendant was also convicted of larceny from a building, MCL 750.360, but the trial court vacated this conviction.

[2] These issues were as follows:

> (1) [W]hether *People v McDaniel*, 256 Mich App 165, 172-173 (2003), was correct in deciding that Offense Variable 13 may be scored based on three or more felonies committed in any five-year period even if that period does not include the date of the sentencing offense, and (2) assuming OV 13 should not have been scored, is defendant automatically entitled to resentencing because of the scoring error, or is resentencing unnecessary because the minimum sentence imposed was "within the appropriate

argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1).[3]

II. STANDARD OF REVIEW

The issues in this case concern the proper interpretation and application of the statutory sentencing guidelines, MCL 777.11 *et seq*., which are both legal questions that this Court reviews de novo. *People v Morson,* 471 Mich 248, 255; 685 NW2d 203 (2004).

III. ANALYSIS

A. OV 13

Defendant argues that the trial court erred in scoring OV 13 at 25 points. Twenty-five points are to be scored under OV 13 where "[t]he offense *was part of a pattern* of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b) (emphasis added). "[A]ll crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). In the instant case, although the sentencing offense took place in 2003, the trial court relied on three felonies that occurred in 1986 to score OV 13 at 25 points.

In *People v McDaniel*, 256 Mich App 165, 172; 662 NW2d 101 (2003),[4] the Court of Appeals held that "*any* five-year period may be utilized," observing:

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guidelines sentence range" within the meaning of MCL 769.34(10). [474 Mich 946 (2005).]

[3] 474 Mich 946 (2005).

[4] The defendant in *McDaniel* filed an application for leave to appeal in this Court and we held it in abeyance, 668 NW2d 909 (2003), for *People v Kimble,* 470 Mich 305; 684 NW2d 669 (2004). After we issued our decision in *Kimble*, and after we scheduled oral argument on whether to grant the application or take other peremptory action permitted by MCR

> The statute clearly refers to "a 5-year period." The use of the indefinite article "a" reflects that no particular period is referred to in the statute. Had the Legislature intended the meaning defendant assumes, the statute would refer to "the 5-year period immediately preceding the sentencing offense." Instead, the phrase "including the sentencing offense" modifies "all crimes." That is, the sentencing offense *may* be counted as one of the three crimes in *a* five-year period. That does not, however, preclude consideration of a five-year period that does not include the sentencing offense. [*Id.* at 172-173 (emphasis in the original).]

The *McDaniel* dissent, on the other hand, concluded that only a five-year period that includes the sentencing offense can be considered, explaining:

> The language at issue states that "all crimes within a 5-year period, *including the sentencing offense*, shall be counted." MCL 777.43(2)(a) (emphasis added). Because the word "shall" is used, I find it is impossible for any five-year period that does not include the sentencing offense to be considered. Contrary to the majority's interpretation of the statute, my reading of the statutory language clearly precludes consideration of a five-year period that does not include the sentencing offense. [*Id*. at 174 (DONOFRIO, J., dissenting).]

We agree with the Court of Appeals dissent that only those crimes committed during a five-year period that encompasses the sentencing offense can be considered.

MCL 777.43(1)(b) states that the sentencing offense must be "*part of a pattern* of felonious criminal activity involving 3 or more crimes against a person." (Emphasis added.) MCL 777.43(2)(a) defines a "pattern" as three or more crimes committed "within a five-year period, *including the sentencing offense* . . . ." (Empha-

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7.302(G)(1), 471 Mich 934 (2004), we dismissed the application upon stipulation of the parties. 692 NW2d 387 (2005).

sis added.) Therefore, in order for the sentencing offense to constitute a part of the pattern, it must be encompassed by the same five-year period as the other crimes constituting the pattern.

The Court of Appeals majority in *McDaniel, supra* at 172, concluded that because MCL 777.43(2)(a) refers to "*a* 5-year period," rather than "*the* 5-year period," "*any* 5-year period may be utilized." However, MCL 777.43(2)(a) does not just refer to "a 5-year period"; instead, it refers to "a 5-year period, *including the sentencing offense* . . . ." (Emphasis added.) It is a long-accepted principle of statutory construction that the court must construe a statute so as to give full effect to all its provisions. *Drouillard v Stroh Brewery Co,* 449 Mich 293, 302; 536 NW2d 530 (1995). The Court of Appeals erred in not considering the language of MCL 777.43(2)(a), above, which specifies that the five-year period must include the sentencing offense.

The Court of Appeals concluded that "the sentencing offense *may* be counted as one of the three crimes in *a* five-year period. That does not, however, preclude consideration of a five-year period that does not include the sentencing offense." *McDaniel, supra* at 172-173. However, MCL 777.43(2)(a) specifically states that "all crimes within a 5-year period, including the sentencing offense, *shall* be counted . . . ." (Emphasis added.) "Shall" is a mandatory term, not a permissive one. *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005). Because MCL 777.43(2)(a) states that the sentencing offense "shall" be included in the five-year period, the sentencing offense *must* be included in the five-year period. Therefore, MCL 777.43(2)(a) does preclude consideration of a five-year period that does not include the sentencing offense.

In this case, the sentencing offense took place in 2003, while the other offenses took place in 1986. Because the sentencing offense did not encompass the same five-year period as the other offenses, OV 13 was improperly scored at 25 points.

B. RESENTENCING

The trial court sentenced defendant to 102 to 480 months of imprisonment under the belief that the statutory sentencing guidelines set forth a minimum range of 87 to 217 months. However, when the statutory sentencing guidelines are correctly scored, they actually set forth a minimum range of 78 to 195 months. Thus, the trial court sentenced defendant to a minimum of 102 months under a misapprehension of the guidelines range.

A defendant is entitled to be sentenced by a trial court on the basis of accurate information. MCL 769.34(10) states, "[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing *absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence*." (Emphasis added.) In other words, if a minimum sentence falls within the appropriate guidelines range, a defendant is not entitled to be resentenced unless there has been a scoring error or inaccurate information has been relied upon. As we explained in *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004), "if the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the

issue was raised at sentencing, in a motion for resentencing, or in a motion to remand."[5]

MCL 769.34(10) makes clear that the Legislature intended to have defendants sentenced according to accurately scored guidelines and in reliance on accurate information (although this Court might have presumed the same even absent such express language).[6] Moreover, we have held that "a sentence is invalid if it is based on inaccurate information." *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).[7] In this case, there was a scoring error, the scoring error altered the appropriate guidelines range, and defendant preserved the issue at sentencing.[8] It would be in derogation of the

[5] The dissent states that, even assuming that OV 13 was misscored, defendant's sentence is within the appropriate guidelines sentence range, and "the Legislature has expressly directed an appellate court to affirm in this circumstance." *Post* at 93. The Legislature, however, has *not* expressly directed an appellate court to affirm in this circumstance. Instead, the Legislature has expressly directed an appellate court to affirm where the sentence is within the appropriate guidelines range "*absent* an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10) (emphasis added).

[6] Even if MCL 769.34(10) does not, as suggested by the dissent, *require* a remand, a remand is required by MCR 2.613(A), which provides that an error does not justify disturbing a judgment "unless refusal to take this action appears to the court inconsistent with substantial justice." It is difficult to imagine something more "inconsistent with substantial justice" than requiring a defendant to serve a sentence that is based upon inaccurate information.

[7] Unlike the dissent, we conclude that when a trial court sentences a defendant in reliance upon an inaccurate guidelines range, it does so in reliance upon inaccurate information.

[8] Where a scoring error does not alter the appropriate guidelines range, resentencing is not required. *People v Davis,* 468 Mich 77, 83; 658 NW2d 800 (2003). Resentencing is also not required where the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range. *People v Mutchie,* 468 Mich 50, 51; 658 NW2d 154

law, and fundamentally unfair, to deny a defendant in the instant circumstance the opportunity to be resentenced on the basis of accurate information.[9] A defen-

(2003). Finally, if the defendant failed to raise the scoring error at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals, and the defendant's sentence is within the appropriate guidelines range, the defendant cannot raise the error on appeal except where otherwise appropriate, as in a claim of ineffective assistance of counsel. MCL 769.34(10) ("[a] party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals"); *Kimble, supra* at 310-311 ("if the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand").

[9] The United States Supreme Court has held that "a court of appeals must remand for resentencing[] if the sentence was imposed as a result of an incorrect application of the [federal] Guidelines" and that "a sentence is imposed 'as a result of' an incorrect application of the Guidelines when the error results in the district court selecting a sentence from the wrong guidelines range." *Williams v United States,* 503 US 193, 202, 203; 112 S Ct 1112; 117 L Ed 2d 341 (1992). As explained by the United States Court of Appeals for the Third Circuit, "[a] defendant has a right to a sentence that not only falls within a legally permissible range, but that was imposed pursuant to correctly applied law" and "imposition of a sentence selected from the wrong range is likely to impair a defendant's right to a fair sentence . . . ." *United States v Knight,* 266 F3d 203, 210 (CA 3, 2001). And, as explained by the United States Court of Appeals for the Sixth Circuit:

> If the range the court used resulted from an incorrect application of the guidelines, an after-the-fact determination that the sentence actually imposed happened to be within the proper range does not cure the court's error. The actual sentence imposed in such a case is not material because it is the district court's application of the guidelines to arrive at the sentencing range that is at issue, not that court's discretionary choice of sentence within that range. [*United States v Lavoie,* 19 F3d 1102, 1104 (CA 6, 1994).]

dant is entitled to be sentenced in accord with the law, and is entitled to be sentenced by a judge who is acting in conformity with such law.

The trial court here sentenced defendant to a minimum of 102 months under the misapprehension that the statutory sentencing guidelines called for a minimum sentence of 87 to 217 months; instead, the guidelines, correctly scored, called for a minimum sentence of 78 to 195 months.[10] While the difference between the mistaken and the correct guidelines ranges is relatively small, the fundamental problem nonetheless is illustrated. The actual sentence suggests an intention by the trial court to sentence defendant near the bottom of the appropriate guidelines range— specifically, fifteen months or 17 percent above the 87-month minimum. Had the trial court been acting on the basis of the correct guidelines range, however, we simply do not know whether it would have been prepared to sentence defendant to a term 24 months or 30 percent above the new 78-month minimum.[11] Indeed, appellate correction of an erroneously calculated guidelines range will always present this dilemma, i.e., the defendant will have

[10] The dissent concludes that, where the trial court sentences a defendant on the basis of an inaccurate guidelines range and where the defendant's sentence falls within the appropriate guidelines range, the courts should employ the "harmless error" rule. However, the dissent next concludes that because defendant's sentence falls within the appropriate guidelines range, any error was harmless. What is the point in applying a harmless error rule if the error is always going to be harmless? And, why did the Legislature provide that a sentence that is within the appropriate guidelines range shall be affirmed "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence," MCL 769.34(10), if it intended *all* sentences that are within the appropriate guidelines to be affirmed, regardless of whether there was an error in scoring the guidelines?

[11] At oral argument, the prosecutor conceded that this case should be remanded for resentencing if OV 13 was determined to be misscored.

been given a sentence which stands differently in relationship to the correct guidelines range than may have been the trial court's intention.[12] Thus, requiring resentencing in such circumstances not only respects the defendant's right to be sentenced on the basis of the law, but it also respects the trial court's interest in having defendant serve the sentence that it truly intends.[13]

Because defendant's sentence here is based upon an inaccurate calculation of the guidelines range and is, therefore, inconsistent with the law, defendant is entitled to be resentenced.[14]

IV. CONCLUSION

Because we conclude that the trial court erred in scoring OV 13, and that this error affected the statutory sentencing guidelines range, we remand to the trial court for resentencing pursuant to the correct guidelines range.

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

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[12] Contrary to the dissent, we are in no way suggesting that courts must "engage in a calculus of comparing percentages." *Post* at 94. We only mention these percentages to demonstrate how a sentence based on an inaccurate guidelines range may not constitute the sentence that the trial court genuinely intended to impose.

[13] We do not accept the premise that a *de minimis* violation of a defendant's rights has occurred, and that resentencing is unnecessary because an error is "harmless," where a defendant is to be deprived of his or her liberty for "only" a few more months. A convicted person is entitled to serve a term of imprisonment that is no longer than that which is lawful. It is not "harmless error" when a person is to be imprisoned, and deprived of his or her liberty, for "only" two or three more months than has been provided for by law.

[14] Concerning the other appellate issues raised by defendant, we deny leave to appeal with regard to those issues because we are not persuaded that the questions presented should be reviewed by this Court.

CORRIGAN, J. (*dissenting*). I respectfully dissent because I would deny this application for leave to appeal. Consistent with our "harmless error" rule, I would not require a remand for resentencing under MCL 769.34(10) when an original sentence still falls within the sentencing guidelines range upon rescoring.

MCL 769.34(10) does require affirming defendant's sentence but does not require a remand for resentencing. MCL 769.34(10), in relevant part, provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

When a "defendant's minimum sentence is within appropriate guidelines sentence range," the plain text of the statute imposes two commands. The Court of Appeals (1) "shall affirm that sentence" and (2) "shall not remand for resentencing," absent one of two exceptions. Here, defendant's minimum sentence of 102 months, even after adopting the majority view that the appropriate guidelines sentence range is now 78 to 195 months, still falls within the appropriate guidelines sentence range. Accordingly, the Legislature has expressly directed an appellate court to affirm in this circumstance.

The Legislature has further expressly barred a remand for resentencing, absent one of two exceptions. No one suggests that the second statutory exception for "inaccurate information" applies here.[1] The remaining exception is for "an error in scoring the sentencing

[1] Unlike *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997), in which our Court remanded when a presentence report did not disclose a prior conviction, the instant case does not turn on a factual determina-

guidelines." Assuming arguendo that the majority has correctly interpreted the scoring requirements for offense variable 13, the statute still does not require a remand. The directive in MCL 769.34(10) *not to remand* unless a condition occurs does not metamorphose into a directive *to remand* when that condition occurs. The language is permissive in that it describes two conditions when an appellate court may remand, but the appellate court retains discretion with regard to whether remand is warranted. This accords with our "harmless error" rule, under which even an error in a ruling may not justify disturbing a judgment.[2]

In the interest of giving full meaning to the terms of the statute, I would affirm defendant's sentence. The Legislature clearly directed that an appellate court affirm "[i]f a minimum sentence is within the appropriate guidelines sentence range . . . ." That the Legislature also provided that an appellate court *could* remand on the basis of a scoring error in no way provides a mandate that an appellate court *must* remand. In the absence of greater clarity in the statute, I would not suggest that lower courts engage in a calculus of comparing percentages. Rather, I would trust the lower courts to employ the "substantial justice" standard of our harmless error rule. Here, any error is harmless because defendant's original sentence of 102 months, which derived from the original guidelines sentencing

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tion but on the legal interpretation of a statute. See also *id*. at 96-97 (citing other cases where errors arose from inaccurate information).

[2] MCR 2.613(A) provides:

> Harmless Error. An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

range of 87 to 217 months, still falls well within the post-*McDaniel* range of 78 to 195 months.

Accordingly, I would conclude that any error in scoring defendant's guidelines sentencing range was harmless, because his original sentence remained within the guidelines range upon rescoring. I respectfully dissent.

WEAVER and YOUNG, JJ., concurred with CORRIGAN, J.

PEOPLE v JOHNSON

Docket No. 127525. Decided March 23, 2006. On application by the defendant for leave to appeal, the Supreme Court, in lieu of granting leave to appeal, ordered oral argument on whether to grant the application or take other peremptory action. Following oral argument, the Supreme Court entered an opinion per curiam remanding the matter to the trial court for resentencing.

William L. Johnson was convicted by a jury in the Calhoun Circuit Court, Allen L. Garbrecht, J., of two counts of third-degree criminal sexual conduct on the grounds that when the defendant was 20 years old he engaged in sexual intercourse with a 15-year-old girl on two different dates. The court sentenced the defendant to two concurrent prison terms of 100 to 480 months as a fourth-offense habitual offender after scoring offense variable 11, MCL 777.41, at 25 points on the basis that the defendant penetrated the victim twice. The defendant appealed, and the Court of Appeals, WHITBECK, C.J., and JANSEN and BANDSTRA, JJ., affirmed the judgment and sentences of the trial court. Unpublished opinion per curiam, issued October 28, 2004 (Docket No. 248480). The Supreme Court, in lieu of granting the defendant's application for leave to appeal, ordered oral argument on whether to grant the application or take other peremptory action. 473 Mich 862 (2005).

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

1. The trial court erred in scoring offense variable 11 because MCL 777.41(2)(a) only allows those penetrations "arising out of the sentencing offense" to be scored under offense variable 11 and because the two penetrations that formed the bases of the two sentencing offenses occurred on different dates and there is no evidence that they arose out of each other.

2. The trial court did not abuse its discretion in admitting evidence of the defendant's three prior felony convictions under MRE 609.

3. The trial court did not err in scoring offense variable 10, MCL 777.40(1)(b), at ten points on the basis that the defendant exploited the victim's youth in committing the sexual assaults.

Justices CAVANAGH and KELLY concurred in the result only.

Justice CORRIGAN, joined by Justices WEAVER and YOUNG, concurring in part and dissenting in part, agreed with the lead opinion's analysis and conclusions regarding the scoring of the offense variables and the admissibility of the evidence of the defendant's prior felony convictions. However, for the reasons stated in her dissent in *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006), she dissented from the conclusion that a remand for a resentencing is required in this case.

Remanded for resentencing.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES — CRIMINAL SEXUAL PENETRATION — FIRST-DEGREE CRIMINAL SEXUAL CONDUCT — THIRD-DEGREE CRIMINAL SEXUAL CONDUCT.

Where an offender is convicted of two counts of third-degree criminal sexual conduct for two penetrations of one victim on two different dates and there is no evidence that the penetrations resulted or sprang from each other or that there is more than an incidental connection between the two penetrations, points for offense variable 11, criminal sexual penetration, may not be scored (MCL 777.41).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Jennifer Kay Clark*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Peter John Van Hoek*) for the defendant.

PER CURIAM. At issue is whether the trial court erred in scoring offense variable (OV) 11 and, if so, whether defendant is entitled to be resentenced. Defendant was convicted of two counts of third-degree criminal sexual conduct. The trial court scored OV 11 at 25 points on the basis that defendant penetrated the victim twice. The Court of Appeals affirmed. Because MCL 777.41(2)(a) only allows those penetrations "arising out of the sentencing offense" to be scored under OV 11, and because the two penetrations that formed the bases

of the two sentencing offenses in this case occurred on different dates and there is no evidence that they arose out of each other, we conclude that the trial court erred in scoring OV 11. Because the trial court sentenced defendant to a minimum of 100 months under the misapprehension that the statutory sentencing guidelines call for a minimum range of 99 to 320 months when the guidelines actually call for a minimum range of 87 to 290 months, we remand this case to the trial court for resentencing.

I. FACTS AND PROCEDURAL HISTORY

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d, on the grounds that when he was 20 years old he engaged in sexual intercourse with a 15-year-old girl on two different dates in November 2001. At the sentencing hearing, defendant unsuccessfully challenged the scoring of points under offense variables 10, 11, and 19. As scored, the statutory sentencing guidelines called for a minimum range of 99 to 320 months. The trial court sentenced defendant to two concurrent prison terms of 100 to 480 months as a fourth-offense habitual offender. Defendant filed an appeal as of right with the Court of Appeals, protesting the admission of evidence of three prior felony convictions at trial and the scoring of points under offense variables 10 and 11. The Court of Appeals affirmed. Unpublished opinion per curiam, issued October 28, 2004 (Docket No. 248480). Defendant applied for leave to appeal in this Court. After directing the parties to address whether OV 11 had been correctly scored by the trial court, we heard oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). 473 Mich 862 (2005).

II. STANDARD OF REVIEW

The issues in this case concern the proper interpretation and application of the statutory sentencing guidelines, MCL 777.11 *et seq*., both of which are legal questions that this Court reviews de novo. *People v Morson,* 471 Mich 248, 255; 685 NW2d 203 (2004). This case also concerns the admission of evidence, which is reviewed for an abuse of discretion. *People v Small,* 467 Mich 259, 261; 650 NW2d 328 (2002).

III. ANALYSIS

A. OV 11

The trial court scored OV 11 at 25 points. Defendant argues that OV 11 should have been scored at zero points. We agree with defendant. MCL 777.41 provides:

> (1) Offense variable 11 is criminal sexual penetration. Score offense variable 11 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) Two or more criminal sexual penetrations occurred ..... 50 points
>
> (b) One criminal sexual penetration occurred ..... 25 points
>
> (c) No criminal sexual penetration occurred ..... 0 points
>
> (2) All of the following apply to scoring offense variable 11:
>
> (a) Score all sexual penetrations of the victim by the offender *arising out of* the sentencing offense.
>
> (b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13.

> (c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense. [Emphasis added.]

In this case, defendant sexually penetrated the victim on two different occasions. Defendant argues that because the two penetrations occurred on separate dates they did not "aris[e] out of" each other, and, thus, the trial court erred in scoring OV 11 at 25 points.

"Arise" is defined as "to result; spring or issue." *Random House Webster's College Dictionary* (1997). The Court of Appeals has explained that the language "arising out of the sentencing offense" means that the "sexual penetration of the victim must result or spring from the sentencing offense." *People v Mutchie,* 251 Mich App 273, 276; 650 NW2d 733 (2002), aff'd on other grounds 468 Mich 50 (2003).[1] In *Mutchie, supra* at 277, the Court of Appeals held that "[b]ecause all three sexual penetrations perpetrated by defendant against the victim occurred at the same place, under the same set of circumstances, and during the same course of conduct, regardless of which first-degree CSC conviction one deems the 'sentencing offense' for purposes of OV 11, the other two sexual penetrations unambiguously fall within the scope of 'sexual penetrations of the victim by the offender arising out of the sentencing offense.' "

In interpreting an insurance contract containing the language "arising out of," we held that such language requires a " 'causal connection' " that is " 'more than

[1] In *Mutchie, supra* at 51-52, we quoted the Court of Appeals opinion in that matter and held that "[t]he analysis of OV 11 offered by the Court of Appeals was dictum" because even if the trial court had erred in scoring OV 11, resentencing would not be warranted " 'given the trial court's remarks that it would have imposed the same sentences regardless of the scoring of OV 11.' "

incidental . . . .' " *Pacific Employers Ins Co v Michigan Mut Ins Co,* 452 Mich 218, 225; 549 NW2d 872 (1996), quoting *Thornton v Allstate Ins Co,* 425 Mich 643, 650; 391 NW2d 320 (1986). Similarly, in interpreting a workers' compensation statute, MCL 418.301, containing the language "arising out of," we held that this language requires a " ' "causal connection . . . ." ' " *Dean v Chrysler Corp,* 434 Mich 655, 659-660; 455 NW2d 699 (1990), quoting *Rucker v Michigan Smelting & Refining Co,* 300 Mich 668, 671; 2 NW2d 808 (1942), quoting *Appleford v Kimmel,* 297 Mich 8, 12; 296 NW 861 (1941).

Obviously, the Legislature did not intend *all* penetrations to be scored nor did it intend for *no* penetrations to be scored. Instead, it intended for those penetrations "arising out of the sentencing offense" to be scored, and it is our role to ascertain which penetrations fairly can be said to have "aris[en] out of the sentencing offense."

As already discussed, we have previously defined "arising out of" to suggest a causal connection between two events of a sort that is more than incidental. We continue to believe that this sets forth the most reasonable definition of "arising out of." Something that "aris[es] out of," or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen. For present purposes, this requires that there be such a relationship between the penetrations at issue and the sentencing offenses.

In this case, the sentencing offenses are for third-degree criminal sexual conduct. Therefore, in order to count the penetrations under OV 11, there must be the requisite relationship between the penetrations and the instances of third-degree criminal sexual conduct. The

victim testified that she had sexual intercourse with defendant on two different dates in November 2001. There is no evidence that the penetrations resulted or sprang from each other or that there is more than an incidental connection between the two penetrations. That is, there is no evidence that the penetrations arose out of each other. More specifically, there is no evidence that the first sexual penetration arose out of the second penetration or that the second penetration arose out of the first penetration.[2] Because the two sexual penetrations did not "aris[e] out of" each other, the trial court erred in scoring OV 11 at 25 points.[3]

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[2] In this case, defendant was convicted of two separate counts of third-degree criminal sexual conduct. Third-degree criminal sexual conduct is an offense based on sexual penetration. MCL 750.520d. The penetration that formed the basis of defendant's first offense "aris[es] out of the [first] sentencing offense." The penetration that formed the basis of defendant's second offense "aris[es] out of the [second] sentencing offense." However, the penetration that formed the basis of the first offense cannot be used for scoring the first offense, and the penetration that formed the basis of the second offense cannot be used for scoring the second offense. This is because MCL 777.41(2)(c) prevents the court from scoring points "for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." While the precise meaning of the language in MCL 777.41(2)(c) is not at issue in this case, it is clear that each criminal sexual penetration that forms the basis of its own sentencing offense cannot be scored for purposes of that particular sentencing offense.

[3] Although criminal sexual penetrations extending beyond the sentencing offense cannot be scored under OV 11, they *may* be scored under OV 12 (contemporaneous felonious criminal acts that occurred within 24 hours of the sentencing offense and that have not and will not result in separate convictions, MCL 777.42) or OV 13 (continuing pattern of criminal behavior, MCL 777.43). In this case, OV 12 cannot be scored because there is no evidence that the sexual penetrations occurred within 24 hours of each other and both penetrations resulted in separate convictions. Moreover, defendant has already been assessed 25 points under OV 13— the highest number of points assessable unless first-degree criminal sexual conduct is the sentencing offense— on the basis of an unarmed robbery conviction in 2000, a larceny from the person conviction in 1999, and the sentencing offense.

If OV 11 is scored at 25 points, the statutory sentencing guidelines call for a minimum sentence range of 99 to 320 months. However, if OV 11 is scored at zero points, as it should have been in this case, the guidelines call for a minimum sentence range of 87 to 290 months. Because defendant's sentences are predicated upon an inaccurate calculation of the guidelines range, defendant is entitled to be resentenced. *People v Francisco,* 474 Mich 82; 711 NW2d 44 (2006).

B. MRE 609

Defendant had three prior felony convictions for breaking and entering in 1999, receiving and concealing stolen property in 2000, and larceny from the person in 2000. We agree with the Court of Appeals that the trial court did not abuse its discretion in admitting evidence of these convictions under MRE 609. The crimes contained elements of theft, were punishable by imprisonment in excess of one year, were committed within two years of the instant offenses, were probative of defendant's credibility, and were not similar to the instant offenses.

C. OV 10

We also agree that the trial court did not err in scoring OV 10 at ten points. MCL 777.40(1)(b) requires OV 10 to be scored at ten points where "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." As the Court of Appeals explained, "[w]here complainant was fifteen years old and defendant was twenty, the court could determine that defendant exploited the victim's youth in committing the sexual assault." Slip op at 2.

IV. CONCLUSION

Because we conclude that the trial court erred in scoring OV 11 and that this error affected the statutory sentencing guidelines range, we remand this case to the trial court for resentencing under the correct guidelines range.

TAYLOR, C.J., and MARKMAN, J., concurred.

CAVANAGH and KELLY, JJ., concurred in the result only.

CORRIGAN, J. (*concurring in part and dissenting in part*). I concur with the lead opinion's analysis and conclusions regarding the scoring of the offense variables and the admissibility of the evidence of defendant's prior felony convictions. However, for the reasons stated in my dissent in *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006), I dissent from the conclusion that a remand for resentencing is required in this case.

WEAVER and YOUNG, JJ., concurred with CORRIGAN, J.

PEOPLE v GILLIS

Docket No. 127194. Argued October 18, 2005 (Calendar No. 1). Decided April 5, 2006.

John A. Gillis was convicted by a jury in the St. Clair Circuit Court, James P. Adair, J., of two counts of first-degree felony murder, with first-degree home invasion as the predicate felony. The defendant appealed, and the Court of Appeals, JANSEN, P.J., and COOPER, J. (METER, J., concurring in part and dissenting in part), vacated the convictions and remanded the matter to the trial court for a new trial on charges of second-degree murder. Unpublished opinion per curiam of the Court of Appeals, issued August 17, 2004 (Docket No. 245012). The Court of Appeals concluded that the murders, which occurred in an automobile accident caused by the defendant while he was being chased by the police several miles away from the dwelling the defendant had attempted to break into and several minutes after the defendant departed from the dwelling, were not part of the continuous transaction of or immediately connected to the home invasion and, therefore, were not committed "in the perpetration of" the home invasion. The Supreme Court granted the prosecution's application for leave to appeal. 471 Mich 958 (2005).

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

The term "perpetration" in the felony-murder statute, MCL 750.316(1)(b), is not limited to the definitional elements of the predicate felony, but also includes those acts that occur during the unbroken chain of events surrounding the predicate felony. A reasonable juror could conclude from the facts elicited at trial that when defendant collided with the victims' vehicle during his flight from the police, that act was part of the res gestae of the home invasion. Further, a reasonable juror could conclude that defendant had neither escaped nor reached a point of temporary safety before the collision. The judgment of the Court of Appeals must be reversed and the matter must be remanded to the Court of Appeals for consideration of the other issues raised by the defendant.

1. A murder committed during the attempt to escape following the commission or attempted commission of an enumerated felony

is committed "in the perpetration of" that predicate felony because the felonious transaction has not been completed until the defendant has escaped.

2. Under the res gestae principle, a murder that occurs during the unbroken chain of events surrounding the commission of the predicate felony is committed "in the perpetration of" that felony for felony-murder purposes. A predicate felony is complete when there has been a break in the chain of events surrounding the predicate felony.

3. The factors that a jury should consider in determining whether a defendant was still "in the perpetration of" the predicate felony when the defendant committed a murder include the length of time between the commission of the predicate felony and the murder, the physical distance between the scene of the predicate felony and the scene of the murder, whether there is some causal connection between the murder and the predicate felony, and whether there is a continuity of action between the predicate felony and the murder.

4. The trial court did not err in denying the defendant's motion for a directed verdict of acquittal. Viewing the evidence in a light most favorable to the prosecutor, a reasonable juror could have concluded beyond a reasonable doubt that the murders were within the res gestae of the predicate offense of home invasion.

5. No rational juror could conclude in this case that the defendant's act of driving the wrong way on two interstate highways as he was being chased by the police was anything other than an act that created a very high risk of death or that great bodily harm was the probable result. The trial court did not err in failing to give an involuntary manslaughter instruction.

Chief Justice TAYLOR, joined by Justices CAVANAGH and KELLY, concurring in part and dissenting in part, agreed that a defendant is no longer "in the perpetration of" an enumerated felony when he or she has reached a place of temporary safety, and that "perpetration" may encompass acts beyond the definitional elements of the predicate felony, including acts committed within the res gestae of that felony, but disagreed with the majority's application of the test. Whether a defendant is still in the perpetration of an enumerated felony when a homicide occurs is either a question of law or fact depending on the strength of the evidence. If the evidence is such that a rational fact-finder could not conclude that the defendant was still in the perpetration of the enumerated felony, the court should not submit the issue to the

jury. Unless the underlying felony involves asportation of stolen property, whether a defendant who is being chased has reached a point of temporary safety and, thus, is no longer engaged "in the perpetration of an enumerated felony" should be gauged by objectively assessing the state of the investigation at the time the arrest is attempted. If the investigation at that point was not the result of apprehenders hotly pursuing the defendant from the scene of the crime, but rather was the result of a fresh pursuit begun after having gathered information about the underlying crime, then the defendant can be said to have reached a point of temporary safety. When the defendant in this case lost his pursuers, and those pursuers began assembling information to reestablish the pursuit, the defendant, as a matter of law, had reached a position of temporary safety. The trial court should have granted a directed verdict, and the jury's verdict should be reversed.

Justice CAVANAGH, joined by Justice KELLY, concurring in part and dissenting in part, concurred with Chief Justice TAYLOR's opinion but wrote separately to reiterate his belief that when the evidence produced at a preliminary examination is legally insufficient to support binding a defendant over for trial, the defendant is entitled to automatic reversal.

Reversed and remanded.

1. HOMICIDE — FELONY MURDER — WORDS AND PHRASES — PERPETRATION.

The term "perpetration" in the felony-murder statute references acts by the defendant that occur outside the definitional elements of the predicate felony and includes acts that occur during the unbroken chain of events surrounding the predicate felony; a murder committed during the attempt to escape the scene of the predicate felony is committed in the perpetration of that felony (MCL 750.316[1][b]).

2. HOMICIDE — FELONY MURDER.

The factors that a jury should consider in determining whether a defendant was still "in the perpetration of" the predicate felony when the defendant committed a murder include the length of time between the commission of the predicate felony and the murder, the distance between the scene of the predicate felony and the scene of the murder, whether there is a causal connection between the murder and the predicate felony, and whether there is a continuity of action between the predicate felony and the murder (MCL 750.316[1][b]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Timothy K. Morris*, Assistant Prosecuting Attorney, for the people.

Karlstrom, Cooney, LLP (by *Timothy P. Flynn* and *Brian T. Dailey*), for the defendant.

Amici Curiae:

Stuart J. Dunnings, III, President, *Jeffrey R. Fink*, Prosecuting Attorney, and *Judith B. Ketchum*, Assistant Prosecuting Attorney, for Prosecuting Attorneys Association of Michigan.

Jacqueline J. McCann, Assistant Defender, for State Appellate Defender Office.

John R. Minock for Criminal Defense Attorneys of Michigan.

MARKMAN, J. We granted leave to appeal to consider whether our state's first-degree murder statute permits a felony-murder conviction "in the perpetration of" a first- or second-degree home invasion in which the homicide occurs several miles away from the dwelling and several minutes after defendant departed from the dwelling.

Following a jury trial, defendant was convicted of two counts of first-degree felony murder, MCL 750.316(1)(b), with home invasion in the first degree, MCL 750.110a, as the predicate felony. Defendant appealed the convictions, asserting that he was no longer "in the perpetration" of home invasion at the time of the automobile collision that killed the victims. The Court of Appeals concluded that the accident was not "part of the continuous transaction of or immediately

connected to the home invasion[,]" and, therefore, vacated the convictions and remanded for a new trial on the charges of second-degree murder. *People v Gillis*, unpublished opinion per curiam of the Court of Appeals, issued August 17, 2004 (Docket No. 245012), slip op at 3. We conclude that "perpetration" encompasses acts by a defendant that occur outside the definitional elements of the predicate felony and includes acts that occur during the unbroken chain of events surrounding that felony. Because defendant at the time of the collision was attempting to escape detection after having been identified during the home invasion, a reasonable juror could conclude that he was still "in the perpetration of" the home invasion. We also conclude that the trial court did not err in failing to instruct on involuntary manslaughter, because no rational view of the evidence could support a finding that defendant acted in a grossly negligent manner or had an intent to injure without malice. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to that Court for consideration of defendant's other issues.

I. FACTS AND PROCEDURAL HISTORY

Just before 2:00 p.m. on May 24, 2001, Steven Albright observed a vehicle pull into his driveway, and then heard a noise in his garage. Upon investigating, he saw defendant standing in the doorway between the garage and the sunroom. When Albright confronted defendant, defendant closed the door and abruptly left the premises. Albright went back into the house, retrieved a handgun from his bedroom, and sought to confront defendant. As he went out of the front door, he observed defendant driving away in a small white car

that he believed to be a Dodge Shadow. Albright then called 911, describing both defendant and the vehicle. After driving his own vehicle around the block for approximately five minutes in an unsuccessful attempt to locate defendant's vehicle, he returned home and called 911 a second time, adding that he had observed a large patch of gray primer on defendant's vehicle.

At 1:51 p.m., Trooper Steven Kramer was driving west on I-94, when he received a "be on the lookout" (BOL) call for a vehicle involved in a home invasion. Trooper Kramer testified that "a couple minutes before 2:00 o'clock" he observed defendant's vehicle, which matched the BOL description, traveling east on I-94. When Kramer first observed the vehicle, it was approximately ten miles from Albright's home. Kramer also testified that it was "a little bit hazy out" when he observed the vehicle. Kramer turned around, pulled up next to defendant's vehicle, and confirmed that both the vehicle and the driver matched the description provided in the BOL.

Kramer activated his vehicle's emergency lights and attempted a traffic stop. Defendant pulled to the shoulder and slowed down to approximately 30 miles per hour, but failed to stop. After driving on the shoulder for about one mile, defendant suddenly accelerated and took an exit off the interstate. After driving on an overpass, defendant quickly reentered I-94, and began driving east in the westbound lanes.[1] Kramer testified that he gave chase, hoping that his emergency lights would alert oncoming traffic to the presence of defendant's vehicle. Defendant stayed on the shoulder of what would be the far left lane for the oncoming traffic,

[1] Trooper Kramer testified that the exit ramp from westbound I-94 was clearly marked with "Do Not Enter" and "Wrong Way" signs.

traveling at around 60 to 70 miles per hour.[2] Still driving the wrong way on I-94, he then entered the I-69 eastbound entrance ramp to westbound I-94. Defendant began driving westward in the eastbound lanes of I-69. After driving the wrong way on I-69 for approximately one mile, defendant came upon a curve in the road which had guardrails on both sides and no shoulder. At this point, a vehicle occupied by Nicholas and Gayle Ackerman attempted to pass the vehicles slowing down in front of it by pulling into the left lane. Defendant's vehicle and the Ackermans' vehicle collided almost directly head on. Nicholas and Gayle Ackerman were killed instantly.[3] Trooper Kramer reported the accident at 2:09 p.m., 18 minutes from the time of the BOL call and approximately ten minutes from the time Kramer initially spotted defendant's vehicle. Defendant was prosecuted for two counts of first-degree felony murder, with the predicate felony of home invasion in the first degree. Defendant moved to quash the information on the felony-murder charges, arguing that the crime of home invasion was complete when defendant departed from Albright's home and eluded Albright's pursuit. The trial court denied the motion, holding that the home invasion and the accident were "continuous, uninterrupted by temporary safety action that was taken by this defendant." The trial court also denied defendant's motion for a directed verdict of acquittal, holding that the prosecutor had presented sufficient evidence to allow a reasonable juror to find defendant guilty beyond a reasonable doubt. Following a jury trial,

[2] Kramer testified that defendant "appeared not [to be] generally interfering with traffic or not trying to interfere with traffic other than the fact that he was going the wrong way on the road."

[3] Defendant suffered a closed-head injury and had amnesia regarding the events of May 21, 2001.

defendant was convicted of two counts of felony murder and sentenced to life in prison without the possibility of parole.

Defendant appealed, contending that the Ackermans' deaths did not occur during the "perpetration or attempt to perpetrate" the home invasion. In a split decision, the Court of Appeals majority applied *People v Thew*, 201 Mich App 78, 85-86; 506 NW2d 547 (1993), which held that, to convict a defendant of felony murder, the murder must be " 'committed as a part of a continuous transaction with, or [must be] otherwise "immediately connected" with[] the underlying felony.' " (Citation omitted.) The Court of Appeals majority concluded that "defendant had already escaped from the scene of the home invasion" and, therefore, that the Ackermans' deaths were not "part of the continuous transaction of or immediately connected to the home invasion." *Gillis, supra,* slip op at 3. Judge METER, who concurred in part and dissented in part, also applied *Thew,* but concluded that because defendant was "engaged in the flight only minutes after committing the home invasion," a rational jury could reasonably conclude that "defendant committed the murders ' "while attempting to escape from or prevent detection of the felony . . . [and] as part of a continuous transaction with . . . the . . . felony." ' " *Id*., slip op at 2 (METER, J., concurring in part and dissenting in part), quoting *Thew, supra* at 85-86, quoting *People v Smith,* 55 Mich App 184, 189; 222 NW2d 172 (1974). The majority also concluded that the trial court erred in denying defendant's request for an instruction on involuntary manslaughter, that "[d]efendant should properly have been charged with fleeing and eluding and second-degree murder," and that the matter must be remanded for a new trial on those charges. *Id.*, slip op at

4. This Court granted the prosecutor's application for leave to appeal. 471 Mich 958 (2005).

II. STANDARD OF REVIEW

The first issue in this case concerns whether the trial court erred in denying defendant's motion to quash under the felony-murder statute, MCL 750.316(1)(b). The proper meaning of a statute constitutes a question of law that this Court reviews de novo. *People v Law*, 459 Mich 419, 423; 591 NW2d 20 (1999). While defendant argues that the trial court committed error by failing to quash the information, where a defendant has received a fair trial, appellate review is limited to the trial court's denial of the defendant's motion for directed verdict. *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990). In reviewing the denial of a motion for a directed verdict of acquittal, this Court reviews the evidence in a light most favorable to the prosecution in order to "determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003).

The other issue concerns whether the trial court erred in denying defendant's request for an instruction on involuntary manslaughter. "[J]ury instructions that involve questions of law are also reviewed de novo." *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005). "But a trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005).

III. ANALYSIS

A. DEFENDANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL

MCL 750.316 states in pertinent part:

> (1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:
>
> * * *
>
> (b) Murder committed in the perpetration of, or attempt to perpetrate . . . home invasion in the first or second degree . . . .[4]

"[O]ur primary task in construing a statute, is to discern and give effect to the intent of the Legislature." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). "The words of a statute provide 'the most reliable evidence of its intent . . . .' " *Id*., quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). The Court must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Sun Valley*, *supra* at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). "The statutory language must be read and understood in its grammatical context, unless it is

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[4] The use of the term "perpetrate" within the context of the crime of felony murder dates back nearly to statehood. Michigan's original murder statute, 1838 RS, part 4, title 1, ch 3, § 1, defined first-degree murder as follows:

> All murder which shall be perpetrated by means of poison or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed *in the perpetration or attempt to perpetrate* any arson, rape, robbery, or burglary, shall be deemed murder of the first degree, and shall be punished by death . . . . [Emphasis added.]

clear that something different was intended." *Sun Valley*, *supra* at 237. "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id.* at 236.

To describe under what circumstances a second-degree murder can be elevated to first-degree murder, the Legislature used the words "in the perpetration of, or attempt to perpetrate" an enumerated felony. MCL 750.316(1)(b). Home invasion in the first degree is one of these enumerated felonies. *Id.* "Perpetrate" is defined as "to carry out; enact; commit." *Random House Webster's College Dictionary* (1997), p 972. To "carry out" is defined as "to effect or accomplish; complete." *Id.* at 201. Defendant argues that a felony is "complete" when the definitional elements of the crime have been satisfied. Thus, in the context of a home invasion, defendant argues that he was no longer "in the perpetration of" first-degree home invasion once he left Albright's home. Indeed, defense counsel admitted under questioning at oral argument that under his interpretation of the statute, if defendant had shot and killed a police officer who was trying to arrest him on the street outside Albright's home, the murder still would not have been "in the perpetration of" the home invasion.[5] However, defendant's theory fails to account for the fact that commission of the felony itself does not render the defendant's criminal plan complete. When a defendant plans to commit a felonious act, it is "a

[5] Defense counsel was asked, "[I]f there had been a successful home invasion here and Mr. Gillis had left the home and was about to enter his car and the police had arrived upon the scene and he had shot one of the police, your view is that would not be 'in the perpetration of' the home invasion. Is that correct?" After clarifying that the hypothetical shooting occurred outside the curtilage of the home, defense counsel responded, "I think it can't take place there."

legitimate assumption that . . . [the defendant] also planned to escape from the scene of his crime." *Commonwealth v Kelly*, 337 Pa 171, 175; 10 A2d 431 (1940).[6] The Colorado Supreme Court has understandably opined that escape is "as important to the execution of the [felony]" as the elements of the crime itself. *Bizup v People,* 150 Colo 214, 218; 371 P2d 786 (1962) (holding that the felony-murder rule applies to a murder committed after the elements of armed robbery were met); see also *People v Boss*, 210 Cal 245, 251; 290 P 881 (1930) (holding that a murder committed during an escape from the scene of an armed robbery is felony murder because "[t]he escape of the robbers with the loot, by means of arms, necessarily is as important to the execution of the plan as gaining possession of the property"). In other words, a felon has not "carried out" or "completed" the felony for felony-murder purposes until the felon has escaped. A murder committed during the attempt to escape is committed "in the perpetration of" that felony, because the felonious transaction has not yet been completed. Accordingly, "perpetration"

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[6] While not at issue in this case, we also note that a defendant's plan to "carry out" the predicate felony may also include acts leading up to the commission of that felony. Professor Wayne LaFave notes:

> "Where a causal connection between the killing and the underlying felony exists, courts generally have held that a killing may take place *sometime before* or after, as distinguished from during, the felony and yet still qualify as a killing 'in the commission or attempted commission of' the felony." [*Thew, supra* at 86, quoting *People v Goddard,* 135 Mich App 128, 135; 352 NW2d 367 (1984), quoting LaFave & Scott, Criminal Law, § 71, p 555 (emphasis supplied).]

See, e.g., *State v Nelson,* 65 NM 403, 411; 338 P2d 301 (1959) (rejecting the defendant's argument that a murder that precedes the predicate felony cannot be felony murder on the basis that "[i]f a killing is committed within the *res gestae* of the felony charged, whether the homicide occurred before or after the felony, is not determinative").

includes not only the definitional elements of the predicate felony, but also includes those acts that are required to complete the felony— such as those that occur after the commission of the predicate felony while the felon is attempting to escape. To hold otherwise would make it " 'quite impracticable to ever convict for a murder committed in the perpetration of any of the [enumerated felonies].' " *Eddy v State,* 496 NE2d 24, 28 (Ind, 1986), quoting *Bissot v State,* 53 Ind 408, 412 (1876).

In addition to its ordinary meaning, the phrase "in the perpetration of" has its roots in the common law. The crime of felony murder is derived from the English common law, which classified " 'all killing resulting from the commission of [a felony as] murder.' " *Fisher v State,* 367 Md 218, 248; 786 A2d 706 (1999), quoting Moreland, The Law of Homicide (1952), p 42. The felony-murder rule was adopted by the colonies and, following the American Revolution, "became a part of the common law or statutory provisions of [nearly] every American state." *Rodriguez v State,* 953 SW2d 342, 346 (Tex App, 1997). In most states, including Michigan, felony-murder statutes are premised upon the 1794 felony-murder statute of Pennsylvania.[7] Pennsylvania defined felony murder as

> "[a]ll murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary . . . ." [*Id.*, citing Keedy, *History of the Pennsylvania statute creating degrees of murder*, 97 U Pa L R 759 (1949).]

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[7] See, e.g., MCL 750.316(1)(b); Cal Penal Code § 189 (murder "committed in the perpetration of, or attempt to perpetrate" an enumerated felony is first-degree murder); Idaho Code § 18-4003(d) ("Any murder committed in the perpetration of, or attempt to perpetrate" an enumerated felony is first-degree murder.).

Michigan's original first-degree murder statute, enacted in 1838, used the same "in the perpetration of" language to describe a killing committed during the course of an enumerated felony. Our Legislature has continued to use this language, with few changes, over the past 178 years. However, neither the original statute nor the current murder statute defines this common-law term. "Where a statute employs the general terms of the common law to describe an offense, courts will construe the statutory crime by looking to common-law definitions." *People v Riddle*, 467 Mich 116, 125; 649 NW2d 30 (2002). Thus, in the absence of a clear legislative intent to change the common law, we "apply the common law as it was understood when the crime of murder was codified . . . ." *Id*. at 126.

One of the first states to address the scope of "perpetration" for purposes of a felony-murder statute was Indiana in *Bissot.* In *Bissot,* the defendant shot and killed a town marshal who accosted him in the midst of a burglary. The defendant argued that, because the elements of burglary were complete before the shooting, the killing was not "in the perpetration of" that burglary. The Indiana Supreme Court opined:

> In this case, take away the elements of burglary which surround it, and the prisoner might plausibly contend that he had committed nothing more than excusable homicide; for it appears that the deceased shot at him first, and thus put his life in immediate jeopardy. It could not be higher than manslaughter, at most; and in such cases it might be accidental, and then, if held not to be "in the perpetration" of the burglary, would be excusable. If the charge was murder committed "in the perpetration" of a robbery, as soon as the accused had forcibly and feloniously, or by violence or putting in fear, taken from the person of another any article of value, the robbery would be consummated; yet, if immediately afterwards, in the struggle to release himself and escape, he had killed his victim, the

> degree of the homicide, unconnected with the robbery, would be no higher than manslaughter. . . .
>
> Although we must construe criminal statutes strictly, adhere closely to the definition of crimes, and interpret technical words according to their fixed meaning, yet we cannot give to the section under consideration the construction contended for by the appellant. In our opinion, where the homicide is committed within the *res gestae* of the felony charged, it is committed in the perpetration of, or attempt to perpetrate, the felony, within the meaning of the statute; and, being convinced in this case that the burglary charged was committed, and that the homicide was committed within the *res gestae* of the burglary, we must hold that it was committed in the perpetration of the burglary, within the true intent and fair meaning of the statute. It seems to us that such a construction is safe to the State and the citizen, and the only one by which the intention of the legislature can be practically carried into effect. And we think, according to this view, that the evidence in this case fairly warrants the conclusion, beyond a reasonable doubt, that the homicide alleged was committed "in the perpetration" of the burglary, as charged in the indictment. [*Bissot, supra* at 412-414.]

See, also, *State v Brown*, 7 Or 186, 208-209 (1879) (noting that in the context of a killing committed during the defendants' escape from the scene of a robbery, "[w]hen a person takes with force or violence the goods of another from his person or presence and against his will, he has committed robbery. . . . [B]ut it does not necessarily complete the crime. It constitutes robbery so far as to render the perpetrator liable to conviction for it; but the act of robbery itself may be prolonged beyond the time when that liability is fixed.").

In commenting on felony-murder statutes, Professor Francis Wharton opined that, in order for a murder to have been committed in the perpetration of a felony,

it must have been done in pursuance of the unlawful act, and not collateral to it. The killing must have had an intimate relation and close connection with the felony, and not be separate, distinct, and independent from it; and when the act constituting the felony is in itself dangerous to life, the killing must be naturally consequent to the felony. . . . It is not enough that it occurred soon or presently after the felony was attempted or committed; there must have been such a legal relationship between the two that it could be said that the killing occurred by reason of, or as a part of, the felony, or that it occurred before the felony was at an end, and was concurrent with it, or at least part of it in an actual and material sense. . . .

Where a homicide is committed within the *res gestae* of a felony, however, it is committed in the perpetration of, or attempt to perpetrate, a felony within the meaning of such statutes. That the attempt to commit the felony was not far advanced does not lessen the offense. And a burglar who breaks into a building, or who shoots a person who discovers him in an effort to escape, cannot avoid punishment for murder in the first degree, upon the theory that the burglary consisted in breaking in, and was consummated before the killing. A burglar may be said to be engaged in the commission of the crime of burglary while making away with the plunder, and while engaged in securing it. So, a robbery within the meaning of a rule that a homicide committed in the perpetration of a robbery is murder in the first degree is not necessarily concluded by the removal of the goods from the presence of the owner; and it is not necessary that the homicide should be committed at the precise time and place of the robbery. As in the case of burglary, the robber may be said to be engaged in the commission of the crime while he is endeavoring to escape and make away with the goods taken. And a homicide committed immediately after a robbery, apparently for the purpose of preventing detection, is within the rule. [Wharton, Law of Homicide (3d ed), § 126, pp 184-186.]

Thus, both the common law, as it was understood when the crime of murder was codified, and the clear

language of MCL 750.316(1)(b) lead to the same conclusion— a murder that occurs during the uninterrupted chain of events surrounding the commission of the predicate felony is committed "in the perpetration of" that felony for felony-murder purposes. Accordingly, we conclude that the term "perpetration" encompasses acts beyond the definitional elements of the predicate felony, to include those acts committed within the res gestae of that felony. *Bissot, supra*; *Brown, supra*; Wharton, *supra.*

Michigan courts have also routinely held that "perpetration" extends beyond those elements required to prove the predicate felony and includes a murder committed after the predicate felony has been committed or attempted. The res gestae principle, which holds that a murder committed during the unbroken chain of events surrounding the predicate felony is committed "in the perpetration of" that felony, was adopted by this Court in *People v Podolski*, 332 Mich 508; 52 NW2d 201 (1952). In *Podolski*, *supra* at 514, the defendant and two accomplices committed armed robbery at a bank and were attempting to escape, when they were intercepted by the police in the "immediate vicinity of the bank." During the ensuing gun battle, an officer was killed by a bullet from a fellow officer's gun. This Court expressly adopted the reasoning of the Pennsylvania Supreme Court in *Commonwealth v Moyer*, 357 Pa 181, 190-191; 53 A2d 736 (1947), which stated:

> It is equally consistent with reason and sound public policy to hold that when a felon's attempt to commit robbery or burglary sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act. . . . Every robber or

> burglar knows that a likely later act in the chain of events he inaugurates will be the use of deadly force against him on the part of the selected victim. For whatever results follow from that natural and legal use of retaliating force, the felon must be held responsible.

The Court, quoting Wharton, then concluded that because the homicide[8] occurred during the res gestae of the robbery, i.e., during the defendant's attempt to escape, he was properly convicted of first-degree felony murder. *Podolski, supra* at 517-518.[9]

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[8] *Podolski* was decided before *People v Aaron*, 409 Mich 672, 727-728; 299 NW2d 304 (1980). In *Aaron*, we held that a homicide that occurred during the commission of a felony constitutes murder only if the prosecutor specifically proves the existence of malice. Thus, the more precise statement of *Podolski*, in light of *Aaron*, is that a *murder* "committed immediately after a robbery, apparently for the purpose of preventing detection, is [felony murder]." *Podolski, supra* at 518.

[9] Defendant argues that the res gestae principle is no longer applicable in light of this Court's decision in *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002). In *Randolph*, this Court addressed the issue whether a completed larceny could be "elevated" to unarmed robbery if the defendant uses force before reaching a point of temporary safety. In a divided decision, this Court held that this "transactional approach" was contrary to the language of the statute and that in order for a larceny to be elevated to unarmed robbery, the force and the felonious taking must occur contemporaneously. According to defendant, *Randolph* applies by analogy to this case. The crime of home invasion was complete at the moment defendant entered the building, and the murders took place after defendant left the home and in a place several miles away. The crimes, he argues, were not contemporaneous and, therefore, the felony-murder statute should not apply.

However, we believe that *Randolph* has no applicability in the present context. The murder statute, unlike the unarmed robbery statute in *Randolph*, contains the word "perpetration"— a word that encompasses a broader range of activities than the core elements of robbery at issue in *Randolph*. We note that the Legislature responded to our decision in *Randolph* by amending the robbery statute, MCL 750.530, to include circumstances where force was used "in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." 2004 PA 128.

The Court of Appeals, including both the majority and dissenting opinions in the instant case, has consistently applied the res gestae principle in felony-murder cases for at least four decades. The most common of these cases define "perpetration" in the context of a murder committed during an escape from the scene of an armed robbery. For example, in *People v Oliver*, 63 Mich App 509; 234 NW2d 679 (1975), the defendant's vehicle was stopped by a Michigan State Police trooper half an hour after and "a few miles" away from the scene where the defendant had robbed a bank and kidnapped a teller. During the traffic stop, the defendant shot and killed the trooper. The defendant argued that he was no longer "in the perpetration" of the armed robbery, because he was not being pursued by the police at the time of the traffic stop and because of the time and distance between the robbery and the murder. Thus, according to the defendant, he had reached a place of "temporary safety" before the stop and, therefore, the robbery was completed *before* the murder. The Court of Appeals rejected this argument, holding:

> [The trooper] was shot only a few miles away from the scene of the robbery within a half an hour after its commission. [The trooper] had his gun drawn and was approaching defendant's car when Oliver discharged his revolver and then quickly sped away. It is incredible that the defendant even suggests that he had reached a point of temporary safety at this point. [*Id.* at 523.]

See, also, *People v Bowen*, 12 Mich App 438, 440-441; 162 NW2d 911 (1968) (relying on the dictionary definition of "perpetrate" as " '[t]o carry through' " to conclude that a homicide committed while attempting to leave the bank was felony murder because "it cannot be said that the entire contemplated robbery, which would include escape, was as yet carried through") (citation

omitted); *People v Goree*, 30 Mich App 490, 495; 186 NW2d 872 (1971) (holding that a defendant who murdered a police officer who was attempting to arrest him for armed robbery is guilty of felony murder because "escape is part of the original felony [and] getting away with the contraband is as essential to the execution of an armed robbery as the theft itself. The escape ceases to be a continuous part of the original felony when the escaping felon reaches a point of at least temporary safety or [has been successfully taken into police custody]."") (citations omitted); *People v Smith,* 55 Mich App 184, 189; 222 NW2d 172 (1974) (stating that "if a murder is committed while attempting to escape from or prevent detection of the felony, it is felony murder, but only if it is committed as a part of a continuous transaction with, or is otherwise 'immediately connected' with, the underlying felony"); *People v Goddard*, 135 Mich App 128, 135; 352 NW2d 367 (1984), rev'd on other grounds 429 Mich 505 (1988) (noting that Michigan's inclusion of murders committed while attempting to escape within the felony-murder rule "has been adopted in other jurisdictions").

The Court of Appeals has also applied the res gestae principle to murders committed "in the perpetration" of felonies other than armed robbery. In *People v Gimotty*, 216 Mich App 254; 549 NW2d 39 (1996), the codefendant stole six dresses from a clothing store and he and the defendant sped away in the defendant's vehicle. The vehicle was identified by another driver, who called the police and then followed the vehicle until the police arrived. Once the police joined the pursuit, they identified the defendant's vehicle and gave chase. During the pursuit, the defendant failed to stop at a red light and struck another vehicle. A three-year-old passenger in the other vehicle died as a result of the collision. The defendant argued that the codefendant's commission of

retail fraud was complete when he left the store and, therefore, that he had reached a point of temporary safety when he got into the car. The Court of Appeals disagreed, concluding that

> defendant sped out of the store's parking area and onto Coolidge Road, where he was observed by another driver, who called the police on his car phone and then followed defendant until the police began their pursuit. Defendant was in the midst of a high-speed police chase when the victim was killed; he had not reached a place of temporary safety. [*Id.* at 258-259.]

See, also, *Thew*, *supra* at 88 (holding that a murder committed 20 minutes after the commission of first-degree criminal sexual conduct was part of a continuous transaction and that "inculpatory inferences can be drawn that he killed the victim to prevent detection of the act of sexual intercourse with [the victim], and that the killing was 'immediately connected' with the act of sexual intercourse").

To summarize, "perpetration" as used in the felony-murder statute contemplates something beyond the definitional elements of the predicate felony. Michigan courts have recognized this broader common-law meaning through the adoption of the "res gestae" principle, which holds that a murder committed during the unbroken chain of events surrounding the predicate felony is committed "in the perpetration of" that felony.[10]

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[10] The concurrence/dissent would define "perpetration" to require that the police either be in hot pursuit following commission of the underlying felony or that they take up a chase initiated by a civilian. *Post* at 144-146. However, it fails to cite any authority for its definition, and, in fact, its definition has been rejected by a number of courts. See, e.g., *Oliver*, *supra* at 523 (rejecting as "incredible" the defendant's assertion that he had reached a point of temporary safety by driving unpursued for half an hour after committing a bank robbery and holding that his subsequent murder of a State Police trooper was committed "in the perpetration of"

Having concluded that "perpetration" encompasses acts beyond the definitional elements of the predicate felony, we must next assess what factors a jury should consider to determine whether a murder has, in fact, taken place during the unbroken chain of events arising out of the predicate felony.[11] As observed by the Ohio Supreme Court, those acts committed in the perpetration of the predicate felony "change with every case, and may be numerous." *Conrad v State,* 75 Ohio St 52, 70; 78 NE 957 (1906). In *Goddard, supra* at 135-136, the Court of Appeals explained that, in order to determine whether a particular murder occurred within the res gestae of the predicate felony,

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the bank robbery); *State v Squire*, 292 NC 494, 512; 234 SE2d 563 (1977) (holding that the defendants who had left the scene of an armed robbery without pursuit had "[o]bviously . . . not reached what they regarded as a place of temporary safety" when their vehicle was pulled over by a police officer 13 minutes after the robbery); *Lampkin v State,* 808 P2d 694 (Okla Crim App, 1991) (holding that a defendant who was observed disobeying a stop sign in the vicinity of a robbery, but who was not being pursued for the robbery, was still "in the perpetration of" that robbery when he led police on a high-speed chase that ended in a fatal collision); *People v Salas*, 7 Cal 3d 812; 103 Cal Rptr 431; 500 P2d 7 (1972) (holding that the defendants, who had left the scene of an armed robbery unpursued but were stopped by police just three minutes after leaving the scene, had not reached a place of temporary safety when one of the defendants shot and killed the officer).

[11] The concurrence/dissent attempts to explain the nearly universal rejection of its novel definition of "perpetration" by theorizing that the term has a different meaning in the context of felonies involving the asportation of stolen property. *Post* at 146 n 4. Specifically, it suggests that a defendant "must be engaged in some act that is required for the full execution of the underlying crime for the defendant to be considered still in perpetration of that felony." *Id.* (emphasis deleted), citing *Franks v State,* 636 P2d 361, 365 (Okla Crim App, 1981). Because defendant here was not transporting stolen property, he "was not engaged in some act required for the full execution of a home invasion when the trooper attempted to stop him." *Id.* However, in almost every circumstance escape is part of a defendant's plan to commit a felony. *Kelly*, *supra* at 175. Thus, the instant home invasion, as with any other felony, was not "fully executed" until defendant effected his escape.

> [c]ourts have usually required that the killing and the underlying felony be "closely connected in point of time, place and causal relation." *State v Adams*, 339 Mo 926; 98 SW2d 632 (1936). The required relationship between the homicide and the underlying felony has been summarized as being "whether there is a sufficient causal connection between the felony and the homicide depends on whether the defendant's felony dictated his conduct which led to the homicide." LaFave & Scott, [Criminal Law, § 71, p 557.]
>
> We hold that, to qualify as felony murder, the homicide must be incident to the felony and associated with it as one of its hazards. It is not necessary that the murder be contemporaneous with the felony. A lapse of time and distance are factors to be considered, but are not determinative.

Professor Wayne LaFave has also observed that a jury should look at four factors "in construing the scope of the expression 'in the perpetration of' ": (1) time; (2) place; (3) causation; and (4) continuity of action. 2 LaFave, Substantive Criminal Law (2d ed), § 14.5(f), p 463.[12] While not exclusive, we agree that these factors should be considered in determining whether there exists sufficient evidence to support a felony-murder conviction.[13]

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[12] While Professor LaFave only lists the first three factors, he makes clear that a jury must also consider whether the murder was committed within the same " 'chain of events' " as the predicate felony. *Id.* at 464-465. Thus, "continuity of action" is a distinct factor that should be considered by a jury. See, e.g., *State v Pierce,* 23 SW3d 289, 295 (Tenn, 2000) (citing LaFave and stating that "we must evaluate the sufficiency of the evidence to determine if the [killing] and the felony . . . are closely connected in time, place, and causation, and continuity of action").

[13] While the LaFave factors have not been considered as a whole by Michigan courts, we note that the individual factors have been separately addressed in a number of cases. See, e.g., *Thew, supra* (discussing the time between the defendant's commission of criminal sexual conduct and the murder of the victim); *Gimotty, supra* (noting the causal connection between the commission of retail fraud and a murder committed while the defendant was attempting to flee from the scene); *Oliver, supra*

The first factor to be considered by the jury pertains to the time between the commission of the predicate felony and the murder. In discussing the "time" factor, Professor LaFave states that,

> even if it is clear beyond question that the crime was completed before the killing, the felony-murder rule might still apply. The most common case is that in which the killing occurs during the defendant's flight. A great many of the modern statutes contain language—typically the phrase "or in immediate flight therefrom"—making this absolutely clear. But even statutes without such language have rather consistently been construed to extend to immediate flight situations. [*Id.* at 464.]

For example, in *Oliver*, the Court of Appeals concluded that the defendant was still in immediate flight from an armed robbery when he murdered a State Police trooper 30 minutes after the commission of an armed robbery. See, also, *Thew* (affirming a felony-murder conviction for a murder committed 20 minutes after the predicate felony). At the same time, the Tennessee Supreme Court held that a killing that took place almost a month after the commission of the predicate felony was too remote in time to support a conviction of felony murder. *State v Pierce*, 23 SW3d 289, 297 (Tenn, 2000). In *Pierce*, the defendant's girlfriend stole her parents' vehicle in Florida. The vehicle was reported stolen and a nationwide bulletin was issued for the vehicle. Twenty days later, while driving the vehicle, the defendant was identified by a Virginia police officer, who gave chase. When the defendant crossed into Tennessee, the Virginia police officer notified Tennessee law enforcement officers, who took over the pursuit. During the pursuit, the defendant struck a

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(holding that a defendant who was driving unpursued at normal highway speeds had not broken the chain of events linking the commission of a robbery and the murder of a State Police trooper).

police car, killing a deputy sheriff. The Tennessee court rejected the prosecutor's argument that the killing occurred within the res gestae of the automobile theft, concluding that "the killing in this case was not closely connected in time or place to the taking of the vehicle." *Id.*

The second factor to be considered by a jury pertains to the physical distance between the scene of the predicate felony and the scene of the murder. For example, in *State v Squire*, 292 NC 494, 512; 234 SE2d 563 (1977), the defendants' vehicle was stopped for a traffic violation by a North Carolina State Police trooper 13 minutes after and ten miles away from the scene where the defendants had robbed a bank. A codefendant, under the apparent mistaken belief that the trooper was investigating the robbery, shot and killed the trooper. The North Carolina Supreme Court upheld the defendants' felony-murder convictions, holding that,

> [o]bviously, the defendants had not reached what they regarded as a place of temporary safety from pursuing officers when the shooting of [the trooper] occurred. Thus, the robbery was still in progress and the shooting occurred in the perpetration of it and was first degree murder. [*Id.* at 512-513.]

At the same time, the Virginia Supreme Court held that a killing that took place 280 miles from the scene of the predicate felony was too remote to support a conviction of felony murder. *Doane v Commonwealth,* 218 Va 500, 502-503; 237 SE2d 797 (1977). In *Doane*, the defendant stole a vehicle from a car dealership. The next day, the defendant disobeyed a stop sign, striking another vehicle and killing the driver. The accident occurred 280 miles away from the scene of the predicate felony. The prosecutor argued that, because the defen-

dant was still in possession of the stolen vehicle at the time of the killing, there was a sufficient nexus between the killing and the predicate felony to support a felony-murder conviction. The Virginia court rejected this argument, holding that "there is neither a showing of causal relationship nor a showing of nexus between the larceny . . . and the accidental killing of [the victim 280 miles from the scene of the larceny.]" *Id.* at 502.

However, "more than a mere coincidence of time and place is necessary" for a murder to qualify as a felony murder. LaFave, *supra* at 465. The third factor to be considered by the jury pertains to whether there is "some causal connection" between the murder and the predicate felony. *Id.* For example, in *Gimotty,* the defendant collided with the victim's vehicle while attempting to avoid capture by the police after fleeing from the scene of a larceny. Likewise, in *Podolski,* the defendant engaged in a gun battle with the police in order to avoid capture after robbing a bank. However, in *Allen v State,* 690 So 2d 1332, 1334 (Fla Dist Ct App, 1997), the Florida District Court of Appeals held that a vehicle accident that occurred outside the context of a pursuit was not causally connected to the predicate felony. In *Allen*, the defendant stole a vehicle and, while driving the vehicle that evening, struck another car, killing the driver. At the time of the accident, the defendant was not being pursued by the police. The Florida court noted that, while the killing was close in time and place to the commission of the predicate felony, the prosecutor failed to show "that the death was causally related to the grand theft." *Id.* Thus, the Florida court held that because the killing did not occur while the defendant was trying to escape, "the death did not occur as a result of the perpetration of the grand theft." *Id.* at 1335.

The fourth factor that the jury should consider pertains to whether there was continuity of action between the predicate felony and the murder. Professor LaFave notes that "perpetration"

> [has] consistently been construed to extend to immediate flight situations. In assessing what flight is sufficiently immediate, courts require that there have been "no break in the chain of events," as to which a most important consideration is whether the fleeing felon has reached a "place of temporary safety." [LaFave, *supra* at 464-465.]

In *Oliver, supra* at 523, the Court of Appeals rejected the defendant's claim that he had reached a point of "temporary safety" by driving unpursued at normal highway speeds, holding that there was no interruption in the chain of events between the robbery and the murder of a State Police trooper who had stopped the defendant's vehicle for a traffic infraction. The Oklahoma Court of Criminal Appeals reached a similar conclusion in addressing a situation bearing a strong resemblance to the instant case in *Lampkin v State,* 808 P2d 694 (Okla Crim App, 1991). In *Lampkin*, the defendant had left the scene of an armed robbery when a police officer observed him disobey a stop sign. The defendant was spotted in the vicinity of the scene of the robbery, just minutes after he had committed the crime. When the officer attempted a traffic stop, the defendant accelerated and a high-speed chase ensued. It was only after the chase began that the officer learned that the defendant was a suspect in a robbery. The chase ended when the defendant struck another vehicle, killing the passengers. The Oklahoma court rejected the defendant's assertion that the robbery was "complete" at the time of the accident, noting that he "had not yet completed the robbery when the chase started; he was not yet in a safe haven, but rather was still in the

process of leaving with the stolen money." *Id.* at 696. Therefore, because the accident was part of one continuing transaction stemming from the robbery, the defendant was properly convicted of felony murder. *Id.*[14]

In contrast, there can be no conviction for felony murder where an intervening act has broken the chain of events "between the killing and the crime committed or attempted . . . ." *State v Diebold*, 152 Wash 68, 72; 277 P 394 (1929). In *Diebold*, the defendant and his friend stole a vehicle and drove it to a café five miles away. The defendant testified that, during the meal, he decided to return the vehicle. On the way back to the scene of the larceny, the defendant lost control of the vehicle, striking and killing a pedestrian. The Washington Supreme Court determined that, because the killing took place after the defendant had stopped at the café, "[i]t cannot be held that, at the time appellant drove his car against the unfortunate victims of his carelessness, he was committing, or attempting to commit, or withdrawing from the scene of, a felony." *Id.* at 73-74. See, also, *Lester v State,* 737 So 2d 1149, 1151-1152 (Fla Dist Ct App, 1999) (The defendant, driving in a vehicle he had stolen the night before, saw a police car and drove away unpursued, eventually disobeying three stop signs before hitting another vehicle and killing the passen-

[14] But see *Franks v State,* 636 P2d 361 (Okla Crim App, 1981). In *Franks*, the defendant was stopped by a police officer for a traffic violation ten blocks away from the scene of an armed robbery. The officer was unaware of the robbery at the time of the stop. The defendant managed to disarm the officer and leave without being arrested. While the defendant was driving unpursued, he disobeyed a stop sign, striking another vehicle and killing the driver. The Oklahoma Court of Criminal Appeals held that the accident was unrelated to the robbery, primarily because the defendant "was not pursued as he left the grocery store robbery nor was he being chased by a police car at the time of the accident." *Id.* at 365.

gers. The Florida District Court of Appeals held that the theft of the vehicle had been "completed" the night before the accident and, therefore, that the defendant's "reckless driving was too attenuated from the grand theft of the car the previous evening to support a felony murder conviction."); *People v Ford*, 65 Cal 2d 41; 416 P2d 132 (1966) (The defendant kidnapped his estranged wife and burglarized the home she was living in. After "[driving] about the countryside without aim or purpose," *id.* at 48, for approximately four hours, he shot and killed a police officer who attempted to disarm him. The California Supreme Court held that the defendant had "won his way to places of temporary safety" during the four-hour drive, because "there was here no direct evidence that defendant was endeavoring to escape the robbery when he shot the [officer] . . . ." *Id.* at 56-57.).

In light of this analysis, we conclude that the trial court here did not err in denying defendant's motion for a directed verdict of acquittal. The relevant question in the instant case is whether, viewing the evidence in a light most favorable to the prosecutor, a reasonable juror could conclude beyond a reasonable doubt that defendant was still in the midst of his escape from the home invasion when he struck and killed the Ackermans. After its review of the case law, and in particular *Gimotty,* the trial court correctly instructed the jury as follows:

> Actions immediately connected with the felony of home invasion in the first degree, including attempts to escape or prevent detection[,] are a continuous part of the commission or perpetration of the felony of home invasion in the first degree. . . . [E]scape ceases to be a continuous part of the felony of home invasion in the first degree if and when the Defendant reaches a point of at least temporary safety.

The facts elicited at trial support the jury's determination that the murder of the Ackermans was "a continuous part of the commission or perpetration of the felony of home invasion in the first degree." Here, the homeowner, Albright, confronted defendant in the doorway between the garage and the sunroom. Defendant closed the door and abruptly fled. Albright observed both defendant and his vehicle flee from the scene of the home invasion. A reasonable juror could infer from defendant's flight his intent to avoid apprehension by the police. Additionally, he was still in flight from the Albright home when Trooper Kramer spotted him approximately ten minutes after his abrupt flight. Under these facts, a reasonable juror could conclude that defendant had neither escaped nor reached a point of temporary safety when Trooper Kramer attempted the traffic stop.[15] Further, a reasonable juror could conclude that defendant had sped away from Trooper Kramer specifically in order to prevent detection of the home invasion. Therefore, such a juror could also conclude that when defendant collided with the Ackermans' vehicle during his flight from the police, that act was part of the res gestae of the home invasion. Accordingly, the trial court did not err in denying defendant's motion for a directed verdict of acquittal.

Application of the LaFave factors lends further support to the jury's verdict. First, addressing the time and

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[15] We are not holding that the jury may consider defendant's subjective understanding of whether he had reached a point of temporary safety. Instead, we are merely holding that the jury may consider all the objective facts surrounding defendant's flight, including reasonable inferences that may be drawn from this evidence. The question whether defendant has reached a point of temporary safety is a question of fact for the jury. Here, a juror could reasonably infer from defendant's actions that he was aware that Albright had spotted him at the scene of the home invasion. The jury properly considered this inference as evidence that defendant had not truly reached a point of temporary safety.

place factors, a reasonable juror could conclude that the murders and the predicate felony in the instant case were sufficiently connected in time and place to support the convictions of felony murder. Approximately ten minutes after the home invasion, defendant's vehicle was spotted by Trooper Kramer. Defendant struck and killed the Ackermans approximately 18 minutes after leaving the scene of the home invasion. The time frame in this case is completely unlike that in *Pierce,* in which there was a 20-day gap between the predicate felony and the killing. Indeed, the 18-minute gap in the instant case is significantly less time than the 30-minute interval between the bank robbery and the traffic stop in *Oliver*. Likewise, the distance between the home invasion and the murder of the Ackermans does not resemble the 280-mile gap between the theft of a vehicle and the killing in *Doane*. Rather, in the instant case, defendant was spotted by Trooper Kramer just over ten miles from Albright's home. The Ackermans were killed within a few miles of the place where defendant was first observed by Albright. Accordingly, we conclude that the scene of the murders was sufficiently close in both time and distance from the scene of the home invasion to support convictions of felony murder.

Likewise, the "causal connection" and "continuity of action" factors also support the jury's conclusion that defendant was "in the perpetration of" the home invasion when he murdered the Ackermans. The common thread running through the cases finding a lack of causal connection is that the defendant was *not* being pursued by the police when the defendant committed the murder. *Doane, supra*; *Allen, supra*; *Franks v State,* 636 P2d 361, 365 (Okla Crim App, 1981); *Diebold, supra*; *Lester, supra*. However, in the instant case, the

record establishes that defendant was interrupted by Albright in the midst of the home invasion. Defendant's reaction was to abruptly flee. Albright testified that he relayed both a description of defendant and a description of the unique characteristics of defendant's vehicle to the police immediately after defendant fled the scene. Approximately ten minutes after the home invasion, defendant's vehicle was spotted by Trooper Kramer. The Court of Appeals concluded that because defendant was driving "in a normal manner" at the time he was spotted by Trooper Kramer, he had reached a point of "temporary safety." However, defendant had not stopped at any point between Albright's home and the point where he was observed by Trooper Kramer. Cf. *Diebold* (the defendant had stopped at a café between the theft and the killing of a pedestrian). Further, defendant's actions were not inconsistent with those of a person attempting to escape detection by the police, cf. *Ford* (the defendant's aimless driving for four hours after commission of the predicate felony demonstrated that he was not attempting to escape at the time he shot a police officer), and, in fact, defendant's act of speeding away from Trooper Kramer during the attempted traffic stop suggests both a causal connection and a continuity of action between the home invasion and the murders. The Court of Appeals failed to consider that defendant recognized that he had been identified as the perpetrator of a home invasion just minutes before. It is reasonable to infer from the testimony at trial that defendant failed to comply with Kramer's direction to stop and instead sped away precisely *because* of this knowledge. Had defendant assumed, for example, that he was being stopped for a broken headlight or for an improper left turn, it seems highly unlikely that he would have failed to stop and instead

engage in the extremely reckless driving that followed. The evidence is consistent with the prosecutor's theory that when defendant led Kramer on a chase while driving the wrong way on I-94 and I-69, he did so in order to escape apprehension for the home invasion. As in *Gimotty,* defendant's act of colliding with the Ackermans' vehicle and killing the couple was part of an unbroken chain of events surrounding the home invasion. Because a reasonable juror could conclude beyond a reasonable doubt that the Ackermans' murders occurred as part of the res gestae of the home invasion, the trial court properly denied defendant's motion to direct a verdict of acquittal.[16]

B. FAILURE TO INSTRUCT

Manslaughter is a necessarily included lesser offense of murder. *People v Mendoza*, 468 Mich 527, 544; 664 NW2d 685 (2003). "[W]hen a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Id.* at 541. In the instant case, defendant requested an instruction on involuntary

[16] The concurrence/dissent asserts that we have created "a rule that there is no rule and the question whether defendant has reached a place of temporary safety always goes to the jury." *Post* at 145. However, we simply hold that "perpetration" constitutes an element of first-degree murder. As with any other element of any other crime, the trial court may direct a verdict in favor of the defendant when the prosecutor fails to "introduce sufficient evidence which could justify a trier of fact in reasonably concluding that defendant is guilty beyond a reasonable doubt . . . ." *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). But, where a reasonable juror could find that a defendant was "in the perpetration of" the underlying felony when the defendant committed the murder, as is the case here, the question whether the defendant has reached a place of temporary safety does constitute a question for the finder of fact. *Smith, supra* at 190.

manslaughter.[17] In *People v Holtschlag*, 471 Mich 1, 21-22; 684 NW2d 730 (2004), we noted that

> "the sole element distinguishing manslaughter and murder is malice," *Mendoza* at 536, and that "[i]nvoluntary manslaughter is a catch-all concept including all manslaughter not characterized as voluntary: 'Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.' " [*People v Datema*, 448 Mich 585, 594-595; 533 NW2d 272 (1995).] (Citation omitted.) If a homicide is not voluntary manslaughter or excused or justified, it is, generally, either murder or involuntary manslaughter. If the homicide was committed with malice, it is murder. If it was committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter.

"Malice" is defined as an act done "with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." *Mendoza, supra* at 540. Thus, defendant was entitled to an involuntary manslaughter instruction *only* if a rational view of the evidence would have supported a finding that the Ackermans' deaths were caused by an act of "gross negligence or an intent to injure, and not malice . . . ." *Holtschlag, supra* at 21-22.

The Court of Appeals majority concluded that it was "possible for a rational trier of fact to determine from the evidence that defendant only possessed the mindset of gross negligence." *Gillis, supra,* slip op at 5. We

[17] The Court of Appeals did not reach defendant's other claims of instructional error— that the trial court denied defendant's request for instructions on first-degree fleeing and eluding (causing death) and voluntary manslaughter.

disagree and hold that no rational juror, under these facts, could conclude that defendant's actions were anything other than acts that "create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." *Mendoza, supra* at 540. Defendant, in his attempt to get away from Trooper Kramer, knowingly entered I-94 going the wrong way. The ramp used by defendant was clearly marked with "Do Not Enter" and "Wrong Way" signs. Further, another officer assisting in the chase crossed over the median and began driving the proper way on I-94 in order to get in front of defendant. Finally, Trooper Kramer testified that he and defendant went past several vehicles on both I-94 and I-69, all of which were being driven the correct way. This was not a circumstance where a driver, through an act of gross negligence, accidentally drove the wrong direction on the highway. Rather, this defendant intentionally drove the wrong way on the freeway and continued to do so for approximately ten minutes before colliding with the Ackermans' vehicle. Trooper Kramer also testified that he was "quite certain [that oncoming traffic] would not have seen [defendant's] small white car . . . ." In fact, this fear of a potential head-on collision was Kramer's primary reason for continuing his pursuit. In other words, by driving the wrong way on the interstate on a hazy day, defendant created a "very high risk" of a head-on collision— a collision that would certainly cause "death or great bodily harm." Further, it would be unreasonable to conclude that defendant did not know that a serious or fatal accident was the probable result of driving the wrong way on the interstate. No rational view of the evidence could support a finding of gross negligence or an intent to injure without malice.

Because the evidence does not support the conclusion that defendant drove the wrong way by accident or

otherwise acted in a merely grossly negligent manner, we conclude that a rational view of the evidence does not support an involuntary manslaughter instruction. Therefore, the trial court did not err by failing to give an involuntary manslaughter instruction.[18]

IV. CONCLUSION

We conclude that "perpetration" encompasses acts by a defendant that occur outside the definitional elements of the predicate felony and includes acts that occur during the unbroken chain of events surrounding that felony. Thus, a felon "is engaged in the perpetration of the crime 'while he is endeavoring to escape . . . [a]nd a [murder] committed immediately after a [felony], apparently for the purpose of preventing detection,' is felony murder." *Smith, supra* at 189, quoting *Podolski, supra* at 518 (emphasis omitted). In determining whether the defendant is still "in the perpetration of" the predicate felony when the defendant commits a murder, factors to be evaluated by the jury include: (1) the length of time between commission of the predicate felony and the murder; (2) the distance between the

[18] Even if defendant was entitled to an involuntary manslaughter instruction, the trial court's failure to so instruct constituted harmless error. Harmless error analysis is applicable to instructional errors involving necessarily included lesser offenses. *People v Cornell*, 466 Mich 335, 361; 646 NW2d 127 (2002). Such errors are deemed non-constitutional errors. *Id.* at 363. "[A] preserved, non-constitutional 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." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Here, defendant was charged with both first- and second-degree murder. The jury convicted of first-degree murder, the greater offense. Given the jury's refusal to either acquit or convict of the lesser offense, defendant has failed to demonstrate that a "miscarriage of justice" occurred when the trial court failed to instruct on involuntary manslaughter.

scene of the predicate felony and the scene of the murder; (3) whether there is a causal connection between the murder and the predicate felony; and (4) whether there is continuity of action between the predicate felony and the murder. LaFave, *supra* at 463, 464-465. Applying these factors to the instant case, we conclude that the trial court did not err in denying defendant's motion to direct a verdict of acquittal because, viewing the evidence in a light most favorable to the prosecutor, a reasonable juror could conclude beyond a reasonable doubt that the murders were within the res gestae of the predicate home invasion. We further conclude that the trial court did not err in refusing defendant's request for an involuntary manslaughter instruction. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the Court of Appeals for consideration of defendant's other issues.[19]

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[19] We also directed the parties to address the issue whether the Court of Appeals order of remand for a new trial violated the separation of powers doctrine. Const 1963, art 3, § 2. The power to determine whether to charge a defendant and what charge should be brought is an executive power, which vests exclusively in the prosecutor. *People v Williams,* 244 Mich App 249, 252-253; 625 NW2d 132 (2001), citing *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972). The exercise of judicial power over the discharge of the prosecutor's duties "is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires." *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995).

When the Court of Appeals remanded this case to the trial court, it noted that "[d]efendant should properly have been charged with fleeing and eluding and second-degree murder." *Gillis, supra,* slip op at 4. We do not believe that this statement constitutes a usurpation of the prosecutor's powers. Rather, the Court of Appeals was simply advising the trial court as to the new trial in accordance with its holding that defendant could not be charged with first-degree felony murder. Had the Court of Appeals purported to substitute its judgment for that of the prosecutor by determining what criminal charges should be

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

TAYLOR, C.J. (*concurring in part and dissenting in part*). I concur with the majority opinion that a defendant is no longer "in the perpetration of" an enumerated felony when he or she has reached a place of temporary safety. I also agree with the majority that "perpetration" may encompass acts beyond the definitional elements of the predicate felony to include acts committed within the res gestae of that felony. I dissent, however, from the majority's application of this test to the facts of this case.

I

The facts are straightforward. Defendant was discovered by the homeowner right after he broke into the garage. Defendant fled the scene. The homeowner called 911 and was unsuccessful in an attempt to follow defendant, who got away in his car. Ten to fifteen minutes later, at a distance of at least ten miles from the scene of the home invasion, the police spotted a car matching the one the homeowner described and attempted to stop defendant. He did not stop, but fled and soon thereafter crashed into the Ackermans' car, resulting in their deaths.

Defendant was charged with two counts of felony murder, with first-degree home invasion as the enumerated felony. Defendant waived his right to a preliminary examination. Before trial defendant moved to quash the felony-murder charges, arguing that he was no longer "in the perpetration of" the home invasion when the

brought against defendant, we agree with the prosecutor that there would have been separation of powers implications.

Ackermans were killed. An evidentiary hearing was held in which the homeowner and the state trooper who attempted to stop defendant testified. The trial court denied the motion to quash, finding that "this was a continuous uninterrupted by temporary safety action that was taken by this Defendant."[1]

At trial, after the prosecutor rested his case, defense counsel moved for a directed verdict on the felony-murder charges, asserting that there was no nexus between the home invasion and the Ackermans' deaths. The trial court denied the motion, stating that one could determine beyond a reasonable doubt that defendant, while in the perpetration of or attempt to perpetrate the home invasion, murdered the Ackermans.

As previously noted, the jury subsequently convicted defendant of two counts of felony murder. On appeal, the Court of Appeals reversed the felony-murder convictions in a split decision because defendant had already escaped from the scene of the home invasion and the Ackermans' deaths were not a part of the continuous transaction of or immediately connected to the home invasion.

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[1] The trial court's decision after the evidentiary hearing was akin to a decision whether there was sufficient evidence to bind a defendant over for trial after a preliminary examination. The Court of Appeals concluded that the motion to quash should have been granted. I agree, but, given that defendant went to trial, appellate review is properly limited to the trial court's denial of his motion for directed verdict. *People v Yost,* 468 Mich 122, 124 n 2; 659 NW2d 604 (2003), citing *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990) (an evidentiary deficiency at the preliminary examination is not a ground for vacating or reversing a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error). See also *People v Wilson*, 469 Mich 1018 (2004). In light of this principle, the Court of Appeals erred in analyzing whether the motion to quash should have been granted.

II

At the time of defendant's trial, MCR 6.419(A) provided:

> 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.

When ruling on a motion for a directed verdict of acquittal, the trial court must determine whether, considering the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979) (opinion by COLEMAN, C.J.). The test is not whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *Id.*

MCL 750.316 states in pertinent part:

> (1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:
>
> * * *
>
> (b) Murder committed in the perpetration of, or attempt to perpetrate, . . . home invasion in the first or second degree . . . .

Whether a defendant is still "in the perpetration of" an enumerated felony when a homicide occurs is either a question of law or a question of fact depending on the

strength of the evidence presented to the jury.[2] Thus, if the evidence is such that a rational fact-finder could not conclude the defendant was still "in the perpetration of" an enumerated felony, the court should not submit the issue to the jury. The court is to decide the issue as a matter of law. I believe we deal with such a situation here.

This case implicates what it means to be in a place of temporary safety and should be a vehicle for establishing usable rules for cases in which a defendant takes flight in a car. I believe the majority in its opinion has really established no rule, or perhaps has created a rule that there is no rule and the question whether defendant has reached a place of temporary safety always goes to the jury. This uncabined rule is unwise because it obliterates any meaning that the point of temporary safety jurisprudence may have had. At least in situations in which the underlying enumerated felony does not involve the asportation of stolen property, I believe the rule should be as follows. Whether a defendant who is being chased has reached a point of temporary safety and, thus, is no longer engaged "in the perpetration of an enumerated felony" should be gauged by objectively assessing the state of the investigation at the time the arrest is attempted. If the investigation at that point

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[2] As stated in Anno: *What constitutes termination of felony for purpose of felony-murder rule*, 58 ALR3d 851, 857:

> [T]he facts of a particular case may be such that there can be no doubt whether the felony and killing are part of one transaction, so that the question should not be submitted to the jury but should be decided by the court as a matter of law.

See, e.g., *Allen v State,* 690 So 2d 1332 (Fla App, 1997), *Doane v Commonwealth,* 218 Va 500; 237 SE2d 797 (1977), and *Franks v State,* 636 P2d 361 (Okla Crim App, 1981), all cases that determined as a matter of law that a defendant was no longer "in the perpetration of" a felony when a homicide occurred.

was not the result of apprehenders hotly pursuing the defendant from the scene of the crime, but rather was the result of a fresh pursuit begun after having gathered information about the underlying crime, then the defendant can be said to have reached a point of temporary safety. Having reached a point of temporary safety, the defendant is no longer in the perpetration of the underlying crime. [3]

Here, there is no question that defendant was spotted by the trooper after the victim's attempt to follow defendant had ended. The trooper, unlike the officers in many of the cases cited by the majority,[4] had not taken

[3] I have no objection to the four factors the majority cites from Professor LaFave for determining whether a defendant is still "in the perpetration of" a felony, i.e., time, place, causation, and continuity of action, but simply contend that their application shows, as a matter of law, that defendant was no longer "in the perpetration of" the home invasion when defendant decided to flee rather than stop for the trooper.

[4] I note that many of the cases cited by the majority in which a defendant was determined to still have been "in the perpetration of" a felony involved situations in which the homicide occurred at, or immediately near, the scene of the crime or as a result of a hot pursuit. See, e.g., *People v Podolski*, 332 Mich 508, 514; 52 NW2d 201 (1952), which indicates that the bank robbers were about to escape when the police arrived. See, also, *People v Gimotty,* 216 Mich App 254, 258-259; 549 NW2d 39 (1996), in which the defendant sped from the store's parking lot onto a road where he was observed by another driver who called the police on his car phone and followed the defendant until the police took over the pursuit. To the extent that *People v Oliver*, 63 Mich App 509; 234 NW2d 679 (1975), is to the contrary, I would not follow it. But, I note that in *Oliver,* as in most of the cases cited by the majority, the underlying felony was a robbery where the defendant was making away with stolen goods. Under such circumstances, i.e., one of the elements of the underlying crime involves asportation of stolen property, a defendant may be considered to still be "in perpetration of" the underlying crime for a longer period than when a defendant, as here, commits a crime that is over no later than when the defendant leaves the scene. But, we are not required to decide that question here.

up the chase the homeowner had started. It was not, so to speak, a relay in which the baton was handed off from the citizen to the constable. Rather, the defendant here had gotten away cleanly, and no one trying to arrest him had any idea where he was, other than he had to be in an area bounded only by, at most, the limitations of time and the speed of his vehicle. The trooper could only make a stop on the basis of radio-conveyed identifying information, and that is what he did, more than ten miles away from, and more than ten minutes after, the aborted home invasion. In my view, a reasonable person could only conclude that the police were, uncontrovertibly at the point of the attempted stop, not in hot pursuit; rather, they were in the investigation phase of the case, putting together bits of information to try to determine which, if any, of the many motorists, or perhaps nonmotorists, they were observing might be the person who had committed a home invasion. Said

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The majority cites *State v Squire*, 292 NC 494; 234 SE2d 563 (1977), *Lampkin v State,* 808 P2d 694, 696 (Okla Crim App, 1991), and *People v Salas*, 7 Cal 3d 812; 103 Cal Rptr 431; 500 P2d 7 (1972), in support of the proposition that one may still be in the perpetration of a felony when there is no hot pursuit. But in each of these cases, the underlying crime was robbery where money was being asported away. In *Lampkin*, the court stated that the defendant was still in the process of leaving with the stolen money when he was observed by the police driving at a fast speed and disobeying a stop sign. In contrast, the defendant here was not in possession of any stolen property, and he was driving in a normal manner when the police spotted him. I also note that in *Franks, supra* at 365, the court said that at the time of a killing, the accused must be engaged in *some act that is required for the full execution of the underlying crime* for the defendant to be considered still in perpetration of that felony. Again, the defendant here was not engaged in some act required for the full execution of a home invasion when the trooper attempted to stop him. The *Salas* court specifically stated that the homicide "was committed before defendant had reached a place of safety while he 'was in hot flight with the stolen property . . . .' " *Salas, supra* at 823. In contrast, defendant in the case at bar was not in hot flight, and he was not transporting stolen property.

another way, when hot pursuit had died ten minutes ago and ten miles away, the police were in the investigatory or "gumshoeing" phase that could produce results now, tomorrow, or perhaps never. That makes all the difference and must mean that the crime of home invasion was over, i.e., had been completed, when the defendant was driving with the flow of traffic. He had gotten away–at least at that time. The criminal in such a situation, if he or she is ever going to be at a point of temporary safety, is in one when he or she has lost the chasers and has slipped into traffic unobtrusively. Said conversely, if apprehension in the investigatory stage does not establish that the defendant was at a point of temporary safety, when would the defendant be? The majority has no answer that satisfies me.

Whether a defendant has reached a place of temporary safety should be based on what the state of the investigation was at the time immediately before the eventual attempt at apprehension. The question that must be asked is: Were the pursuers single-mindedly, without need of additional information, aware of whom they were after and where he was, or were they unclear on these things? If they were unclear and, as here, putting together available information to reestablish the pursuit, the defendant would be in a position of temporary safety.

Here, this defendant, lost among the cars on the highway, was, as a matter of law, in a place of temporary safety. The police had lost the scent and were using other techniques to find him. Thus, he was no longer "in the perpetration of" the crime. Indeed, when defendant refused to stop, he moved on to the new crime of fleeing and eluding, and it was "in the perpetration of" that crime, not the home invasion, that the Ackermans were killed.

Under such circumstances, I believe that the trial court should have granted a directed verdict on the felony-murder charges because the evidence was insufficient that defendant was "in the perpetration of" the home invasion when the Ackermans were killed. Accordingly, the jury's verdict should be reversed.

III

In conclusion, the Court of Appeals properly vacated defendant's felony-murder convictions because defendant was no longer "in the perpetration of" first-degree home invasion when the Ackermans were killed. I believe the home invasion ended as a matter of law when defendant reached a point of temporary safety, i.e., driving unnoticed and unpursued in traffic. It was only after defendant had reached this point of temporary safety that defendant was spotted by the state trooper and fled when the trooper attempted to stop defendant. Given that fleeing and eluding is not an enumerated felony under our felony-murder statute, the felony murder charges should have been dismissed as a result of defendant's motion for directed verdict. Thus, defendant was improperly convicted of felony murder.[5]

CAVANAGH and KELLY, JJ., concurred with TAYLOR, C.J.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur with the opinion written by Chief Justice TAYLOR. I write separately only to reiterate my belief that when the evidence produced at a preliminary examination is legally insufficient to support binding a

[5] I agree with the Court of Appeals that defendant could be charged with second-degree murder regarding the Ackermans' deaths, but not felony murder.

defendant over for trial, the defendant is entitled to automatic reversal. See *People v Hall*, 435 Mich 599, 616-629; 460 NW2d 520 (1990) (CAVANAGH, J., dissenting). The inquiry is not dependent on whether the defendant nonetheless received a fair trial.

KELLY, J., concurred with CAVANAGH, J.

SWEEBE v SWEEBE

Docket No. 126913. Argued October 18, 2005 (Calendar No. 2). Decided April 26, 2006.

Marilyn V. Sweebe was granted a consent judgment of divorce from Herbert O. Sweebe in the Midland Circuit Court in 1986. In the judgment, the parties agreed to give up any interest either had in any insurance contract or policy of the other. In 1963, Herbert Sweebe had designated Marilyn Sweebe as the beneficiary of a life insurance policy provided by his employer. He did not change the designation after the divorce and, when he died in 2001, the administrator of the insurance plan paid the proceeds to Marilyn Sweebe, as required under the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq*. After the decedent's surviving spouse, Gail Sweebe, was appointed personal representative of his estate, she brought a motion seeking to enforce the waiver provision of the judgment of divorce. The court, Paul J. Clulo, J., denied the motion on the grounds that ERISA preempted the waiver. The Court of Appeals, METER, P.J., and GRIFFIN and BORRELLO, JJ., reversed the order of the circuit court and remanded the matter to that court for entry of an order directing Marilyn Sweebe to pay the decedent's estate an amount equal to the insurance proceeds. Unpublished order of the Court of Appeals, entered July 19, 2004 (Docket No. 253520). The Court of Appeals held that Marilyn Sweebe had expressly waived any entitlement to the proceeds in the consent judgment of divorce. The Supreme Court granted Marilyn Sweebe's application for leave to appeal. *Sweebe v Sweebe Estate*, 472 Mich 881 (2005).

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

ERISA does not preclude a named beneficiary from waiving the proceeds from a life insurance policy. While the plan administrator is required by ERISA to distribute plan proceeds to the named beneficiary, the named beneficiary can then be found to have waived the right to retain those proceeds.

The Court of Appeals correctly held that Marilyn Sweebe waived her right to retain the proceeds. The plaintiff waived her

right to the proceeds when she agreed to the judgment of divorce, which contained a waiver provision. The plaintiff must pay an amount equal to the insurance proceeds to the decedent's estate, which will then distribute the proceeds according to the decedent's will or the laws of intestacy.

Affirmed.

INSURANCE — LIFE INSURANCE — EMPLOYEE RETIREMENT INCOME SECURITY ACT — WAIVER.

The administrator of a life insurance plan covered by the Employee Retirement Income Security Act must pay benefits to the named beneficiary as required by the act; however, once the proceeds are distributed, the named beneficiary can then be found to have waived the right to retain those proceeds under a contract with the decedent (29 USC 1001 *et seq.*).

Handlon, Eastman, DeWitt & Beale, P.C. (by *Michael J. Beale*), for Marilyn V. Mason, formerly Marilyn V. Sweebe.

Purcell, Tunison & Boardman, P.C. (by *James P. Boardman*), for Gail Sweebe, Personal Representative of the Estate of Herbert O. Sweebe, deceased.

CAVANAGH, J. The issue in this case is whether the preemption provision of the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq.*, precludes a named beneficiary from waiving the proceeds from a life insurance policy. We hold that it does not. While a plan administrator is required by ERISA to distribute plan proceeds to the named beneficiary, the named beneficiary can then be found to have waived the right to retain those proceeds. In this case, the Court of Appeals correctly held that plaintiff waived her right to retain the proceeds. Accordingly, we affirm the Court of Appeals order that directs plaintiff to pay an amount equal to the insurance proceeds to the decedent's estate.

FACTS AND PROCEEDINGS

Plaintiff Marilyn V. Mason (formerly Marilyn V. Sweebe) and the decedent, Herbert O. Sweebe, were divorced in 1986. At the time, they agreed to give up any interest either had in any insurance contract or policy of the other. They memorialized this in their judgment of divorce as follows:

> IT IS FURTHER ORDERED AND ADJUDGED that any interest which either of the parties may now have or may have had in any insurance contract or policy, and any other interest in any insurance contract or policy of the other party, shall be extinguished, and that the parties shall in the future hold all such insurance free and clear from any right or interest which the other party now has or may have had therein, by virtue of being the beneficiary, contingent beneficiary or otherwise.

The decedent had a life insurance policy provided by his employer. The decedent had designated plaintiff as the beneficiary of the life insurance policy in 1963, and he never changed this designation after his divorce from plaintiff. Therefore, when the decedent died in 2001, the insurance plan administrator paid the plan proceeds to plaintiff because she was listed as the named beneficiary.

The decedent's surviving spouse, defendant Gail Sweebe, was appointed personal representative of his estate. Acting on behalf of the estate, she filed a motion to enforce the waiver in the judgment of divorce. The circuit court denied the motion because it held that ERISA preempted the waiver.

On application for leave to appeal, the Court of Appeals reversed the order of the circuit court in a peremptory order and remanded for entry of an order directing plaintiff to pay the decedent's estate an amount equal to the insurance proceeds. *Sweebe v*

Sweebe, unpublished order of the Court of Appeals, entered July 19, 2004 (Docket No. 253520). The Court held that plaintiff could not retain the life insurance proceeds because she expressly waived any entitlement to the proceeds in the consent divorce judgment. Plaintiff applied for leave to appeal, which this Court granted. *Sweebe v Sweebe Estate*, 472 Mich 881 (2005).

STANDARD OF REVIEW

The proper interpretation of a statutory provision is a question of law that this Court reviews de novo. *Lincoln v Gen Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000). Likewise, contract interpretation is also a question of law reviewed de novo. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). Waiver is a mixed question of law and fact. *Klas v Pearce Hardware & Furniture Co*, 202 Mich 334, 339; 168 NW 425 (1918). The definition of a waiver is a question of law, but whether the facts of a particular case constitute a waiver is a question of fact. *Id*. A trial court's findings of fact are reviewed for clear error. *Sands, supra* at 238.

ANALYSIS

The life insurance policy at issue in this case is an employee benefit plan governed by ERISA. 29 USC 1003(a). In general, ERISA's preemption provision states that ERISA supersedes all state laws that relate to an employee benefit plan. 29 USC 1144(a).[1] Therefore, under ERISA preemption, Michigan law cannot affect ERISA's determination of the proper beneficiary.

[1] In relevant part, the preemption provision states that "the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."

ERISA provides that a plan administrator must distribute the proceeds of an insurance policy to the named beneficiary. 29 USC 1104(a)(1)(D). A "beneficiary" is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 USC 1002(8). In this case, the named beneficiary was plaintiff. Under ERISA, plaintiff is entitled to receive the insurance proceeds because the decedent designated her as the beneficiary. Consistent with ERISA, this Court cannot undermine her status as the beneficiary. Therefore, the plan administrator properly distributed the proceeds from the life insurance policy to plaintiff in accord with ERISA requirements.

Because the plan administrator distributed the proceeds to plaintiff, the named beneficiary, as required by ERISA, we find that the issue in this case solely involves waiver and not ERISA preemption. Plainly, the issue is whether plaintiff, having lawfully renounced her interest in the insurance proceeds in a binding judgment of divorce, may lawfully retain them. This issue is governed exclusively by Michigan law because the proceeds have been properly distributed under ERISA.

A recent case decided by this Court—*State Treasurer v Abbott*, 468 Mich 143; 660 NW2d 714 (2003)—also dealt with ERISA. While *Abbott* dealt with pension benefits and ERISA's antialienation provision, the principle espoused by this Court was that the *Abbott* defendant's pension plan proceeds were no longer protected by ERISA after they had been paid by the plan administrator.[2] Similarly, today's decision does not invade the

[2] While members of this Court, myself included, disagreed with the majority's analysis in *Abbott*, the general proposition that ERISA is not implicated once a plan administrator distributes the proceeds from a plan to the beneficiary is one that I do not dispute.

purview of ERISA because the plan administrator is still only required to do that which ERISA explicitly directs the administrator to do—distribute the proceeds to the named beneficiary. Accordingly, while a plan administrator must pay benefits to the named beneficiary as required by ERISA, this does not mean that the named beneficiary cannot waive her interest in retaining these proceeds. Once the proceeds are distributed, the consensual terms of a prior contractual agreement may prevent the named beneficiary from retaining those proceeds.

A number of courts have also addressed this issue and have similarly held that ERISA does not preempt a waiver by a beneficiary. See, e.g., *Melton v Melton*, 324 F3d 941, 945 (CA 7, 2003); *Clift v Clift*, 210 F3d 268, 270 (CA 5, 2000); *Altobelli Estate v Int'l Business Machines Corp*, 77 F3d 78, 79 (CA 4, 1996); *Mohamed v Kerr*, 53 F3d 911, 916 (CA 8, 1995); *Fox Valley & Vicinity Constr Workers Pension Fund v Brown*, 897 F2d 275, 280, 281 (CA 7, 1990). While the United States Court of Appeals for the Sixth Circuit has held to the contrary in *Metro Life Ins Co v Pressley*, 82 F3d 126, 130 (CA 6, 1996), and *McMillan v Parrott*, 913 F2d 310, 312 (CA 6, 1990), the plan administrators in those cases had not yet paid the proceeds to the named beneficiaries, contrary to the situation in this case.

Our decision today holding that a valid waiver is not preempted by ERISA and should be enforced is consistent with numerous past decisions by this Court recognizing that parties have a broad freedom to contract. See, e.g., *Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 200; 702 NW2d 106 (2005); *Fresard v Michigan Millers Mut Ins Co*, 414 Mich 686, 694; 327 NW2d 286 (1982). This Court has long held that "[w]aiver is the intentional relinquishment of a

known right." *Bailey v Jones*, 243 Mich 159, 162; 219 NW 629 (1928); see also *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003). It is also well-settled that a waiver may be shown by express declarations or by declarations that manifest the parties' intent and purpose. *Klas*, *supra* at 334.

Consistent with other courts that have reviewed this issue and with general contract interpretation principles, a court must examine the language of the waiver provision to determine the intent of the parties and if there was a valid waiver of the rights in question. See *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994); *Silber v Silber*, 99 NY2d 395, 404-405; 786 NE2d 1263 (2003); *Manning v Hayes*, 212 F3d 866, 874 (CA 5, 2000). There is no magic language that must be included to effectively waive a person's interest in plan proceeds. Rather, courts that have examined what constitutes a waiver have consistently stated that a waiver must simply be explicit, voluntary, and made in good faith. See, e.g., *Melton*, *supra* at 945; *Clift*, *supra* at 271.

In the context of this case, "explicit" means that the divorce decree is not completely silent on the issue of insurance proceeds. *Clift*, *supra* at 271. However, there are no specific words that must be included. In determining if a waiver exists, a court must determine if "a reasonable person would have understood that she was waiving her beneficiary interest in the life insurance policy at issue." *Id*. at 271-272.

In this case, plaintiff signed a provision in her judgment of divorce in which she extinguished any interest she had or may have had in any insurance contract or policy of the decedent.[3] The provision she

[3] The provision in the judgment of divorce in this case is a waiver of rights, but it does not meet the requirements of a qualified domestic relations order. See 29 USC 1056(d)(3)(B)(i) and (ii).

signed stated "that any interest which either of the parties may now have or may have had in any *insurance* contract or policy, and any other interest in any *insurance* contract or policy of the other party, shall be *extinguished* . . . ." (Emphasis added.) It also stated that "the parties shall in the *future* hold all such insurance free and clear from any right or interest which the other party now has or may have had therein, by virtue of being the beneficiary, contingent beneficiary or otherwise." (Emphasis added.) Our review of this provision indicates that plaintiff clearly and unequivocally waived her right to the plan proceeds. Plaintiff and the decedent freely reached an agreement about how to divide property and insurance proceeds. Therefore, plaintiff consented to the waiver of her right to receive proceeds from the decedent's insurance plan. Under Michigan law, plaintiff validly waived the right to retain the proceeds under the binding judgment of divorce.

Today's decision is not in conflict with the United States Supreme Court's decision in *Egelhoff v Egelhoff*, 532 US 141; 121 S Ct 1322; 149 L Ed 2d 264 (2001). In *Egelhoff*, the Court addressed a mandatory state statute that automatically revoked named beneficiaries upon divorce. The statute governed the distribution of benefits in all applicable cases, requiring plan administrators to administer plans in accord with differing state requirements. The statute clearly invaded an area that is covered by ERISA.

In contrast, the beneficiary in this case was not determined by a state statute. Plaintiff and the decedent each freely contracted to waive any interest in insurance proceeds from the other's plans. There is no invasion into the requirements of ERISA because the plan administrator distributed the proceeds to the

named beneficiary, as required by ERISA. However, after the plan administrator distributed the proceeds as required by ERISA, a claim could then be filed against the named beneficiary alleging that she waived her right to retain the proceeds.

Moreover, our decision today does not conflict with the United States Supreme Court's decision in *Boggs v Boggs*, 520 US 833; 117 S Ct 1754; 138 L Ed 2d 45 (1997). The issue in *Boggs* was whether ERISA preempted a state law allowing a nonparticipant spouse to transfer by testamentary instrument an interest in proceeds from an undistributed pension plan. *Boggs* involved a conflict between ERISA pension law and state community property law, which would create a direct right in the proceeds from an ERISA plan. The case before this Court involves a life insurance policy, not pension benefits,[4] and does not conflict with ERISA because the plan administrator's responsibilities do not change. This case is simply a contractual waiver dispute between two parties.

Accordingly, we affirm the Court of Appeals order. We conclude that the benefits were properly paid to plaintiff under ERISA, but plaintiff has no legal right to retain the proceeds under the waiver provision in the judgment of divorce. Plaintiff must pay an amount equal to the insurance proceeds to the decedent's estate, which will then distribute the proceeds according to the decedent's will or the laws of intestacy. However, we also note that today's holding does not preclude anyone, including plaintiff, from asserting that there is a will or other valid expression of testamentary intent that the court should recognize, or from asserting a

[4] "Pension benefits support participants and beneficiaries in their retirement years, and ERISA's pension plan safeguards are designed to further this end." *Id.* at 852.

valid claim against the estate in the usual fashion our probate statutes and rules allow.

CONCLUSION

We hold that while a plan administrator is required by ERISA to distribute the proceeds from a plan to a named beneficiary, the named beneficiary can then be found to have waived the right to retain the distributed proceeds. In this case, plaintiff waived her right to the proceeds from the plan when she agreed to the judgment of divorce, which contained a waiver provision. Accordingly, we affirm the Court of Appeals order that requires plaintiff to pay an amount equal to the insurance proceeds to the decedent's estate.

Affirmed.

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

WILSON v ALPENA COUNTY ROAD COMMISSION

Docket No. 126951. Argued November 9, 2005 (Calendar No. 5). Decided April 26, 2006.

Diane and Paul Wilson brought an action in the Alpena Circuit Court against the Alpena County Road Commission, alleging negligent road maintenance in connection with injuries Diane Wilson sustained in a fall while riding a bicycle. On cross-motions for summary disposition, the court, Joseph P. Swallow, J., granted summary disposition for the defendant after concluding, among other things, that the defendant lacked notice of a defect and that the plaintiffs had not sufficiently shown causation. The Court of Appeals, WHITBECK, C.J., and GRIFFIN and BORRELLO, JJ., reversed the trial court's grant of summary disposition and remanded the matter for further proceedings, concluding that the plaintiffs sufficiently pleaded a cause of action, that the plaintiffs' claim was within the highway exception to governmental immunity, and that material questions of fact remained regarding notice and causation. 263 Mich App 141 (2004). The Supreme Court granted the defendant's application for leave to appeal. 472 Mich 899 (2005).

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

MCL 691.1402 and MCL 691.1403 require that the governmental agency responsible for road maintenance and repair have actual or constructive notice of the existence of a roadbed defect, have notice that the defect makes the road not reasonably safe and convenient for public travel, and fail to repair the defect within a reasonable time before the agency can be held liable for bodily injury or property damage caused by the defect. Neither party showed that there was no question of fact regarding the defendant's notice of an unsafe condition. Thus, both motions for summary disposition should have been denied. The Court of Appeals properly found that the plaintiffs sufficiently raised a question of material fact on the issue of causation. The decision of the Court of Appeals must be affirmed and the matter must be remanded to the trial court for proceedings consistent with the opinion of the Supreme Court.

Justice CAVANAGH, concurring in part and dissenting in part, concurred in the majority opinion and in Justice KELLY's partial concurrence and partial dissent, but wrote separately to note his continuing disagreement with the proposition that governmental immunity exists in instances where design defects or conditions that are outside the roadbed make a road unreasonably unsafe for public travel.

Justice KELLY, concurring in part and dissenting in part, concurred in the result reached by the majority, but differed from the majority in one important respect. While the majority asserts that MCL 691.1402(1) creates a singular duty to maintain a highway in reasonable repair so that it is reasonably safe and convenient for public travel, the statute, in fact, imposes two duties: the duty to maintain the highway in reasonable repair and the duty to keep the highway reasonably safe. Thus, the statute provides a cause of action to an individual who was injured or who suffered property damage because a highway was not maintained in reasonable repair or because the highway was not kept in a condition reasonably safe and fit for travel.

Affirmed and remanded to the circuit court.

GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — NOTICE OF DEFECT.

A plaintiff seeking to hold a governmental agency that is responsible for the repair and maintenance of a road liable for bodily injury or property damage caused by a defect in the roadbed must establish that the agency knew or should have known about the defect and had notice that the defect made the road not reasonably safe and convenient for public travel but failed to repair the defect within a reasonable time (MCL 691.1402, 691.1403).

Nelson, Petruska, Atkinson & Hart, P.C. (by *Linda M. Atkinson* and *Eugene H. Petruska*), and *Patrick & Kwiatkowski, PLLC* (by *Aaron J. Gauthier*), for the plaintiffs.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg*) for the defendant.

TAYLOR, C.J. In this case we are called on to determine under Michigan's governmental immunity scheme what notice of a defect in a road the governmental agency responsible for road maintenance and repair

must have before it can be held liable for damage or injury incurred because of the defect. We conclude that MCL 691.1402 and 691.1403 require that the governmental agency be aware that the defect rises to the level that, if not repaired, it unreasonably endangers public travel. Thus, a plaintiff must allege that the governmental agency had actual or constructive notice of a defect in the roadbed that, because of the agency's failure to reasonably maintain or repair, resulted in the road being not reasonably safe and convenient for public travel. Here, plaintiffs did so plead, but in their motions for summary disposition, both parties raised and briefed only the question whether reasonable repair and maintenance had been done. Neither they nor the trial court recognized that defendant does not just have a duty to "maintain the highway in reasonable repair" but to "maintain the highway in reasonable repair *so that it is reasonably safe and convenient for public travel*." Therefore, we affirm the Court of Appeals decision that reversed the trial court's grant of summary disposition for defendant.

I

On May 31, 1999, plaintiff Diane Wilson[1] was riding her bicycle on Monaghan Point Road. According to her, she had to "snake" her way through the innumerable potholes in the road. She alleged that at some point as she was riding along, she suddenly felt her handlebars drop down and she was thrown over the handlebars onto the road. After this fall, she suffered frequent migraines and blackouts.

[1] Suing also is her husband, Paul Wilson. His claim is for loss of consortium, which is a derivative action. Therefore, we refer to Diane Wilson as "plaintiff."

Ms. Wilson sued the Alpena County Road Commission, which had jurisdiction over Monaghan Point Road. Her complaint alleged that the road had potholes in excess of six inches deep that had existed more than 30 days at the time of her accident and that defendant "failed to properly maintain Monaghan Pt. Rd. so as to be safe for vehicular travel." She also argued that the road had for years been in a condition that was dangerous to public safety because it was persistently potholed and rutted and only full resurfacing could make it safe. Because full resurfacing had not been performed, she argued that the road commission had breached its duty under MCL 691.1402[2] to maintain and repair the road and thus was liable for her injuries.[3]

The road commission moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10), asserting that it was immune from suit because, among other reasons, it had no notice of a defective road that could constitute the notice that MCL 691.1403[4] requires before its immunity from suit is lost. In support of this,

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[2] MCL 691.1402(1) requires that "each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel."

[3] Plaintiff correctly framed her claim in terms of a defect resulting from failure to maintain and repair, aware that a claim cannot be brought for defective design. *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 500; 638 NW2d 396 (2002).

[4] MCL 691.1403 states:

> No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.

it argued that potholes had been repaired by a road crew that "cold patched"[5] the road two weeks before plaintiff's accident and that no complaints were received after the cold patching. Thus, because it lacked notice of any six-inch potholes, that defect could not be used to establish an exception to the road commission's immunity from suit.[6] Plaintiff responded by claiming that even if the road commission had cold patched without subsequent complaints, the deteriorated condition of the road itself should suffice to establish the required notice.

The trial court granted defendant's motion on the basis of its conclusions that resurfacing was outside the scope of defendant's duty, that defendant lacked notice of a defect, and that plaintiff had not sufficiently shown causation. On appeal, the Court of Appeals reversed in a published opinion,[7] concluding that plaintiff sufficiently pleaded a cause of action, plaintiff's claim was within the exception to governmental immunity, and material questions of fact remained regarding notice and causation.

We granted leave to appeal, 472 Mich 899 (2005), directing the parties to include among the issues briefed "whether the plaintiffs sufficiently pleaded facts and

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[5] As one of defendant's employees explained in his deposition, cold patching generally involves manually shoveling an asphalt mixture into the hole and allowing it to be compacted by the tires of passing vehicles.

[6] There are two notice provisions in the statute. The notice provision at issue here, MCL 691.1403, requires for a finding of liability that the governmental agency have notice of the defect before the accident occurs. The other notice provision, MCL 691.1404, requires plaintiffs to provide notice of injury as a condition precedent to bringing suit. The defendant has not pursued its claim that the plaintiff failed to comply with MCL 691.1404. Therefore, we decline to address it.

[7] 263 Mich App 141; 687 NW2d 380 (2004).

provided evidence sufficient to place their claim within the highway exception to governmental immunity, MCL 691.1402."

II

We review de novo the trial court's grant of summary disposition. *Chandler v Muskegon Co*, 467 Mich 315, 319; 652 NW2d 224 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion, *Maiden, supra* at 120, and if the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

Likewise, we review de novo an issue of statutory construction. *Id*. When interpreting statutory language, we are to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. *Id*. Statutory exceptions to the immunity of governmental agencies are to be narrowly construed. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000).

III

Two related provisions of the government tort liability act (GTLA) are relevant to our decision today. MCL 691.1402(1) states in relevant part:

> [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

MCL 691.1403 states:

> No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.

Thus, with regard to the governmental agency having jurisdiction over a highway, the Legislature has waived immunity from liability for bodily injury or property damage if the road has become, through lack of repair or maintenance, not reasonably safe for public travel. As we explained in *Nawrocki, supra*, MCL 691.1402(1) establishes the duty to maintain the highway in "reasonable repair." The phrase "so that it is reasonably safe and convenient for public travel" simply refers to the duty to maintain and repair, and states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway "reasonably safe." *Nawrocki, supra* at 160. Hence, the Legislature has not waived immunity if the repair is reasonable but the road is nonetheless still not reasonably safe because of some other reason.

Nawrocki, supra; *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492; 638 NW2d 396 (2002).

Viewing the GTLA as a whole, it can also be seen that the converse of this statement is true: that is, the Legislature has not waived immunity where the maintenance is allegedly unreasonable but the road is still reasonably safe for public travel. We note that, pursuant to MCL 691.1403, in order for immunity to be waived, the agency must have had actual or constructive notice of "the defect" before the accident occurred. In determining what constitutes a "defect" under the act, our inquiry is again informed by the "reasonably safe and convenient for public travel" language of MCL 691.1402(1). In other words, an *imperfection* in the roadway will only rise to the level of a compensable "defect" when that imperfection is one which renders the highway not "reasonably safe and convenient for public travel," and the government agency is on notice of that fact.

Thus, while MCL 691.1402(1) only imposes on the governmental agency the duty to "maintain the highway in reasonable repair," in order to successfully allege a violation of that duty, a plaintiff must allege that the governmental agency was on notice that the highway contained a defect rendering it not "reasonably safe and convenient for public travel." The governmental agency does not have a separate duty to eliminate *all* conditions that make the road not reasonably safe; rather, an injury will only be compensable when the injury is caused by an unsafe condition, of which the agency had actual or constructive knowledge, which condition stems from a failure to keep the highway in reasonable repair.[8]

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[8] The *Nawrocki* Court was not presented with the issue whether the road was reasonably safe. It decided two issues: whether the governmen-

If the agency knows, or should have known, of the existence of the defect or condition that makes the road defective, i.e., not reasonably safe for public travel, it has only a reasonable time to repair it. If it does not do so, it can be held liable for injury or damage caused by that defect. The Legislature has also indicated that knowledge and time enough to repair are conclusively presumed when the defect has been readily apparent to an ordinarily observant person for 30 days or longer before the injury.

It is this element of notice that the road was not reasonably safe for travel that is dispositive here. In this case, neither motion under MCR 2.116(C)(10) made any attempt to argue with supporting evidence the issue whether the road was reasonably safe for public travel and, if it was not, whether defendant had notice of that condition. While all parties concede that there was notice of certain problems—that the road was bumpy and required frequent patching—these problems do not invariably lead to the conclusion that the road was not reasonably safe for public travel. It may be that a road can be so bumpy that it is not reasonably safe, but to prove her case plaintiff must present evidence that a reasonable road commission, aware of this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it. Over 93 years ago, in *Jones v Detroit*, 171 Mich 608; 137 NW 513 (1912), this Court made it clear that a road in bad repair, or with rough pavement, is not per se one that is not reasonably safe. As the Court said:

> Nearly all highways have more or less rough and uneven places in them, over which it is unpleasant to ride; but

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tal agency might owe a duty to a pedestrian pursuant to MCL 691.1402, and whether the duty extends to signage.

> because they have, it does not follow that they are unfit and unsafe for travel. The most that can be said for the testimony in this case is that it established the fact that the pavement on that part of [the street] was rough, and called for more careful driving than did other portions of it. [*Id.* at 611.]

More recently, in *Scheurman v Dep't of Transportation*, 434 Mich 619, 631; 456 NW2d 66 (1990), this Court stated:

> The purpose of the highway exception is not to place upon the state or the counties an unrealistic duty to ensure that travel upon the highways will always be safe. Looking to the language of the statute, we discern that the true intent of the Legislature is to impose a duty to keep the physical portion of the traveled roadbed *in reasonable repair*. [Emphasis added.]

Accordingly, because neither party showed there was no question of fact regarding the road commission's statutorily required notice of an unsafe condition, both motions for summary disposition should have been denied by the trial court. The Court of Appeals correctly reversed the judgment of the trial court on that issue.

IV

To conclude, to defeat governmental immunity based on MCL 691.1402, a plaintiff must establish that the defendant knew or should have known about the defect and had notice that the defect made the road not reasonably safe and convenient for public travel. Plaintiff successfully pleaded in avoidance of immunity, but neither party showed there is no question of material fact on the matter. We agree with the Court of Appeals that plaintiff sufficiently raised a question of material fact on the issue of causation. We therefore affirm the Court of Appeals decision and remand this matter to

the trial court for proceedings consistent with this opinion. Defendant is free to bring a second motion making the proper argument and submitting the proper supporting evidence, and plaintiff may attempt to defeat it by putting competent evidence in the record that defendant had notice that the road was not reasonably safe.

Affirmed and remanded to the circuit court.

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

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur in the majority opinion of this Court. I also concur in Justice KELLY's partial concurrence and partial dissent. I write separately only to note my continuing disagreement with the principles expressed *ante* at 167-168. I disagree that governmental immunity exists in instances where design defects or conditions that are outside the actual roadbed make a road unreasonably unsafe for public travel. See *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 504; 638 NW2d 396 (2002) (KELLY, J., dissenting); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 188; 615 NW2d 702 (2000) (KELLY, J., dissenting). While these principles are not implicated in the present case, the majority's affirmation of them necessitates this statement.

KELLY, J. (*concurring in part and dissenting in part*). I concur in the result. I believe that plaintiffs presented sufficient evidence to create genuine issues of material fact concerning whether (1) the deteriorated condition of Monaghan Point Road made the road not reasonably safe for public travel, and (2) the Alpena County Road Commission had actual or constructive notice of that fact at the time of plaintiff Diane Wilson's accident.

But I differ from the majority in one important respect. The majority asserts that MCL 691.1402(1) creates a singular duty to maintain a highway in reasonable repair "so that it is reasonably safe and convenient for public travel." It says:

> The phrase "so that it is reasonably safe and convenient for public travel" simply refers to the duty to maintain and repair, and states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway "reasonably safe." [*Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 160; 615 NW2d 702 (2000).] [*Ante* at 167.]

This is inaccurate. As I pointed out in my dissent in *Nawrocki*, the majority incorrectly reads MCL 691.1402(1). The Legislature expressly provides a legal right to sue to persons who suffer damage or injury because a governmental agency failed to keep its highway "in reasonable repair *and* in a condition reasonably safe and fit for travel."[1] The Legislature used the word "and." The majority removes "and," replacing it with the clause found in the previous sentence, "so that it is."

In *Nawrocki*, the majority read the statute so that the government's duty was only to maintain the highway in "reasonable repair." It recognized no second duty to keep the highway "reasonably safe," disregarding the exact words of the statute. It ignored the fact that the Legislature created two duties, coupling them with the word "and," allowing a plaintiff who alleged a violation of either to avoid governmental immunity.

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[1] The second sentence of MCL 691.1402(1) states, "A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair *and* in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency." (Emphasis added.)

In this case, the majority at last recognizes the existence of the second part of the sentence. It realizes that the agency does have a responsibility to keep the road reasonably safe. But it still does not acknowledge that two distinct duties exist.

It cites *Jones v Detroit*,[2] for the proposition that "a road in bad repair, or with rough pavement, is not per se one that is not reasonably safe." *Ante* at 169. The road in *Jones* was Jefferson Avenue in Detroit nearly 100 years ago. Neither the century nor the road is remotely the same as the time and place involved in the instant case. Hence, I question the value of the majority's reliance on *Jones*.

In my opinion, the statute provides a cause of action to an individual who was injured or who suffered property damage because a highway was not maintained in reasonable repair. A person may also recover if the governmental agency controlling the highway failed to keep it in a condition reasonably safe and fit for travel.

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[2] 171 Mich 608; 137 NW 513 (1912).

PEOPLE v HAWTHORNE

Docket No. 128168. Decided April 26, 2006. On application by the prosecution for leave to appeal, the Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals and reinstated the defendant's convictions.

Frank J. Hawthorne was convicted by a jury in the Wayne Circuit Court, Michael M. Hathaway, J., of second-degree murder and possession of a firearm during the commission of a felony. The defendant, who claimed that the shooting was accidental, had requested that the jury be instructed with CJI2d 7.1, the jury instruction on accident as a defense to murder. The court refused the requested instruction. The defendant appealed, and the Court of Appeals, KELLY, P.J., and GAGE and ZAHRA, JJ., reversed the convictions and remanded the matter to the trial court for a new trial. 265 Mich App 47 (2005). The Court of Appeals noted that it was bound to reach that decision by Supreme Court precedent and urged the Supreme Court to review the continued viability of that precedent in light of *People v Lukity*, 460 Mich 484 (1999), which, if applied by the Court of Appeals, would have resulted in an affirmance of the defendant's convictions. The prosecution sought leave to appeal.

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

The standard explicated in *Lukity* and *People v Rodriguez*, 463 Mich 466 (2002), applies to the failure to instruct on the defense of accident, where accident was a central issue in the case. The failure to instruct on this defense requires the reversal of a preserved, nonconstitutional error only where the defendant establishes that the alleged error undermined the reliability of the verdict. The opinions in *People v Lester*, 406 Mich 252 (1979), and *People v Ora Jones*, 395 Mich 379 (1975), and their progeny, fail to adhere to the standard set forth in *Lukity* and MCL 769.26 and must be overruled to the extent that they are inconsistent with this decision of the Supreme Court.

Under the *Lukity*/*Rodriguez* standard, the defendant did not meet his burden of demonstrating that the failure to instruct on

the accident defense undermined the reliability of the verdict and affected the outcome of the proceedings. The judgment of the Court of Appeals must be reversed and the convictions must be reinstated.

Reversed; convictions reinstated.

Justice KELLY, dissenting, would affirm the judgment of the Court of Appeals. *People v Lester* and *People v Ora Jones*, which established the rule that a trial court's failure to instruct the jury on the defense of accident requires automatic reversal whenever the question whether there was an accident is central to a criminal case, should not be overruled. *Lester* and *Ora Jones* are consistent with MCL 769.26, which controls judicial review of preserved, nonconstitutional error, and they were correctly decided. Even if *Lester* and *Ora Jones* were wrongly decided, the majority in this case cannot establish that overruling them would not produce practical real-world dislocations given that the courts of this state have relied on these decisions for 30 years. In any event, applying *People v Lukity* to this case, the trial court's failure to instruct on accident as a defense undermined the reliability of the verdict and requires a reversal of the defendant's convictions.

Justice CAVANAGH would deny leave to appeal.

CRIMINAL LAW — JURY INSTRUCTIONS — FAILURE TO INSTRUCT — HARMLESS ERROR.

A preserved claim of nonconstitutional error involving a trial court's failure to instruct on the defense of accident in a murder trial where accident was a central issue in the case is subject to "harmless error" analysis; the defendant has the burden to demonstrate that the claimed error resulted in a miscarriage of justice; reversal is not required unless, after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the claimed error was outcome determinative by undermining the reliability of the verdict.

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 *Olga Agnello*, Principal Attorney, Appeals, for the people.

State Appellate Defender (by *Jacqueline J. McCann*), for the defendant.

PER CURIAM. The issue in this case is whether a court's failure to instruct on the defense of accident requires automatic reversal of a defendant's conviction where accident was a central issue in the case. We hold that the failure to instruct on this defense requires reversal only where the defendant satisfies the standard explicated in *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999), and *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000).[1] In this case, defendant has not established that the alleged error undermined the reliability of the verdict. We therefore reverse the judgment of the Court of Appeals and reinstate defendant's convictions of second-degree murder, MCL 750.317; and possession of a firearm during the commission of a felony, MCL 750.227b.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

The Court of Appeals summarized the underlying facts:

> On the evening of October 18, 2002, defendant and [Dennis] Jeffries met at an illegal gambling house and got into an argument over a $5 bet. When the argument escalated, defendant walked out of the room and returned with an automatic handgun. Two men tried unsuccessfully to disarm defendant. Everyone present in the house then ran for the exits, except for Vance Claxton, who watched the encounter by peering around a wall. Jeffries said to defendant, "What you going to do with the gun? We supposed to be family. We supposed to be better than that. What, you going to shoot me?" Jeffries then challenged defendant to a fight. When defendant pressed the barrel of the gun into Jeffries's chest, Jeffries grabbed defendant's

[1] The case before us involves a preserved, nonconstitutional error. If the defendant had failed to preserve the issue, the plain-error standard set forth in *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999), would govern.

> wrist and pushed him against the wall. Claxton saw defendant and Jeffries standing face-to-face and speaking while Jeffries held defendant's wrist and they waved the gun around, pointing it in different directions. Defendant was trying to push the gun toward Jeffries, and Jeffries was trying to push the gun away. Claxton then looked away, and approximately two seconds later he heard a gunshot and saw Jeffries fall to the ground.
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> About ten seconds after the shot, Claxton heard defendant say, "Man, I'm sorry. You know I didn't shoot you. The gun was on safety. I'm sorry." Defendant found Claxton hiding in the bedroom and told him, "I shot Dennis by accident. Come apply pressure to his chest." Defendant told Claxton to call 911. With defendant's help, Claxton put Jeffries in a car. Claxton then drove Jeffries to the hospital. More than a month later, Jeffries died from complications arising from the gunshot wound. [265 Mich App 47, 49-50; 692 NW2d 879 (2005).]

It is also noteworthy that before he started gambling, Jeffries had removed a wad of $100 bills from his jacket and counted it. He then returned the money to his jacket pocket and gambled with smaller denominations. When Jeffries's jacket and shirt were removed following the shooting, the money was missing from the jacket.

Defendant was charged with first-degree premeditated murder, MCL 750.316; first-degree felony murder, MCL 750.316; and felony-firearm. The court refused defendant's request to read CJI2d 7.1, the standard jury instruction on accident as a defense to murder. The court cited *People v Morrin*, 31 Mich App 301; 187 NW2d 434 (1971), and *People v Hess*, 214 Mich App 33; 543 NW2d 332 (1995), and stated that

> under the authority of *Hess* and *Morrin*, if the accident occurred in connection with some other unlawful act, because that's the way I'm reading those cases, then the accident defense is not available. It's not available in this setting. I think we talked about this in chambers. Factually

speaking, at a very minimum your client committed a felonious assault by going into the living room, getting a gun, bringing it into the dining room and pointing it at the victim and threatening him.

Now, there may not have been an intent to pull the trigger. The pulling of the trigger may have been an accident, but as I read *Hess* and *Morrin*, you're not entitled to the accident instruction unless your client essentially has clean hands so to speak and was not otherwise engaged in some other unlawful act. That's why I didn't give it.

If the Court of Appeals says I was wrong about that, well, so be it, but that's the way I read those two cases.[2]

The jury found defendant guilty of second-degree murder, as a lesser included offense of first-degree premeditated murder, and felony-firearm. The Court of Appeals reversed the convictions, but urged this Court

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[2] The Court of Appeals did conclude that the trial court had misread these cases, explaining:

> However, neither *Morrin* nor *Hess* precludes a defendant from receiving an instruction on accident as a defense to murder if there is evidence that the defendant's actions were criminally negligent. *Morrin* and *Hess* merely explained that, for a defendant to be completely excused from killing a person (i.e., to be acquitted of all charges of murder, manslaughter, and careless, reckless, or negligent discharge of a firearm causing death, etc.), the death must be the result of an accident, and the defendant cannot have acted with criminal negligence. *Hess, supra* at 38-39, held that accident is not a defense to involuntary manslaughter, because involuntary manslaughter is not an intent crime and accident is subsumed within that offense. Thus, a defendant is only excused from involuntary manslaughter if he did not act with criminal negligence. But the defendant need not be free of criminal negligence to be excused from a homicide charge that includes intent as one of its elements, such as murder. Accident is a viable defense to murder even if the defendant acted with criminal negligence. Neither *Morrin* nor *Hess* held that a defendant cannot be excused from murder if the death was an accident but was the result of the defendant's criminal negligence. [265 Mich App at 51-52.]

We agree with the Court of Appeals analysis.

to review the precedent that it believed required the reversal in light of *Lukity*. The Court of Appeal stated: "Were we free to apply *Lukity* without regard to prior decisions of the Supreme Court that suggest that the instructional error that occurred in this case requires reversal, we would conclude that defendant did not establish a miscarriage of justice and affirm his convictions." 265 Mich App at 49.

The prosecutor filed an application for leave to appeal in this Court.

II. STANDARD OF REVIEW

The question whether the *Lukity*/*Rodriguez* standard applies to the failure to instruct on the defense of accident is a question of law that we review de novo. *People v Young*, 472 Mich 130, 135; 693 NW2d 801 (2005).

III. ANALYSIS

In finding that the trial court had erred in refusing to instruct on the defense of accident, the Court of Appeals observed that the trial court had conceded that " 'there may not have been an intent to pull the trigger. The pulling of the trigger may have been an accident . . . .' " 265 Mich App at 52. The Court of Appeals agreed with the trial court that evidence was presented to support the defense of accident:

> Defendant and Jeffries were struggling for control of the gun when it discharged. After Jeffries was shot, defendant made statements indicating that he was sorry and that he had fired the gun accidentally. He also helped get medical attention for Jeffries. [*Id.*]

Further, the Court of Appeals opined that this Court's decisions in *People v Lester*, 406 Mich 252; 277

NW2d 633 (1979) (*Lester II*), and *People v Ora Jones*, 395 Mich 379; 236 NW2d 461 (1975), overruled on other grounds in *People v Cornell*, 466 Mich 335, 357-358; 646 NW2d 127 (2002), along with several Court of Appeals cases,[3] mandate reversal for failure to give an accident instruction where accident was a central issue in the case. The Court of Appeals concluded that whether the shooting here was intentional or accidental was a central issue in this case, and that the failure to instruct the jury with CJI2d 7.1 therefore constituted error requiring reversal of defendant's convictions under *Lester II* and *Ora Jones*.

Nonetheless, the Court of Appeals urged this Court "to examine the continued viability of *Lester II* and *Ora Jones* and their progeny in light of *Lukity* and *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999)." 265 Mich App at 56. The Court of Appeals stated:

> Since *Lester II* and *Ora Jones* and their progeny were decided, our Supreme Court has set forth specific criteria that must be established before trial court error requires reversal. See *Carines*, *supra* at 774. In *Lukity*, *supra* at 494, our Supreme Court held that, to justify the reversal of a conviction in the case of preserved, nonconstitutional error, the defendant has the burden of establishing that the error asserted resulted in a miscarriage of justice under a "more probable than not" standard. We conclude that application of *Lukity* to the present case would result in a different outcome than that reached in *Lester II* and *Ora Jones* and their progeny. In those pre-*Lukity* decisions, the courts did not place the burden on the defendants to establish that the errors required reversal. We conclude that the facts presented in this case fail to establish error requiring reversal under the *Lukity* standard. The jury instructions

[3] See *People v Glover*, 154 Mich App 22; 397 NW2d 199 (1986); *People v Newman*, 107 Mich App 535; 309 NW2d 657 (1981); *People v Stanley Jones*, 69 Mich App 459; 245 NW2d 91 (1976).

> explaining the intent element of murder made it clear that a finding of accident would be inconsistent with a finding that defendant possessed the intent required for murder. Accordingly, were we not bound by *Lester II* and *Ora Jones*, we would conclude that defendant cannot demonstrate that it is more probable than not that the trial court's failure to give the instruction on accident was outcome determinative. *Lukity*, *supra* at 496. [265 Mich App at 56-57.]

We agree with the Court of Appeals assessment that the *Lukity* standard should apply in this case. This Court has previously applied *Lukity* in reviewing a trial court's refusal to instruct on a defense theory.

In *Rodriguez*, *supra*, the trial court failed to instruct the jury regarding a statutory tax exemption. We explained that " 'when a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge.' " *Rodriguez, supra* at 472 (citation omitted). Because the statutory exemption would have applied if the jury had believed the evidence introduced by the defendant, we concluded that the trial court had erred in failing to give the requested instruction.

We did not, however, treat this error as subject to automatic reversal. Rather, we considered whether the error was harmless. We explained that "nonconstitutional preserved error is evaluated under the standard set forth in" *Lukity*. *Id*. at 473. Under *Lukity*, the defendant has the burden to demonstrate that a preserved, nonconstitutional error resulted in a miscarriage of justice. MCL 769.26 sets forth a presumption that such an error does not warrant 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." *Lukity*, *supra* at 496 (quoting MCL 769.26). " 'An error is

deemed to have been "outcome determinative" if it undermined the reliability of the verdict.' " *Rodriguez*, *supra* at 474, quoting *People v Elston,* 462 Mich 751, 756; 614 NW2d 595 (2000), quoting *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000).

Similarly, in *People v Riddle*, 467 Mich 116; 649 NW2d 30 (2002), we applied the *Lukity*/*Rodriguez* standard to the failure to instruct on the defense theory that the defendant was not required to retreat before exercising deadly force in self-defense. We explained:

> A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. [*Rodriguez, supra* at 472]; *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995). When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction. *Rodriguez*, *supra* at 472-473; *Mills*, *supra* at 81. However, if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice. MCL 769.26; *Rodriguez*, *supra* at 473-474; [*Lukity*, *supra* at 493-494]. [*Riddle, supra* at 124-125.]

Our decisions in *Rodriguez* and *Riddle* make plain that the *Lukity* standard governs an appellate court's determination regarding whether a failure to instruct on a defense theory requires reversal. As the Court of Appeals in this case correctly observed, *Lester II* and *Ora Jones* and their progeny fail to adhere to the standard set forth in *Lukity* and mandated by MCL 769.26. We therefore overrule those decisions to the extent they are inconsistent with our decision in this case.[4] We can discern no principled reason why the

[4] We note that rules of automatic reversal are disfavored. *People v Graves*, 458 Mich 476, 481; 581 NW2d 229 (1998); *People v Belanger*, 454 Mich 571, 575; 563 NW2d 665 (1997); *People v Pickens*, 446 Mich 298, 346; 521 NW2d 797 (1994); *People v Grant*, 445 Mich 535, 543; 520 NW2d

failure to instruct on the defense of accident should be reviewed under a different standard than the defense theories at issue in *Rodriguez* and *Riddle*.

In deciding whether to overrule a precedent, we consider (1) whether the earlier decision was wrongly decided and (2) whether practical, real-world dislocations would arise from overruling the decision. *Robinson v Detroit*, 462 Mich 439, 464-466; 613 NW2d 307 (2000). As discussed, we believe that *Lester II* and *Ora Jones* were wrongly decided because their holdings create essentially a rule of automatic reversal, which is inconsistent with the text of MCL 769.26 and our decisions in *Lukity, Rodriguez*, and *Riddle*.[5]

Moreover, we can discern no practical, real-world dislocations that would arise from overruling *Lester II* and *Ora Jones*. Those decisions "have not become so embedded, accepted or fundamental to society's expectations that overruling them would produce significant

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123 (1994); *People v McCline*, 442 Mich 127, 134 n 10; 499 NW2d 341 (1993); *People v Mosko*, 441 Mich 496, 502; 495 NW2d 534 (1992).

We reject the dissent's claim that our opinion today is inconsistent with *People v Silver,* 466 Mich 386; 646 NW2d 150 (2002). The majority's opinion in that case did not purport to create a rule of automatic reversal. Rather, properly read, it is a case where the majority determined that the failure to instruct the jury regarding a necessarily lesser included offense undermined the reliability of that defendant's conviction.

[5] See, e.g., *People v Tucker*, 469 Mich 903 (2003), where we stated:

> The Court of Appeals correctly applied the analysis found in *People v Carines*, 460 Mich 750 [597 NW2d 130] (1999), as the plain error rule of *Carines, supra*, has superseded the automatic reversal rule of *People v Smith*, 396 Mich 109 [240 NW2d 202] (1976).

See, also, *People v Young,* 472 Mich 130, 142; 693 NW2d 801 (2005), where we overruled the automatic reversal rule of *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974), because it contradicted MCL 769.26 and MCL 768.29.

dislocations." *Robinson*, *supra* at 466. It is apparent that defendant did not act in reliance on *Lester II* and *Ora Jones* when he produced an automatic handgun and pointed it at the victim. If anything, his awareness of such decisions would have arisen only after the shooting and the filing of charges against him. "Such after-the-fact awareness does not rise to the level of a reliance interest because to have reliance the knowledge must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event. Such a situation does not exist here." *Robinson*, *supra* at 466-467.

In addition, failing to overrule *Lester II* and *Ora Jones* would produce inconsistent rules regarding whether the failure to instruct on a defense theory requires reversal. As we held in *Rodriguez* and *Riddle*, such an error requires reversal only where the defendant has met the burden of establishing that the error undermined the reliability of the verdict. The decisions in *Rodriguez* and *Riddle* conform to the plain language of MCL 769.26, and "it is to the words of the statute itself that a citizen first looks for guidance in directing his actions." *Robinson*, *supra* at 467.

> Thus, 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. [*Id.*]

Applying the *Lukity*/*Rodriguez* standard to this case, we agree with the Court of Appeals conclusion that defendant has not met his burden of demonstrating

that the failure to instruct on the accident defense undermined the reliability of the verdict. As the Court of Appeals explained, "[t]he jury instructions explaining the intent element of murder made it clear that a finding of accident would be inconsistent with a finding that defendant possessed the intent required for murder." 265 Mich App at 57. Further, the jury was instructed regarding the lesser offense of statutory involuntary manslaughter, MCL 750.329,[6] but instead concluded that defendant was guilty of second-degree murder. If the jury had any doubts regarding whether defendant had the requisite malice for second-degree murder, it could have convicted him of statutory involuntary manslaughter, which does not require a finding of malice. The jury instead found that defendant possessed a mental state that was greater than simply intentionally pointing a weapon at the victim.

On the facts of this case, we conclude that defendant has not met his burden of demonstrating that the error affected the outcome of the proceedings. We therefore reverse the judgment of the Court of Appeals and reinstate defendant's convictions.

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

KELLY, J. (*dissenting*). The issue before the Court is whether we should disregard 30 years of Michigan law

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[6] MCL 750.329, at the time relevant to this case, provided:

> Any person who shall wound, maim or injure any other person by the discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter.

and overrule *People v Lester*[1] and *People v Ora Jones*[2] in light of *People v Lukity,*[3] and *People v Rodriguez.*[4] I dissent from the majority's decision to do so, and I would affirm the judgment of the Court of Appeals.

LESTER AND *ORA JONES*

Whenever the question whether there was an accident is central to a criminal case, a court's failure to instruct the jury on the defense of accident requires automatic reversal. *Lester* and *Ora Jones* established this law many years ago, and I would not overrule it.

These two decisions recognize that a defendant is entitled to have the jury weighing the evidence against him or her be properly instructed. They also recognize the difficulty a defendant has in meeting a "harmless error" standard of review in the event of an instructional mistake.

To prove that the failure to give an instruction on the defense of accident was not harmless, the defendant must be able to prove the jury's thought process. Yet, it is nearly impossible for anyone not in the jury room to know how a jury reached its verdict. Hence, it is one of the most basic tenets of our judicial system that a court cannot attempt to journey behind a jury's verdict or into the jury room. *Lukity, supra* at 509 (CAVANAGH, J., dissenting).

THE FIRST PRONG OF *ROBINSON*

The majority's decision in this case represents a rejection of precedent. In *Robinson v Detroit*,[5] we articu-

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[1] 406 Mich 252; 277 NW2d 633 (1979).

[2] 395 Mich 379; 236 NW2d 461 (1975), overruled on other grounds in *People v Cornell,* 466 Mich 335, 357-358; 646 NW2d 127 (2002).

[3] 460 Mich 484; 596 NW2d 607 (1999).

[4] 463 Mich 466; 620 NW2d 13 (2000).

[5] 462 Mich 439; 613 NW2d 307 (2000).

lated a two-part test for determining when it is proper for the Court to do so. A simplified statement of the test is this: it is proper to overrule a decision if (1) the case was wrongly decided and (2) there has not been extensive reliance on the decision so that striking down the precedent would not produce practical real-world dislocations. *Robinson, supra* at 466.

In applying this test, we first ask whether *Lester* and *Ora Jones* were wrongly decided. The majority finds that they were. It opines that they are inconsistent with § 26 of the Code of Criminal Procedure, MCL 769.26, and *People v Lukity* and *People v Rodriguez,* cases decided many years later.

MCL 769.26 "controls judicial review of preserved, nonconstitutional error." *Lukity, supra* at 495. The question becomes whether *Lester* and *Ora Jones* are inconsistent with MCL 769.26, which has remained unchanged since it became effective in 1927. It provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

This statute places the burden on the defendant to prove that a miscarriage of justice occurred. *Lukity* stated that what a defendant must prove is that more probably than not a preserved nonconstitutional error influenced the outcome of the trial. *Lukity, supra* at 495.

It is my belief that *Lester* and *Ora Jones* do not conflict with MCL 769.26. Rather, they recognize that

the failure to give the instruction where accident is a central issue results in a miscarriage of justice and undermines the reliability of the verdict. Because the error undermines the reliability of the verdict, it cannot be harmless. *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002). The right to a properly instructed jury is fundamental to a criminal trial. Without the basic protection provided in *Lester* and *Ora Jones*, many criminal trials in this state would fail utterly to serve as a reliable vehicle for determining guilt. *Arizona v Fulminante*, 499 US 279, 310; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

THE SECOND PRONG OF *ROBINSON*

This Court decided *Ora Jones* in 1975. The rule expressed there has been followed by numerous decisions of the Court of Appeals.[6] Yet, the majority insists that it has not become embedded or fundamental to societal expectations, that overruling it would not produce significant real-world dislocations. Surely 30 years of reliance creates a presumption that the rule in *Ora Jones* has become fundamental to our system of justice.

The majority states that "defendant did not act in reliance on *Lester* [] and *Ora Jones* when he produced an

[6] E.g., *People v Swaizer*, unpublished opinion per curiam of the Court of Appeals, issued June 16, 2005 (Docket No. 253443); *People v Brandt*, unpublished opinion per curiam of the Court of Appeals, issued January 16, 2001 (Docket No. 218588); *People v Fugate*, unpublished opinion per curiam of the Court of Appeals, issued January 19, 1999 (Docket No. 204109); *In re Evans*, unpublished opinion per curiam of the Court of Appeals, issued February 27, 1998 (Docket No. 203019); *People v Glover*, 154 Mich App 22; 397 NW2d 199 (1986); *People v Peery*, 119 Mich App 207; 326 NW2d 451 (1982); *People v Owens*, 108 Mich App 600; 310 NW2d 819 (1981); *People v Newman*, 107 Mich App 535; 309 NW2d 657 (1981); *People v Ritsema*, 105 Mich App 602; 307 NW2d 380 (1981); *People v Martin*, 100 Mich App 447; 298 NW2d 900 (1980); *People v Morris*, 99 Mich App 98; 297 NW2d 623 (1980); *People v Stanley Jones*, 69 Mich App 459; 245 NW2d 91 (1976).

automatic handgun and pointed it at the victim." *Ante* at 184. This characterization of the test for determining whether overruling precedent produces significant real-world dislocations is obviously ridiculous when applied to precedent of the type involved here. However, it is not far-fetched to say that defendant knew that someone might be accidentally shot during his skirmish with Jeffries. He was entitled to rely on the fact that the judge would tell the jury that his defense was that there had been an accident.

In addition, defense counsel had an embedded expectation that if he presented evidence of an accident at trial, the court would instruct the jury on that defense. But there is another major disruption to the justice system caused by the overturning of *Lester* and *Ora Jones*: Now an innocent defendant can be convicted if unable to carry the enormous burden of proving a different outcome but for the judge's failure to give an accident instruction.

In summary, *Lester* and *Ora Jones* do not contradict MCL 769.26. Moreover, the majority cannot gainsay that dislocations will arise after 30 years of reliance on *Ora Jones* by the courts of this state.

APPLICATION OF *LUKITY*

Notwithstanding my belief that the error involved in this case always requires automatic reversal, the majority's ruling in *Lukity* requires it.

The majority in this case was the same majority in *Lukity*. It states that the failure here to instruct the jury on Frank Hawthorne's accident defense did not undermine the reliability of the verdict against him. It relies on the fact that the court instructed the jury on statutory involuntary manslaughter.

The majority hypothesizes that the jury had no doubts about defendant's guilt of second-degree murder. Otherwise, it reasons, the jury would have convicted defendant of statutory involuntary manslaughter. The majority believes that, because the jury found that defendant's intent was not simply to point a weapon at the victim, the jury would have disregarded an accident defense instruction. That is sheer guesswork.

Only four years ago, this Court rejected the very logic used by the majority now. *People v Silver*, 466 Mich 386; 646 NW2d 150 (2002).[7] *Silver* held that it was not harmless error for the trial court to fail to instruct the jury on a lesser included offense. It reasoned that "[n]ot to give [the jurors] an instruction that allowed them to agree with defendant's view of the events . . . undermines the reliability of the verdict" and violates MCL 768.32(1). *Id.* at 393. The majority does not and cannot reconcile its opinion here with its pronouncement in *Silver*.[8]

It is undisputed that, at various points throughout the trial in this case, defendant presented evidence that the shooting was an accident. Even so, the trial court failed to give defendant's requested accident instruction. As in *Silver,* defendant was thereby deprived of a jury instruction on his view of the events. Therefore, just as in *Silver,* the failure here to give the instruction undermined the reliability of the verdict.

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[7] There are several concurring and dissenting opinions in *Silver*. Justices TAYLOR, YOUNG, CAVANAGH, and I comprised the majority. We agreed that the same logic that the majority uses in this case is improper.

[8] The majority argues that this case does not conflict with *Silver* because the automatic reversal rule was not involved in *Silver*. The argument is unpersuasive. In *Silver*, the failure to properly instruct the jury on the defendant's version of events was enough to undermine the jury's verdict. That same failure to properly instruct equally undermines the jury's verdict in this case, making the error anything but harmless.

This is emphasized by the majority's supposition about the rationale used by the jury in its verdict. Such a guessing game is inconsistent with this Court's precedent and the general concept of fair proceedings as recognized in *Lukity* and *People v Carines,* 460 Mich 750; 597 NW2d 130 (1999).

CONCLUSION

I would not overrule the 30 years of precedent laid down by *Lester* and *Ora Jones.* Neither of these cases is inconsistent with MCL 769.26. Also, I would find that defendant met his burden of showing that the trial court's failure to instruct the jury on the accident defense undermined the reliability of the verdict.

The Court of Appeals judgment should be affirmed.

CAVANAGH, J., would deny leave to appeal.

WEXFORD MEDICAL GROUP v CITY OF CADILLAC

Docket No. 127152. Argued November 9, 2005 (Calendar No. 4). Decided May 4, 2006.

Wexford Medical Group filed a petition in the Tax Tribunal challenging the assessment of ad valorem property taxes by the city of Cadillac, alleging that it qualifies for an exemption from such taxation as a charitable institution under MCL 211.7o and 211.9(a), and because it serves a public health purpose, MCL 211.7r. The Tax Tribunal upheld the assessment. The Court of Appeals, SMOLENSKI, P.J., and WHITE and KELLY, JJ., affirmed in an unpublished opinion per curiam, issued August 24, 2004 (Docket No. 250197). The Supreme Court granted the petitioner's application for leave to appeal. 472 Mich 899 (2005).

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

The petitioner qualifies for a tax exemption as a charitable institution under MCL 211.7o. It is not necessary to determine whether the petitioner also serves a public health purpose, MCL 211.7r. The part of the judgment of the Court of Appeals that held that the petitioner was not a charitable institution must be reversed, the part of the judgment that held that the petitioner did not exist for a public health purpose must be vacated, and the matter must be remanded to the Tax Tribunal for the entry of a judgment for the petitioner.

1. A three-part test is used to determine whether an institution is a "charitable institution" for purposes of tax exemption under MCL 211.7o. First, the real estate must be owned and occupied by the exemption claimant. Second, the exemption claimant must be a nonprofit charitable institution. Third, the exemption exists only when the buildings and other property thereon are occupied by the claimant solely for the purposes for which it was incorporated. There is no dispute in this matter that the petitioner qualifies with respect to the first and third factors and is a nonprofit organization.

2. In determining whether an organization is a "charitable institution" the institution's activities as a whole must be examined. It is the overall nature of the institution, as opposed to its

specific activities, that should be evaluated. An indispensable principle is that the organization must offer its charitable deeds to benefit people who need the type of charity being offered. Each case is unique and deserving of separate examination. There is no threshold imposed by statute. The Tax Tribunal and the Court of Appeals misapplied existing law by erroneously narrowing the focus of their inquiry to the dollar value of the free health care provided by the petitioner when determining whether the petitioner is a charitable institution. What should have been considered instead was the plaintiff's unrestricted and open-access policy of providing free or below-cost care to all patients who requested it.

3. Factors considered when determining whether an institution is a "charitable institution" under MCL 211.7o and MCL 211.9(a) include: (a) a "charitable institution" must be a nonprofit institution; (b) a "charitable institution" is one that is organized chiefly, if not solely, for charity; (c) a "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the service; rather, a "charitable institution" serves any person who needs the type of charity being offered; (d) a "charitable institution" brings people's minds or hearts under the influence of education or religion, relieves people's bodies from disease, suffering, or constraint, assists people to establish themselves for life, erects or maintains public buildings or works, or otherwise lessens the burdens of government; (e) a "charitable institution" can charge for its services as long as the charges are not more than what is needed for its successful maintenance; and (f) a "charitable institution" need not meet any monetary threshold of charity to merit the charitable institution exception; rather, if the overall nature of the institution is charitable, it is a "charitable institution" regardless of how much money it devotes to charitable activities in a particular year. Consideration of these factors leads to a conclusion that the petitioner is a charitable institution entitled to tax exemption under MCL 211.7o.

Reversed in part, vacated in part, and remanded to the Tax Tribunal.

1. TAXATION — AD VALOREM PROPERTY TAXES — EXEMPTIONS — CHARITABLE INSTITUTIONS.

Three factors are properly assessed in determining whether a claimant is entitled to a tax exemption as a charitable institution: first, the real estate must be owned and occupied by the exemption claimant, second, the exemption claimant must be a nonprofit charitable institution, and third, the exemption exists only when

the buildings and other property thereon are occupied by the claimant solely for the purposes for which it was incorporated (MCL 211.7o, 211.9[a]).

2. TAXATION — AD VALOREM PROPERTY TAXES — EXEMPTIONS — CHARITABLE INSTITUTIONS.

An institution's activities as a whole must be examined in determining whether the institution is entitled to a tax exemption as a charitable institution; it is the overall nature of the institution, as opposed to its specific activities, that must be evaluated; to qualify, the institution must offer its charitable deeds to benefit people who need the type of charity being offered; each case is unique and should be examined separately (MCL 211.7o; 211.9[a]).

3. TAXATION — AD VALOREM PROPERTY TAXES — EXEMPTIONS — WORDS AND PHRASES — CHARITY.

Factors considered when determining whether an institution is a "charitable institution" that is entitled to a tax exemption include: (1) a "charitable institution" must be a nonprofit institution; (b) a "charitable institution" is one that is organized chiefly, if not solely, for charity; (c) a "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the service; rather, a "charitable institution" serves any person who needs the type of charity being offered; (d) a "charitable institution" brings people's minds or hearts under the influence of education or religion, relieves people's bodies from disease, suffering, or constraint, assists people to establish themselves for life, erects or maintains public buildings or works, or otherwise lessens the burdens of government; (e) a "charitable institution" can charge for its services as long as the charges are not more than what is needed for its successful maintenance; and (f) a "charitable institution" need not meet any monetary threshold of charity to merit the charitable institution exception; rather, if the overall nature of the institution is charitable, it is a "charitable institution" regardless of how much money it devotes to charitable activities in a particular year (MCL 211.7o, 211.9[a]).

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich* and *Stewart L. Mandell*) for the petitioner.

McCurdy & Wotila, P.C. (by *Roger Wotila* and *Cynthia Wotila*), for the respondent.

Amici Curiae:

Butzel Long, P.C. (by *E. William Shipman*), for Michigan Rural Health Clinics Organization.

Dykema Gossett PLLC (by *Phyllis Donaldson Adams, Stewart A. Binke,* and *Christine Mason Soneral*) for Michigan Association of Homes and Services for the Aging.

Payne, Payne, Broder & Fossee, P.C. (by *Carol L. Fossee* and *Kenneth A. Krasity*), for McLaren Health Care Corporation.

Lewis, Reed & Allen, P.C. (by *Richard D. Reed* and *Matthew L. Lager*), for Michigan Municipal League and Michigan Townships Association.

Hall, Render, Killian, Heath & Lyman, PLLC (by *Kimberly J. Commins* and *Michael J. Philbrick*), for Michigan Health & Hospital Association.

CAVANAGH, J. This case calls on this Court to interpret certain provisions of the General Property Tax Act (GPTA), MCL 211.1 *et seq*. Specifically, we must decide whether the Tax Tribunal improperly denied petitioner's request to be exempt from ad valorem property taxes because of its claimed status as a charitable institution under MCL 211.7o and 211.9(a), and its claim that it serves a public health purpose as described in MCL 211.7r. Because there is no statutory language that precludes finding petitioner exempt as a charitable institution, and because exempting petitioner on that basis fully comports with the reasoning of our previous cases, we hold that petitioner does in fact qualify for that exemption. In refusing to grant the exemption, the Tax Tribunal adopted a wrong principle and misapplied

the law by failing to distinguish *ProMed Healthcare v City of Kalamazoo*, 249 Mich App 490; 644 NW2d 47 (2002), and by focusing only on the amount of free medical services plaintiff provided. Instead, the tribunal should have considered plaintiff's unrestricted and open-access policy of providing free or below-cost care to all patients who requested it.

Our finding in that regard makes it unnecessary to determine whether petitioner also exists for a public health purpose. As such, we reverse the part of the Court of Appeals judgment that held that petitioner was not a charitable institution and vacate the part of the judgment that held that petitioner did not exist for a public health purpose. The matter is remanded to the Tax Tribunal for entry of a judgment for the petitioner.

I. BACKGROUND

Petitioner Wexford Medical Group is a nonprofit corporation that provides health care in Wexford County, Michigan, which is a federally designated health professional shortage area. Petitioner does business as Great Lakes Family Care. Petitioner is a § 501(c)(3)[1] (nonprofit) organization and is owned jointly by Trinity Health Care and Munson Health Care, two other § 501(c)(3) organizations. Petitioner's articles of incorporation identify petitioner's mission as "providing access to quality and affordable health care services to the communities it serves." Both its statement of purpose and its bylaws further declare that petitioner will, among other things, conduct its activities within the confines of the rules governing

[1] 26 USC 501(c)(3).

§ 501(c)(3) organizations, prevent inurement of funds to private individuals, and refrain from political activities.[2]

In accord with its mission, petitioner has a "charity care" policy and an "open-access" policy for Medicare and Medicaid patients. The charity care policy provides free and discounted health care to anyone whose income is up to twice the federal poverty level. Under its open-access policy, patients are treated on a first-come, first-served basis, and petitioner places no limit on the number of Medicare and Medicaid patients it will treat. In 2000, two patients took advantage of the charity care program; 11 patients used it in 2001. The total value of care rendered to these 13 patients was $2,400. Petitioner also reported that 50 percent of its patients utilized Medicare or Medicaid, which it stated was a significantly higher percentage than was true for other providers in the area.

In the years at issue, petitioner's annual budget was $10 million, and it handled approximately 40,000 to 44,000 patient visits a year. Petitioner's expected fee collection was as follows: 83 percent recovery from self-pay patients, 75 percent from Blue Cross Blue Shield patients, 60.3 percent from Medicare patients,

[2] Specifically, the bylaws state as follows:

> The Corporation shall be operated exclusively for charitable, scientific and educational purposes as a nonprofit corporation. No individual Trustee shall have any right, title to or interest in the corporate property or earnings in his/her individual or private capacity and no part of the net earnings of the Corporation shall inure to the benefit of any Trustee or any individual. No substantial part of the activities of the Corporation shall consist of carrying on propaganda or otherwise attempting to influence legislation, nor shall the Corporation participate in or intervene in any political campaign on behalf of or in opposition to any candidate for public office.

and 40.4 percent from Medicaid patients. Under its policy of accepting patients who cannot pay their Medicare or Medicaid co-pays, petitioner provided below-cost health care totaling nearly $2 million more than its receipts. Overall, petitioner suffered financial losses in 1999, 2000, and 2001 of $575,000, $731,000, and $673,000, respectively. These losses were subsidized by its parent companies. And while petitioner's goal was to eventually become profitable, its agent testified that any surplus would be invested back into the organization in accord with its statement of purpose.

Petitioner also engaged in a variety of health-based community services such as offering classes, lectures, training, testing and screening, and sports physicals. Other of its community endeavors included treating communicable diseases such as human immunodeficiency virus-acquired immune deficiency syndrome (HIV-AIDS), tuberculosis, hepatitis, and meningitis; treating maladies such as diabetes, obesity, and heart disease; and providing educational services such as disease screening, blood-borne pathogen instruction, defibrillator training, and first aid instruction. A significant number of these and other services provided by petitioner are not provided by anyone else in the community.

After respondent assessed and taxed petitioner's property in 2000 and 2001,[3] petitioner appealed the assessments to the Tax Tribunal. Petitioner argued that it was entitled to the GPTA's charitable institution exemption, MCL 211.7o, and its public health purpose exemption, MCL 211.7r, so it should not have to pay ad valorem property taxes.

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[3] Thirteen percent of petitioner's property is leased to a for-profit entity and is, thus, not tax-exempt; petitioner's arguments pertain only to the remaining 87 percent.

MCL 211.7o creates the ad valorem property tax exemption for charitable institutions. Section 7o (1) states as follows:

> Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which it was incorporated is exempt from the collection of taxes under this act.

The corollary statute addressing personalty, MCL 211.9(a), exempts from taxation

> [t]he personal property of charitable, educational, and scientific institutions incorporated under the laws of this state.

MCL 211.7r, which contains the public health purpose exemption, states, in pertinent part:

> The real estate with the buildings and other property located on the real estate on that acreage, owned and occupied by nonprofit trust and used for hospital or public health purposes is exempt from taxation under this act, but not including excess acreage not actively utilized for hospital or public health purposes and real estate and dwellings located on that acreage used for dwelling purposes for resident physicians and their families.

The Tax Tribunal upheld the assessment, finding that petitioner did not qualify for either exemption. With respect to the charitable institution exemption, the tribunal held that while petitioner extended charity care and indigent services to the community, its primary purpose was to operate as a typical family medical practice. It found that it could not distinguish petitioner's case from *ProMed, supra*. The tribunal commented:

> While, unlike *ProMed*, Petitioner is able to document the number of individuals it has served under its charity care policy, serving 13 patients under that program in a

> two-year time period is not sufficient for a medical practice that has up to 44,000 patient visits per year.

Citing petitioner's $10 million annual budget, the tribunal concluded that "[a] charity care write-off of approximately $2,400 is not an appropriate level of charity care to qualify Petitioner as a charitable institution."

Petitioner appealed the tribunal's decision,[4] and relying heavily on *ProMed*, *supra*, the Court of Appeals affirmed the tribunal's decision. *Wexford Med Group v Cadillac*, unpublished opinion per curiam of the Court of Appeals, issued August 24, 2004 (Docket No. 250197). The Court of Appeals held that petitioner "failed to present evidence that its 'provision of charitable medical care constituted anything more than an incidental part of its operations.' Specifically, the evidence indicated that Wexford provided no-cost services to only two people in 2000, and eleven people in 2001, which amounted to writing off $129.13 in 2000, and $2,229.09 in 2001." *Id.*, slip op at 2, quoting *ProMed*, *supra* at 500. The Court of Appeals was also not persuaded by petitioner's argument that it had written off losses sustained from underpayments by Medicare and Medicaid, reasoning as follows: "That the amount of payment under these programs often does not cover the cost of providing the service does not change the character of the service from service in exchange for payment to charity. Further, it is undisputed that Wexford's aim is to become profitable." *Wexford, supra* at 2. The Court was similarly unpersuaded by petitioner's

[4] The Court of Appeals consolidated this case with a similar appeal, *McLaren Regional Med Ctr v Owosso*, unpublished opinion per curiam of the Court of Appeals, issued August 24, 2004 (Docket No. 244386). An application for leave to appeal in *McLaren* is being held in abeyance for the resolution of this case. 696 NW2d 708 (2005).

argument that it was a charitable institution because it provided health care in an area deficient of such services.

With respect to whether petitioner served a public health purpose that would entitle it to ad valorem tax exemption, the Court also found against petitioner. The Court concluded that petitioner's "operations parallel a typical private medical clinic, rather than an organization that provides public health services" and that "the services that Wexford claims as serving public health purposes were 'inherent to the medical profession.' " *Id.* at 3. Therefore, petitioner's appeal was rejected.

This Court granted petitioner's application for leave to appeal, 472 Mich 899 (2005), as well as motions by various amici curiae to file briefs. Briefs were received from amici Michigan Rural Health Clinics Organization, McLaren Health Care Corporation, Michigan Health & Hospital Association, and Michigan Association of Homes and Services for the Aging in support of petitioner, and by amici Michigan Municipal League and Michigan Townships Association in support of respondent.

II. STANDARD OF REVIEW

The standard of review for Tax Tribunal cases is multifaceted. Where fraud is not claimed, this Court reviews the tribunal's decision for misapplication of the law or adoption of a wrong principle. *Michigan Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994). We deem the tribunal's factual findings conclusive if they are supported by "competent, material, and substantial evidence on the whole record." *Id.*, citing Const 1963, art 6, § 28 and *Continental Cablevision v Roseville*, 430 Mich 727, 735; 425 NW2d 53

(1988). But when statutory interpretation is involved, this Court reviews the tribunal's decision de novo. *Danse Corp v Madison Hts*, 466 Mich 175; 644 NW2d 721 (2002).

III. ANALYSIS

While our courts have had occasion to examine the charitable institution and public health purpose statutes in the past, this case tests the boundaries of those decisions by presenting a more finely tuned question. We must now decide precisely how, in the absence of a statutory yardstick, we should measure whether an institution is a "charitable institution" when it performs some level of charitable work. Similarly, we are asked to calculate whether an institution exists for a "public health purpose" when it engages in some level of activities designed to benefit public health. Stated differently, we must determine in which instances an organization claiming to perform charity work or work benefiting the public health does so to an extent that would merit the respective tax exemptions, and, importantly, whether there are any concrete parameters that can be imposed to assist with these inquiries.

Because the Legislature chose not to define the terms "charitable institution," found in MCL 211.7o, or "public health purposes," found in MCL 211.7r, the specific meaning of these phrases has been the subject of decades of case law. Turning our attention first to the term "charitable institution," a brief look back at the development of the law surrounding this phrase is useful to the analysis.

As an initial matter, the seminal cases addressing the meaning of "charitable institution" were written before parts of the GPTA were revised and renumbered by 1980 PA 142. Before those amendments, the pertinent exemption was found in MCL 211.7. In line with the

statutory language as it then existed, a four-part test was developed to help assess whether a claimant was entitled to a tax exemption:

> (1) The real estate must be owned and occupied by the exemption claimant;
>
> (2) The exemption claimant must be a library, benevolent, charitable, educational or scientific institution;
>
> (3) The claimant must have been incorporated under the laws of this State;
>
> (4) The exemption exists only when the buildings and other property thereon are occupied by the claimant solely for the purposes for which it was incorporated. [*Engineering Society of Detroit v Detroit*, 308 Mich 539, 550; 14 NW2d 79 (1944).]

Because of the 1980 amendments, the second and third factors must now be adapted to correspond with the present wording of MCL 211.7o. Because the Legislature did not retain language requiring in-state incorporation,[5] we remove factor three. And under factor two, a claimant must now show that it is a "nonprofit charitable institution." Thus, the revised test for this particular subsection is as follows:

(1) The real estate must be owned and occupied by the exemption claimant;

(2) the exemption claimant must be a nonprofit charitable institution; and

(3) the exemption exists only when the buildings and other property thereon are occupied by the claimant solely for the purposes for which it was incorporated.

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[5] The requirement that to be tax-exempt, an institution be incorporated within the state has been found to be unconstitutional. See *American Youth Foundation v Benona Twp*, 37 Mich App 722, 724; 195 NW2d 304 (1972), citing *WHYY v Glassboro*, 393 US 117; 89 S Ct 286; 21 L Ed 2d 242 (1968).

In the present case, there is no dispute with respect to factors one or three. Nor is there a question whether petitioner is a nonprofit organization; it is.[6] Instead, the central inquiry is whether petitioner is a "charitable institution," and, in a more general sense, what precise meaning that term has.

In examining this issue, we bear in mind the time-honored rules of statutory construction, under which our paramount concern is identifying and effecting the Legislature's intent. *Michigan United Conservation Clubs v Lansing Twp*, 423 Mich 661, 665; 378 NW2d 737 (1985). And where a tax exemption is sought, we recall that because tax exemptions upset the desirable balance achieved by equal taxation, they must be narrowly construed. *Id.*; see also *Michigan Baptist Homes & Dev Co v City of Ann Arbor*, 396 Mich 660, 669-670; 242 NW2d 749 (1976).

A. "CHARITABLE INSTITUTION"

It appears that the earliest examination of the term "charitable institution," albeit brief, was conducted in *Attorney General v Common Council of Detroit*, 113 Mich 388; 71 NW 632 (1897). Construing a precursor to the current charitable institution exemption statute,[7]

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[6] And the statute's plain language disposes of any argument that an institution is automatically a charitable one if it is first a nonprofit institution. By requiring an institution to show that it is both nonprofit and charitable, the Legislature has presumed that there are instances when a nonprofit institution might not be considered "charitable." See also *Ladies Literary Club v Grand Rapids*, 409 Mich 748, 752 n 1; 298 NW2d 422 (1980) (noting that our tax exemption statutes are more narrowly drawn than the federal statute governing § 501[c][3] corporations).

[7] At the time, the statute exempted the following property:

> Such real estate as shall be owned and occupied by library, benevolent, charitable, educational and scientific institutions in-

this Court determined that real estate of the Masonic Temple Association, the Harmonie Society, and the Arbeiter Society were not exempt from taxation. *Id.* at 390. Although this Court did not discuss the factual underpinnings of the decision, we did set forth this foundational principle: "It is not enough, in order to exempt such associations from taxation, that one of the direct or indirect purposes or results is benevolence, charity, education, or the promotion of science. They must be organized chiefly, if not solely, for one or more of these objects." *Id.*

An opportunity to construe the term "charitable institution" in a slightly different context presented itself in *Michigan Sanitarium & Benevolent Ass'n v Battle Creek*, 138 Mich 676; 101 NW 855 (1904). At issue in that case was a statute that, in conjunction with a predecessor to MCL 211.7o(3), governed the tax exemption of property gifted to another with the condition that the property be used " 'for the purpose of founding or endowing a hospital or other charitable asylum within this State, for the care or relief of indigent or other sick or infirm persons . . . .' " *Id.* at 680, quoting 1897 CL 8288. A dispute arose when the respondent city taxed the petitioner's property because the respondent believed, among other things, that the petitioner was not using the property for charitable purposes as required by the statute.

To determine whether the petitioner was a "charitable" hospital, it was necessary to examine the nature of the petitioner's activities. We observed first that the

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corporated under the laws of this State, with the buildings and other property thereon, while occupied by them solely for the purposes for which they were incorporated: *Provided*, that such exemption shall not apply to fraternal or secret societies, but all charitable homes of such societies shall be exempt. [1893 PA 206, § 7(4).]

petitioner operated a hospital in which it treated sick and infirm persons. *Id.* at 682. We noted that the petitioner treated some patients for free and some at a reduced rate. *Id.* And while most of the petitioner's patients paid "a regular schedule of prices fixed by [the petitioner's] management," *id.* at 682, we concluded, because the respondent did not show otherwise, "that the charges collected from patients were not larger than were necessary to the successful maintenance of the institution." *Id.* at 682-683. Therefore, we determined that if we were to accept the respondent's position that to be considered "charitable," the petitioner could accept no fees from patients, we would be adopting the untenable position that "persons who dedicate a hospital to the public must pay taxes on that hospital unless they maintain the same from their private means." *Id.* at 683. We favored a different, more sensible, rule and held that "a corporation is sufficiently charitable to entitle it to the privileges of the act when the charges collected for services are not more than are needed for its successful maintenance." *Id.*

This Court next visited the meaning of "charitable institution" in *Auditor General v R B Smith Mem Hosp Ass'n*, 293 Mich 36, 38; 291 NW 213 (1940), where we again examined the predecessor to the current version of MCL 211.7o. There, we approvingly noted an ALR discussion on tax exemption for charitable institutions:

> "The determination of the exemption in a particular case seems to depend, in the last analysis, upon two things: First, whether the organization claiming the exemption is a charitable one; and, second, whether the property on which the exemption is claimed is being devoted to charitable purposes. In general, it may be said that any body not organized for profit, which has for its purpose the promotion of the general welfare of the public, extending its benefits without discrimination as to race, color, or creed, is

> a charitable or benevolent organization within the meaning of the tax exemption statutes. In determining whether the property is being devoted to charitable purposes within the meaning of the statute, the rule that tax exemptions are to be construed strictly is generally applied, with the result that, in the absence of a specific charter or statutory provision, no property owned by a charitable institution, but held as a source of income, can escape taxation, although the fact that a charge is made for benefits conferred, against those who are able to pay, in no way detracts from the charitable character of an organization." [*Id.* at 38-39, quoting 34 ALR 634, 635.]

Along with observing this ALR explanation, we relied on the definition we applied in *Michigan Sanitarium*, *supra*, and found that the facts of the case compelled the conclusion that the hospital was tax-exempt. For example, the hospital operated as a public hospital, rather than a private one, relying heavily on donations of money and volunteer work from the community. *Id.* at 40. It was maintained without anyone profiting monetarily from it, and it did not pay any dividends. *Id.* And surpluses, when there were any, were invested back into the hospital and used to maintain it. *Id.* Thus, we held that the hospital was entitled to tax exemption, pointedly noting that an institution does not lose its charitable character merely because "in some years, instead of the usual deficit, it shows a small surplus which is used to supply needed equipment." *Id.* at 41.

On the next occasion we construed the charitable institution exemption statute, we were faced with a petitioner's claim of disparity when two of its nursing homes were granted tax-exempt status, but one, Hillside Terrace, was not. *Michigan Baptist*, *supra*. We affirmed the city's decision to tax Hillside Terrace, cataloguing the following differences between one home owned by another association that was granted tax-exempt status and the one by the petitioner that was

not. For instance, Hillside Terrace was funded entirely by loans, debentures, and resident fees. *Michigan Baptist, supra* at 667. In fact, the residents paid a substantial up-front sum and monthly fees thereafter. *Id.* at 667, 668. Hillside Terrace had losses for two consecutive years, although the petitioner admitted that, should the losses continue, it would raise the residents' fees to eliminate the deficit. *Id.* at 669. The petitioner had neither solicited nor received any gifts, despite that gifts to Hillside Terrace were tax-deductible. *Id.* at 667. The petitioner offered reduced rates to four of its 72 residents in one year and waived the fees for one other resident. *Id.* at 668. Residents were hand-selected by the establishment after an application process that asked them to fully detail their financial status and their health. *Id.* at 668-669. Those who could not show sufficient means or who were in less than reasonably good health were, in large part, rejected. *Id.* at 669.

On the other hand, the other nursing home, the Anna Botsford Bach Home, was endowed by and partially financed through charitable contributions and annual charity drives. *Id.* at 674. Rather than rely on resident fees for its maintenance, operational costs were paid using principal and interest from the endowment fund. *Id.* The Bach Home residents did not pay the full cost of their care, nor were they expected to. *Id.* And residents were accepted on the basis of their lack of ability to find care elsewhere, not on the basis of being in good financial and physical health. *Id.*

We found these differences critical and, thus, rejected the petitioner's equal protection claim that Hillside Terrace deserved the same tax exemption granted to the Bach Home. *Id.* at 674. In light of the fundamental differences in the way the homes were run, we held that the city's decision to treat the entities differently was

fully justified. Moreover, we found that Hillside Terrace, while purported to exist for benevolent, charitable, and general welfare purposes, was not actually furthering those objectives. *Id.* at 671. Because of its selection process and resident-funded mechanism, we concluded that the home did not "serve the elderly generally," but, rather, "provide[d] an attractive retirement environment for those among the elderly who have the health to enjoy it and who can afford to pay for it." *Id.* at 671. This structure for the nursing home, we held, did not comport with the legislative intent behind the charitable institution exemption statute. *Id.*

This Court again visited the meaning of the term "charitable institution" in *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc, v Sylvan Twp*, 416 Mich 340, 348-349; 330 NW2d 682 (1982), wherein we construed another previous version of the charitable institution exemption.[8] The petitioner in *Retirement Homes* sought tax exemption as a charitable institution for the apartment complex it operated in conjunction with a licensed nursing home and a licensed home for the aged. *Id.* at 343. While the two licensed care facilities had already been established as tax-exempt, the apartments were a new addition to the complex and had not yet been evaluated. *Id.* We accepted the Tax Tribunal's finding that the apartment building was not entitled to tax exemption merely

[8] At that time, the statute exempted the following types of property:

> [S]uch real estate as shall be owned and occupied by library, benevolent, charitable, educational or scientific institutions and memorial homes of world war veterans incorporated under the laws of this state with the buildings and other property thereon while occupied by them solely for the purposes for which they were incorporated. Also charitable homes of fraternal or secret societies . . . . [MCL 211.7.]

by virtue of its association with the tax-exempt properties, and, thus, had to be examined separately. See *id.* at 346 n 9.

We then looked closely at how the apartment component of the complex was operated and found that the apartments differed little from the nursing home in *Michigan Baptist*, *supra*, that was not tax-exempt. We observed the Tax Tribunal's findings that residents were admitted "on the basis of their health and ability to pay the monthly fee," which contradicted the petitioner's articles of incorporation. *Id.* We also noted the tribunal's finding that "the apartments were merely 'a method whereby [the apartment] residents assure themselves a bed in a nursing home upon becoming disabled' and 'a convenient method of keeping a ready supply of prospective nursing home and old age home residents on hand'." *Id.*

It was unclear whether the apartments were profitable, but we took care to note the juxtaposing propositions that while "[a] corporation does not qualify for a tax exemption merely because it is structured to be nonprofit and in fact makes no profit," "[b]y the same token, a nonprofit corporation will not be disqualified for a charitable exemption because it charges those who can afford to pay for its services as long as the charges approximate the cost of the services." *Id.* at 350 n 15, citing *Michigan Sanitarium*, *supra* at 683, *Auditor General*, *supra* at 39, and *Gull Lake Bible Conference Ass'n v Ross Twp*, 351 Mich 269; 88 NW2d 264 (1958). We noted that apartment residents who became unable to pay the monthly fee were relocated into areas of the retirement homes' complex that would entitle them to government assistance, which, consequently, lifted the petitioner's burden of charity. *Id.* at 345-346.

Commencing our legal analysis, we first sought the meaning of "charity." *Id.* at 348. We noted the proposition pronounced in our past cases that "to qualify for a charitable or benevolent tax exemption, property must be used in such a way that it 'benefit[s] the general public without restriction'." *Id.* at 348, quoting *Michigan Baptist*, *supra* at 671, and citing *Auditor General*, *supra* at 38. Surveying case law from other jurisdictions, we also took note of a widely used definition that seemed to restate and elaborate on that principle, and which similarly seemed to have stood the test of time:

> "[Charity] * * * [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." [*Id.* at 348-349, quoting *Jackson v Phillips*, 96 Mass (14 Allen) 539 (1867) (emphasis deleted; alterations in original).]

As such, we framed the pertinent question as follows: "Does Retirement Homes operate the apartments in such a way that there is a 'gift' for the benefit of 'the general public without restriction' or 'for the benefit of an indefinite number of persons'?" *Id.* at 349. In light of the particular facts of the case, we concluded in the negative and explained our reasoning as follows:

> [T]here is no "gift" for the benefit of an indefinite number of persons or for the benefit of the general public without restriction in the operation of the apartments. The monthly fee is designed to cover all operating costs as well as to recover the construction costs of the apartments. While it does not appear that the apartments are operated for a profit, neither does it appear that the residents

> receive any significant benefit that they do not pay for. There is no "gift" to the residents.
>
> The operation of the apartments does not appear to benefit the general public. Its residents are chosen on the basis of their good health, their ability to pay the monthly charge, and, generally, their ability to live independently. [*Id.* at 349-350.]

Most recently, we applied the charitable institution microscope to an environmental organization engaged in conservation efforts, the promotion of natural resource management, and the protection of the rights of citizens to bear arms. *Michigan United Conservation Clubs*, *supra* at 665. To further these goals, the petitioner conducted or sponsored educational seminars and courses, published informational brochures, maintained a library, conducted lobbying, and administered a fund to oppose any movement to restrict gun ownership. *Id.* at 666-667. Restating the definition of charity set forth in *Retirement Homes*, *supra*, we concluded that the petitioner was not a charitable institution, although we rejected the Court of Appeals exclusive focus on the petitioner's lobbying activities. *Id.* at 673. And while we agreed that the petitioner did provide some services that could be deemed charitable gifts, we found that, on balance, the petitioner was organized to benefit its paying members rather than to benefit "the general public without restriction" or "for the benefit of an indefinite number of persons." *Id.* at 673.

Several common threads can be found in this line of cases. First, it is clear that the institution's activities as a whole must be examined; it is improper to focus on one particular facet or activity. In that sense, the inquiry pertains more to whether an institution could be considered a "charitable" one, rather than whether the institution offers charity or performs charitable

work. So it is the overall nature of the institution, as opposed to its specific activities, that should be evaluated.

A second indispensable principle is that the organization must offer its charitable deeds to benefit people who need the type of charity being offered. In a general sense, there can be no restrictions on those who are afforded the benefit of the institution's charitable deeds. This does not mean, however, that a charity has to serve every single person regardless of the type of charity offered or the type of charity sought. Rather, a charitable institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group. The charitable institution's reach and preclusions must be gauged in terms of the type and scope of charity it offers.

From these precepts, it naturally follows that each case is unique and deserving of separate examination. Consequently, there can be no threshold imposed under the statute. The Legislature provided no measuring device with which to gauge an institution's charitable composition, and we cannot presuppose the existence of one. To say that an institution must devote a certain percentage of its time or resources to charity before it merits a tax exemption places an artificial parameter on the charitable institution statute that is unsanctioned by the Legislature.

The Tax Tribunal and the Court of Appeals focused exclusively on the dollar amount of free health care petitioner gifted as part of its charity care program, looking no further into the nature of petitioner's organization. This was error because it is clear that both tribunals had in mind a monetary threshold that is not only not discernable from the statute, but that would be, by its very nature, quite arbitrary.

As petitioner aptly pointed out, there are multiple reasons why inventing legislative intent in this regard would be ill-advised and most unworkable. In fact, the difficulties with formulating a monetary threshold illuminate why setting one is the Legislature's purview, not the courts'. To set such a threshold, significant questions would have to be grappled with. For instance, a court would have to determine how to account for the indigent who do not identify themselves as such but who nonetheless fail to pay. A court would have to determine whether facilities that provide vital health care should be treated more leniently than some other type of charity because of the nature of its work, or even if a health care provider in an underserved area, such as petitioner, is more deserving of exemption than one serving an area of lesser need. A court would need to consider whether to premise the exemption on whether the institution had a surplus and whether providing below-cost care constitutes charity. Clearly, courts are unequipped to handle these and many other unanswered questions. Simply put, these are matters for the Legislature.

We conclude that the definition set forth in *Retirement Homes*, *supra* at 348-349, sufficiently encapsulates, without adding language to the statute, what a claimant must show to be granted a tax exemption as a charitable institution:

> "[Charity] * * * [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." [*Id.*, quoting *Jackson v Phillips*, 96 Mass (14 Allen) 539 (1867) (emphasis deleted; alterations in original).]

In light of this definition, certain factors come into play when determining whether an institution is a "charitable institution" under MCL 211.7o and MCL 211.9(a). Among them are the following:

(1) A "charitable institution" must be a nonprofit institution.

(2) A "charitable institution" is one that is organized chiefly, if not solely, for charity.

(3) A "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a "charitable institution" serves any person who needs the particular type of charity being offered.

(4) A "charitable institution" brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.

(5) A "charitable institution" can charge for its services as long as the charges are not more than what is needed for its successful maintenance.

(6) A "charitable institution" need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a "charitable institution" regardless of how much money it devotes to charitable activities in a particular year.

Examining petitioner under these factors, we find that it is a charitable institution. Petitioner's medical clinic is readily distinguishable from the entities that we have found nonexempt under MCL 211.7o. Petitioner is not only organized as a charitable institution as reflected in its statement of purpose and its bylaws,

but it devotes itself to charitable works on the whole. We instructed in *Attorney General v Common Council of Detroit*, *supra* at 390, that an institution must be "organized chiefly, if not solely" for charity, and petitioner meets this test. Respondent has pointed to no other reason for petitioner's existence. Nor has respondent shown any evidence that petitioner is not actively pursuing its mission to the exclusion of any noncharitable activities. We find these omissions telling.

Petitioner is also fundamentally different from the Hillside Terrace home for the aged in *Michigan Baptist*, *supra,* and the apartment complex in *Retirement Homes*, *supra*. In both of those cases, the cost of maintaining the institutions was covered by fees collected from the residents. Prospective residents whose health or financial status did not meet strict requirements were not accepted. And although the petitioner in *Michigan Baptist* made some small exceptions in that regard, the general rule was of an exclusionary nature, not a charitable one.

Petitioner in the present case shares no similarities with those institutions. Petitioner has a charity care program that offers free and reduced-cost medical care to the indigent with no restrictions. It operates under an open-access policy under which it accepts any patient who walks through its doors,[9] with preferential treatment given to no one. Although petitioner sustains notable financial losses by not restricting the number of Medicare and Medicaid patients it accepts, it bears

[9] Petitioner's agent did explain that it must occasionally turn away patients who have destroyed the physician-patient relationship by exhibiting violence, being dishonest to the detriment of petitioner's ability to treat them, or engaging in drug-seeking behavior. We find those exceptions to petitioner's general rule to be well-justified and, thus, to have no effect on petitioner's status as a charitable institution.

those losses rather than restricting its treatment of patients who cannot afford to pay.

Petitioner more closely matches the hospitals examined in *R B Smith*, *supra*, and *Michigan Sanitarium*, *supra*, hospitals we found qualified for the charitable institution exemption. Just as in those cases, the overall nature of petitioner's organization is charitable. The losses the institution sustains are not fully subsidized by the patients, but by petitioner's parent corporations, patients who can afford to pay, and, to some extent, by government reimbursements. And the fact that petitioner receives government reimbursements has little bearing on the analysis because, despite any government aid, the beneficiary of the medical care receives a gift. See, e.g., *Huron Residential Services v Pittsfield Charter Twp*, 152 Mich App 54; 393 NW2d 568 (1986) (holding that a petitioner who received approximately 99 percent of its revenues from state funding was a charitable institution because the residents did not pay full value for the services rendered and, thus, received a charitable gift from the petitioner). See also *Retirement Homes*, *supra* at 350 n 15 ("[A] nonprofit corporation will not be disqualified for a charitable exemption because it charges those who can afford to pay for its services as long as the charges approximate the cost of the services.").

Moreover, it is clear in this case that the reimbursements petitioner receives from government funding fall well short of defraying the costs petitioner incurs to render medical care. Thus, not only are Medicare and Medicaid patients receiving a gift from petitioner, but petitioner is not fully recouping its costs from the government because of the government's underpayments.

Respondent argues that petitioner's goal of profitability negates its claim that it is a charitable institu-

tion. We find that argument hollow. Petitioner's bylaws do not allow any individual to profit monetarily from the petitioner's clinic; thus, "profitability" has a different meaning for this institution than it would for an entity whose goal it was to reward its agents or shareholders with profits. And the idea that an institution cannot be a charitable one unless its losses exceed its income places an extraordinary—and ultimately detrimental—burden on charities to continually lose money to benefit from tax exemption. A charitable institution can have a net gain—it is what the institution does with the gain that is relevant. See *R B Smith Mem Hosp*, *supra* at 36, 41. When the gain is invested back into the institution to maintain its viability, this serves as evidence, not negation, of the institution's "charitable" nature.

Nor can credence be given to respondent's argument that petitioner is not "charitable" because it is not open 24 hours a day or because it includes noncompetition clauses in its physicians' contracts. Taken alone, these are merely neutral facts, and whether they gain or lose relevance depends on their importance when considered as part of the broader picture. In the totality of petitioner's circumstances, we do not find them particularly meaningful. First, just as there is no monetary threshold by which we can gauge an institution's charity, there is certainly no rule requiring a charity to never sleep. Petitioner holds regular business hours, and during those hours, it accepts any patient who needs medical care. And with respect to the noncompetition clauses, petitioner explained that it is very difficult to attract physicians to the region, so these clauses are included to encourage physicians to remain with the charity and assist petitioner with carrying out its charitable work. Moreover, petitioner's agent testified that

petitioner has never enforced one of its noncompete clauses. Thus, these facts do nothing to reduce petitioner's charitable status.

Respondent also unconvincingly argues that petitioner does not "lessen the burden of government," see *Retirement Homes*, *supra* at 349, because it enlists eligible patients in government-subsidized programs. While "lessening the burden of government" is a component of the definition of "charity" found in *Retirement Homes*, *supra*, respondent takes it out of context. This Court stated that a charitable institution is one that benefits an indefinite number of persons " 'either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or *otherwise* lessening the burdens of government.' " *Id.* (emphasis added; citation omitted). Implicit in the definition is that relieving bodies from disease or suffering *is* lessening the burden of government. In other words, petitioner does not have to prove that its actions lessen the burden of government. Rather, it has to prove, as it did, that it "reliev[es] their bodies from disease, suffering or constraint," which is, by its nature, a lessening of the burden of government. In any event, even though petitioner helps to enroll patients in Medicare and Medicaid, it still subsidizes the cost of care in light of the government's underpayment, thus lessening the government's burden of covering the full cost of a person's care.

Finally, we reject the reliance of the lower tribunals and respondent on *ProMed*, *supra*. The Court of Appeals holding in that case was directly tied to its finding

that the petitioner had presented *no* documentation of the level of charitable service it provided. The Court of Appeals was correct to hold that when an institution presents no evidence of its charitable works, then, as a matter of law, it cannot be found to be a charitable institution. But it does not follow that an institution must present evidence of a *particular* level of charitable care because there is no such threshold level contained in the statute. And we refuse to create one. Accordingly, *ProMed* must not be interpreted as requiring quantitative proof of the *value* of charitable care. Rather, the focus should be on the overall nature of the institution as judged by the particular facts presented in each individual case.[10]

In sum, the Tax Tribunal and Court of Appeals erred by denying petitioner's request for tax exemption as a charitable institution. Petitioner satisfies the concepts we have previously set forth with respect to what a claimant must show to be found "charitable." See *Retirement Homes*, *supra* at 348-349. Petitioner pro-

[10] The *ProMed* Court also reasoned that to allow ProMed a charitable exemption, it "would in effect be granting tax exempt status to every doctor's office in the state, as well as every organization offering health-related services, as long as those organizations are structured as nonprofit corporations and maintain policies of offering some 'appropriate' level of charity medical care to indigent persons." *ProMed*, *supra at* 500-501. We reject that reasoning for two reasons. Most importantly, the Court inappropriately based its statement on its subjective fear of the outcome of applying the clear statutory language, rather than simply applying the language of the statute itself, which says nothing about an "appropriate" level of care. And even if the Court's concern were relevant, we find it somewhat overblown in that it is doubtful that any significant number of profitable medical institutions would forgo their for-profit status in exchange for property tax exemption. In any event, the charitable institution exemption has been in place for over 100 years, and we discern no sign of rampant abuse of it. Nor, apparently, has the Legislature because it has not altered the exemption in any significant way since we first interpreted it in 1897.

vides a gift—free or below-cost health care—to an indefinite number of people by relieving them of disease or suffering.

As such, while we will generally "defer to the Tax Tribunal's interpretation of a statute that it is delegated to administer," *Maxitrol Co v Dep't of Treasury*, 217 Mich App 366, 370; 551 NW2d 471 (1996), we decline to do so in this case because we find that the tribunal misinterpreted the law. The statute says nothing about how much "charity" an institution should provide. Despite that, the tribunal erroneously engrafted a nonexistent threshold of charitable activity. Had the Legislature wanted such a threshold, it could have easily included one. Therefore, we find that petitioner is a charitable institution entitled to the corresponding tax exemption.

B. "PUBLIC HEALTH PURPOSE"

Petitioner also argued that it was entitled to the exemption offered under MCL 211.7r to organizations serving a "public health purpose." Because we find that petitioner is exempt as a charitable institution under MCL 211.7o, there is no need to delve any further. Thus, we leave further examination of the meaning of "public health purpose" for another day. We do, however, vacate the part of the Court of Appeals judgment that held that petitioner did not qualify for this exemption.

IV. CONCLUSION

Whether an institution is a charitable institution within the meaning of MCL 211.7o is a fact-specific question that requires examining the claimant's overall purpose and the way in which it fulfills that purpose.

The determination will rarely, if ever, rest on one specific fact, such as the percentage of monetary value of services given for free. Because the Tax Tribunal and the Court of Appeals misapplied existing law by erroneously narrowing the focus of their inquiry to the value of the free medical care petitioner rendered in the given tax years, they erroneously denied the requested exemption. Petitioner is a charitable institution because it exists for, and carries out, the purpose of giving a gift for the benefit of an indefinite number of persons by providing free and below-cost medical care to anyone who needs it without qualification, and it realizes no pecuniary gain from its activities. As such, it is entitled to an ad valorem tax exemption.

We reverse the part of the Court of Appeals judgment that held that petitioner was not a charitable institution. We further vacate the part of its judgment pertaining to whether petitioner served a public health purpose. We remand this case to the Tax Tribunal for entry of judgment for petitioner.

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

WOLD ARCHITECTS AND ENGINEERS v STRAT

Docket No. 126917. Argued November 9, 2005 (Calendar No. 7). Decided May 4, 2006.

Wold Architects and Engineers brought an action in the Oakland Circuit Court against Thomas Strat and Strat and Associates, Inc., seeking declaratory and injunctive relief against a scheduled arbitration hearing involving a dispute between the parties with regard to payments by Wold to Thomas Strat under an employment agreement that was entered into as part of an agreement by Wold to purchase the assets of Strat and Associates from Thomas Strat, the sole owner. The employment agreement included an arbitration provision, but the asset purchase agreement did not. The court, Steven N. Andrews, J., eventually granted the defendants' motion for summary disposition and denied the plaintiff's motion to vacate the arbitration award that had been issued after Wold revoked its agreement to arbitrate. Wold appealed to the Court of Appeals alleging, in part, that the trial court erred in finding that the employment agreement provided for binding statutory arbitration. The Court of Appeals, MURPHY, P.J., and JANSEN and COOPER, JJ., reversed the trial court's order and remanded the matter to the trial court for further proceedings. Unpublished opinion per curiam, issued June 17, 2004 (Docket No. 246874). The Supreme Court granted leave to appeal, directing the parties to include among the issues briefed: (1) whether common-law arbitration should be deemed preempted by the Michigan arbitration act (MAA), MCL 600.5001 *et seq*.; (2) if common-law arbitration continues to exist, what language must be included in an agreement to make it statutory arbitration; (3) whether the parties' arbitration agreement became an agreement for statutory arbitration because of the conduct of the parties during the arbitration process; and (4) whether common-law arbitration agreements should be unilaterally revocable. 472 Mich 908 (2005).

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

1. The agreement in this matter potentially falls under MCL 600.5001(2) because § 5001(2) covers agreements to arbitrate causes of action that have yet to accrue. The agreement meets the first requirement of § 5001(2) because it is in writing, but does not qualify

under § 5001(2) as an agreement calling for statutory arbitration because it does not provide that a judgment of any circuit court may be rendered upon the award. The agreement to arbitrate is not enforceable under MCL 600.5011 or 600.5025.

2. Parties agree to common-law arbitration when their agreement to arbitrate does not comply with the requirements of MCL 600.5001 for statutory arbitration. Under common-law arbitration, a party may terminate arbitration at any time before the arbitrator renders an award.

3. The MAA does not abrogate common-law arbitration.

4. The unilateral revocation rule is applicable with regard to common-law arbitration agreements.

5. The arbitration agreement in this matter did not become one for statutory arbitration because of the conduct of the parties during the arbitration process. The decision of the Court of Appeals must be affirmed and the matter must be remanded to the trial court for further proceedings.

Justice CORRIGAN, joined by Justice YOUNG, concurring, agreed with the majority's decision to affirm the Court of Appeals determination that the trial court erred in granting the defendants' motion for summary disposition and in denying the plaintiff's motion to vacate the arbitration award. While a majority of this Court has decided to retain the common-law rule that arbitration agreements are unilaterally revocable at any time, the Legislature should consider the wisdom of retaining the rule in its current form. The rule is based on outdated notions that arbitration is an unfavorable means of resolving disputes and that arbitration ousts courts of their rightful jurisdiction over disputes. Arbitration agreements should be governed by the same contractual principles as other agreements and the parties should be free to agree by contract to revocable or irrevocable arbitration as they see fit.

Affirmed and remanded to the circuit court for further proceedings.

1. ARBITRATION — COMMON LAW — UNILATERAL REVOCATION.

Common-law arbitration is not preempted in Michigan by the Michigan arbitration act; common-law arbitration agreements in Michigan are unilaterally revocable before an arbitration award is made (MCL 600.5001 *et seq.*).

2. ARBITRATION — STATUTORY ARBITRATION — COMMON-LAW ARBITRATION.

Parties wishing to conform their agreements to arbitrate future disputes to the requirements of MCL 600.5001(2) for statutory arbitration must put their agreements in writing and require that

a circuit court may enforce them; otherwise, such agreements will be treated as agreements for common-law arbitration.

Butzel Long (by *Bruce L. Sendek*) for the plaintiff.

Thomas M. Keranen & Associates, P.C. (by *Frederick F. Butters*), for the defendants.

KELLY, J. We granted leave in this case to determine: whether "common-law" arbitration should be deemed preempted by the Michigan arbitration act (MAA), MCL 600.5001 *et seq*., and, if common-law arbitration continues to exist, (1) what language must be included in an agreement to make it subject to the rules of statutory arbitration; (2) whether common-law arbitration agreements should be unilaterally revocable; and (3) whether the arbitration in this case, if it was common-law arbitration, became statutory arbitration because of the conduct of the parties during the arbitration process.

We hold that common-law arbitration is not preempted by the MAA and that common-law arbitration continues to exist in Michigan jurisprudence. In addition, common-law arbitration agreements continue to be unilaterally revocable before an arbitration award is made. And the common-law arbitration in this case was not transformed into statutory arbitration because of the conduct of the parties during the arbitration process.

We affirm the Court of Appeals determination that the trial court erred in granting defendants' motion for summary disposition and in denying plaintiff's motion to vacate the arbitration award.

THE UNDERLYING FACTS

In June 2000, plaintiff Wold Architects and Engineers, an architectural engineering firm, entered into an agreement to purchase the assets of defendant Strat

and Associates, Inc. (Strat, Inc.), an architectural firm specializing in government and institutional work. Defendant Thomas Strat (Strat) is the sole owner of Strat, Inc. As part of the purchase agreement, Strat entered into a five-year employment agreement with Wold. Under the agreement, he was expected to develop business and consult. His compensation was based primarily on the profitability of Wold's Troy, Michigan, office. The employment agreement included an arbitration provision:

> The parties agree to submit any disputes arising from this Agreement to binding arbitration. The arbitrator shall be selected through the mutual cooperation between the representatives or counsel for the respective parties, failing agreement on which may be referred by either party to the Detroit Regional Office of the American Arbitration Association for appointment of an arbitrator and processing under their Voluntary Labor Arbitration Rules. [Employment/Incentive Compensation Agreement, p 5.]

The asset purchase agreement, unlike the employment agreement, did not include an arbitration agreement. The purchase agreement transferred, among other assets, the renovation then in progress of the Macomb County courthouse. At the time of contracting, Strat, Inc. had already billed the county for 53 percent of the total project fee. Wold's senior accounting staff carefully reviewed the books and status of the project. Also, Wold had the opportunity to inspect the status of the project.

After the parties entered into the purchase agreement, Wold concluded that, rather than 47 percent of the project remaining in need of completion, 70 percent was incomplete. It began to withhold payments due under the employment agreement on the basis that Strat, Inc., had overstated the percentage of completion of the courthouse project and other projects.

Strat filed a demand for arbitration with the American Arbitration Association (AAA) on January 22, 2002, claiming that Wold owed him payments under the employment agreement. The AAA wrote both parties on February 12, 2002, indicating that its commercial dispute resolution procedures would govern all disputes rather than the voluntary labor arbitration rules specified in the contract. The AAA made the change because it deemed the commercial dispute procedures more apt for the situation at hand. They state that judgment on the arbitration award may be entered in the circuit court. The parties did not agree to this change in writing, and no writing signed by the parties exists that contains such a provision.

In March, Wold filed a counter-demand for arbitration claiming that Strat had billed too much for the courthouse project. The parties then selected an arbitrator who held a prehearing conference in July. Document exchanges and witness disclosures followed. Wold agreed to an administration schedule that included an evidentiary hearing in October 2002.

Wold sent letters to the AAA in August and September questioning the scope of the arbitration. On October 8, it revoked its agreement to arbitrate, claiming that Strat had asserted claims that more properly fell under the asset purchase agreement, which contained no arbitration clause. It objected to use of the employment agreement arbitration clause because it created "a mess here that needs to be cleaned up."

On October 11, the arbitrator decided that the arbitration hearing would proceed as scheduled. It was his opinion that the arbitration that was agreed to in the employment agreement could not be revoked unilaterally.

Wold filed the instant action in Oakland Circuit Court seeking a declaratory judgment that (1) the pending arbitration was invalid because the asset purchase agreement did not contain an arbitration provision, and (2) the arbitration provision in the employment agreement was unilaterally revocable because it lacked the requisite language to be a statutory agreement that is nonrevocable. The complaint alleged that defendants either negligently or innocently misrepresented the extent of the completion of the courthouse project, which amounted to fraud in the inducement. Wold also requested a preliminary injunction to prevent the scheduled arbitration.

At a hearing, the circuit court denied Wold's motion to enjoin the arbitration and for summary disposition. It found that each of the claims submitted to the AAA could be arbitrated without irreparable harm to Wold. It ruled that the parties had included in their agreement all language required to qualify for statutory arbitration.

The arbitration proceeded as scheduled. On November 27, the arbitrator issued an award of $104,559.27 to Strat and declared, "This award is in full settlement of all claims and counter-claims submitted to this arbitration. All claims not expressly granted herein are hereby denied."

Defendants then brought a motion in circuit court for summary disposition pursuant to MCR 2.116(C)(10). They contended that there was no longer a genuine issue of material fact concerning whether the parties had entered into a valid arbitration agreement. Wold moved to vacate the award, claiming that it had revoked the agreement to arbitrate.

The trial court granted defendants' motion for summary disposition and denied Wold's motion to vacate the award. Wold appealed to the Court of Appeals,

contending, among other things, that the trial court had erred in finding that the employment agreement provided for binding statutory arbitration. The Court of Appeals held that the trial court had erred in enforcing the common-law arbitration agreement that Wold had revoked before the award was announced. Accordingly, the Court of Appeals reversed the judgment of the trial court and remanded the case for further proceedings. *Wold Architects & Engineers, Inc v Strat*, unpublished opinion per curium of the Court of Appeals, issued June 17, 2004 (Docket No. 246874). We granted leave to appeal. 472 Mich 908 (2005).

STATUTORY ARBITRATION

We review a trial court's determination regarding a motion for summary disposition de novo. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). This case presents questions of law that are also reviewed de novo. *American Alternative Ins Co, Inc v York*, 470 Mich 28, 30; 679 NW2d 306 (2004).

Michigan has long recognized that a distinction exists between statutory and common-law arbitration. *Clement v Comstock*, 2 Mich 359 (1852); *F J Siller & Co v Hart*, 400 Mich 578, 581; 255 NW2d 347 (1977), citing *Frolich v Walbridge-Aldinger Co*, 236 Mich 425, 429; 210 NW 488 (1926). Statutory arbitration is provided for in MCL 600.5001 *et seq*. In order for an agreement to qualify for statutory arbitration, it must meet certain requirements:

> (1) All persons, except infants and persons of unsound mind, may, by an instrument *in writing*, submit to the decision of 1 or more arbitrators, any controversy existing between them, which might be the subject of a civil action, except as herein otherwise provided, and may, in such submission, *agree that a judgment of any circuit court shall be rendered upon the award made pursuant to such submission.*

> (2) A provision in a written contract to settle by arbitration under this chapter, a controversy thereafter arising between the parties to the contract, with relation thereto, and in which it is agreed that *a judgment of any circuit court may be rendered upon the award made pursuant to such agreement*, shall be valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the rescission or revocation of any contract. Such an agreement shall stand as a submission to arbitration of any controversy arising under said contract not expressly exempt from arbitration by the terms of the contract. Any arbitration had in pursuance of such agreement shall proceed and the award reached thereby shall be enforced under this chapter. [MCL 600.5001 (emphasis added).]

MCL 600.5011 divests parties of the power to unilaterally revoke agreements made pursuant to MCL 600.5001. It provides:

> Neither party shall have power to revoke *any agreement or submission made as provided in this chapter without the consent of the other party*; and if either party neglects to appear before the arbitrators after due notice, the arbitrators may nevertheless proceed to hear and determine the matter submitted to them upon the evidence produced by the other party. The court may order the parties to proceed with arbitration. [Emphasis added.]

MCL 600.5025 provides:

> Upon the making of an agreement described in section 5001, the circuit courts have jurisdiction to enforce the agreement and to render judgment on an award thereunder. The court may render judgment on the award although the relief given is such that it could not or would not be granted by a court of law or equity in an ordinary civil action.

Because MCL 600.5001(1) applies to agreements made when there is an existing controversy between the parties, it covers agreements to arbitrate that are made after a cause of action has accrued. By contrast, MCL 600.5001(2) covers agreements to arbitrate causes of action that have yet to accrue.

The agreement in this case falls under MCL 600.5001(2), because that statute covers unaccrued claims. The agreement meets the first requirement of MCL 600.5001(2) because it is in writing. But, the agreement does not provide that a judgment of any circuit court may be rendered upon the award. Therefore, it does not qualify under MCL 600.5001(2) as an agreement providing for statutory arbitration, and it is not enforceable under MCL 600.5011 or MCL 600.5025.

COMMON-LAW ARBITRATION

When the parties' agreement to arbitrate does not comply with the requirements of MCL 600.5001, the parties are said to have agreed to a common-law arbitration. *Frolich, supra* at 429. What characterizes common-law arbitration is its unilateral revocation rule. 4 Am Jur 2d, Alternative Dispute Resolution, § 94, p 148. This rule allows one party to terminate arbitration at any time before the arbitrator renders an award.

Although this Court first used the term "common law arbitration" as long ago as 1852,[1] it was not until 1890 that we specifically stated:

> It is conceded that an agreement to submit all matters in controversy between parties to arbitration, and thus oust courts of their jurisdiction, is void, and may be repudiated by either party at any time before award is made. [*Chippewa Lumber Co v Phenix Ins Co*, 80 Mich 116, 120; 44 NW 1055 (1890) (emphasis deleted).][2]

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[1] *Clement, supra*.

[2] The Court's use of "conceded" indicates that this was settled law in 1890 despite the nonappearance of the rule in any opinion by this Court before *Chippewa*. This is further shown by the decisions cited from other jurisdictions in *Chippewa* such as *President, Managers & Co of Delaware & Hudson Canal Co v Pennsylvania Coal Co*, 50 NY 250 (1872), in which the New York Court of Appeals stated:

The *Chippewa* Court held that, when a common-law arbitration agreement exists solely as a condition precedent to filing suit, it does not divest the courts of jurisdiction. Therefore, it is valid and will be enforced. *Id.* at 121-122, citing *Stephenson v Piscataqua Fire & Marine Ins Co*, 54 Me 55 (1866).[3] This Court has not

> [T]he rule that a general covenant to submit any differences that may arise in the performance of a contract, or under an executory agreement, is a nullity, is too well established to be now questioned . . . . [*Id.* at 258.]

[3] We disagree with the Court of Appeals dicta in *Hetrick v David A Friedman, DPM, PC,* 237 Mich App 264, 273; 602 NW2d 603 (1999), that *Chippewa's* discussion of the revocation rule is dicta. "Dicta" is defined as follows:

> " 'Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but *obiter dicta* and lack the force of an adjudication.' " [*Rowe v Montgomery Ward & Co, Inc,* 437 Mich 627, 719 n 101; 473 NW2d 268 (1991) (LEVIN, J., dissenting), quoting *Hett v* Duffy, 346 Mich 456, 461; 78 NW2d 284 (1956), quoting a headnote from People *v Case*, 220 Mich 379; 190 NW 289 (1922).]

The issue presented in *Chippewa* was whether the arbitration agreement between the parties was enforceable. Thus, a statement of the law regarding the enforceability of a common-law arbitration agreement was necessary to the determination of the case. Therefore, it is not dicta.

We also disagree with the Court of Appeals dicta in *Hetrick, supra,* that *Norton v Hayden,* 109 Mich 682; 67 NW 909 (1896), contradicts *Chippewa*. In *Norton*, the issue presented to the Court was whether the "making and delivery of an award [was] a condition precedent to the right of action[.]" *Id.* at 684. The plaintiff argued that, just because the agreement was a common-law arbitration, it was revocable at any time. *Id.* at 685. The Court disagreed and stated, "We must construe the parties contract as the parties have made it." *Id*. Viewed in isolation, the statement appears to contradict *Chippewa*. However, on closer reading, the Court is merely stating that it must interpret the contract to determine if the parties made arbitration a condition precedent to bringing an action at law. The *Chippewa* Court held that agreements are enforceable in which arbitration is a condition precedent to bringing an action at law. Therefore, *Norton* is consistent with *Chippewa's* holding.

changed the unilateral revocation rule since it decided *Chippewa* in 1890.

PREEMPTION

Given that we have long recognized common-law arbitration in Michigan, the next question is whether the Legislature preempted it when it enacted the MAA.

The common law, which has been adopted as part of our jurisprudence, remains in force until amended or repealed. Const 1963, art 3, § 7. Whether a statutory scheme preempts, changes, or amends the common law is a question of legislative intent. *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987), citing *Jones v Rath Packing Co*, 430 US 519; 97 S Ct 1305; 51 L Ed 2d 604 (1977). In *Millross* we observed:

> In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter. [*Millross, supra* at 183, citing 2A Sands, Sutherland Statutory Construction (4th ed), § 50.05, pp 440-441.]

Michigan courts have uniformly held that legislative amendment of the common law is not lightly presumed. *Marquis v Hartford Accident & Indemnity* (*After Remand*), 444 Mich 638, 652 n 17; 513 NW2d 799 (1994). In interpreting statutory language, courts must determine and give effect to the intent of the Legislature. *In re MCI Telecom Complaint,* 460 Mich 396, 411; 596 NW2d 164 (1999). The first step in ascertaining legislative intent is to look at the words of the statute itself. *House Speaker v State Admin Bd,* 441 Mich 547; 495 NW2d 539 (1993).

In this case, the language of the MAA does not show an intention to abrogate common-law arbitration. It merely sets out guidelines indicating when agreements to arbitrate will be enforced.

Statutory and common-law agreements to arbitrate have long coexisted. 2 Michigan Law & Practice, 2d, Arbitration, § 1, p 504, citing *Siller, supra*. *Frolich, supra,* clarifies that statutory and common-law arbitrations coexist. Nothing in the MAA indicates that the Legislature intended to change this existing law.

The Legislature is presumed to know of the existence of the common law when it acts. *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996). When wording the MAA, the Legislature could easily have stated an intent to abrogate common-law arbitration.

Defendants argue that the scheme set forth in MCL 600.5001 clearly evidences the Legislature's intent to occupy the entire area of arbitration law. As previously observed, the MAA specifically covers two types of written agreements. MCL 600.5001(1) covers agreements to arbitrate a controversy that has already arisen, and MCL 600.5001(2) covers agreements to arbitrate possible future controversies. The statute does not refer to any other agreement, such as an oral agreement to arbitrate, which could survive our statute of frauds.[4] Moreover, the MAA explicitly removes from

[4] MCL 566.132 provides in relevant part:

> (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
>
> (a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.

its purview arbitration agreements made pursuant to "collective contracts between employers and employees or associations of employees in respect to terms or conditions of employment." MCL 600.5001(3).

Also, importantly to this case, MCL 600.5011 specifically removes from its purview all agreements to arbitrate that do not conform to MCL 600.5001(1) or (2). For instance, the agreement in this case does not conform to MCL 600.5001(2) and is unenforceable under the MAA. Therefore, we conclude that the MAA, codified at MCL 600.5001 *et seq.,* does not occupy the entire area of arbitration law and does not preempt common-law arbitration in Michigan.

Parties wishing to conform an agreement to MCL 600.5001(2) must put it in writing and require that a circuit court may render judgment upon the award made pursuant to the agreement. Otherwise, it will be treated as an agreement for common-law arbitration.

THE UNILATERAL REVOCATION RULE

Given that common-law arbitration exists in Michigan for agreements to arbitrate future controversies, we now turn to the question whether common-law arbitration agreements remain unilaterally revocable. The unilateral revocation rule was developed when courts were highly skeptical of arbitration. Many thought it to be against public policy for parties to divest the courts of jurisdiction. *E E Trip Excavating Contractor, Inc v Jackson Co*, 60 Mich App 221, 244; 230 NW2d 556 (1975).

Many, if not all, agreements to arbitrate, by their terms, could be performed within one year from the making of the contract. This is especially true under MCL 600.5001(1). Therefore, the statute of frauds would not bar oral agreements to arbitrate that by their terms could be performed within one year of the making of the agreements.

Some courts have criticized the rule suggesting that this Court should exercise its powers to change the common law and eliminate the unilateral right to revoke. Specifically, an opinion and a concurrence from the Court of Appeals have asked this Court to clear the rule from this state's jurisprudence. *Hetrick, supra*; *Tony Andreski, Inc v Ski Brule, Inc,* 190 Mich App 343; 475 NW2d 469 (1991) (GRIFFIN, P.J., concurring). The decision in *Hetrick* and the concurrence in *Andreski* argue that the rule is an atavistic vestige of the past, supported only by public policy arguments over 100 years old:

> "The heavily case-loaded courts are no longer jealous of their jurisdiction. Where the parties, by a fair agreement, have adopted a speedy and inexpensive means by which to have their disagreements adjusted, we see no public policy reasons for the courts to stand in their way. On the contrary we have a clear expression of public policy in the legislative enactments which provide for statutory arbitration." [*Andreski, supra* at 350 (GRIFFIN, P.J., concurring), quoting *E E Trip, supra* at 246–247.]

Nonetheless, we are unpersuaded that the time is ripe to change Michigan's common-law arbitration unilateral revocation rule. When the Legislature enacted the MAA, it created a method for binding arbitration that protects the rights of those who choose such arbitration. By not specifically abrogating the unilateral revocation rule, the Legislature chose to retain as well the protections that the rule offers. Parties entering into agreements to arbitrate future claims do not have full knowledge of what matters would be encompassed by the arbitration.

The unilateral revocation rule protects the right to bring suit when claims arise that a party did not anticipate and would not want handled outside the courts' direct protection. The Legislature has deter-

mined that public policy concerns do not require abrogation of the unilateral revocation rule, and we see no need to contravene that determination. See, e.g., *Lowe v Estate Motors Ltd,* 428 Mich 439, 467; 410 NW2d 706 (1987).

Second, the unilateral revocation rule leaves an option to parties entering into contracts in Michigan. As previously stated, parties agreeing to arbitrate claims that have not yet arisen may choose common-law arbitration specifically because of the unilateral revocation rule. The rule allows them flexibility in the event of a dispute. After a claim has arisen, the parties can arbitrate or not. If they prefer irrevocable arbitration, they can provide for it in their agreement or draft their agreement so that it provides for statutory arbitration.

Because of the long history and continuing utility of the unilateral revocation rule, we are unpersuaded of the need to overrule the rule. Hence, we affirm its existence as a useful part of Michigan jurisprudence.

CONDUCT OF THE PARTIES

We conclude that the issue whether the arbitration agreement here became statutory arbitration because of the conduct of the parties during the arbitration process must be answered in the negative.

The change from the voluntary labor arbitration rules to the commercial dispute resolution procedures did not transform the parties agreement from a common-law arbitration agreement to a statutory arbitration agreement. The basic requirement of MCL 600.5001 *et seq*. that the agreement must be made in writing is not met in this case. It is true that the parties acquiesced in using the commercial dispute resolution

procedures, but that does not change the fact that there is no written agreement containing the statutorily required language.

Under common-law arbitration, Wold had the right to withdraw from the arbitration process at any time until the arbitrator made an award. Therefore, Wold's unilateral revocation of the arbitration process was in conformity with its right under common-law arbitration and with the parties' agreement.

CONCLUSION

We hold that common-law arbitration is not preempted by the Michigan arbitration act, MCL 600.5001 *et seq.*, and that common-law arbitration continues to exist in Michigan jurisprudence. Parties wishing to conform their agreements to MCL 600.5001(2) must put their agreements in writing and require that a circuit court may enforce them. Otherwise, their agreements will be treated as agreements for common-law arbitration. In addition, common-law arbitration agreements continue to be unilaterally revocable before an arbitration award is made. And the common-law arbitration in this case was not transformed into statutory arbitration because of the conduct of the parties during the arbitration process.

We affirm the decision 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 MARKMAN, JJ., concurred with KELLY, J.

CORRIGAN, J. (*concurring*). I concur with the majority's decision to affirm the Court of Appeals determina-

tion that the trial court erred in granting defendants' motion for summary disposition and in denying plaintiffs' motion to vacate the arbitration award. A majority of this Court has decided to retain the common-law rule that arbitration agreements are unilaterally revocable at any time. Even if I were inclined to abrogate the unilateral revocation rule, a majority of this Court is not so inclined. Thus, I commend this important policy choice to our Legislature. I urge that body to examine whether it is prudent to retain the common-law unilateral revocation rule. The common-law rule is rooted in an antiquated notion that arbitration is an inferior method of resolving disputes. It undermines the well-established doctrine that parties enjoy the freedom to contract.

The unilateral revocation rule apparently originated in the statement of Lord Coke in *Vynior's Case*, 4 Coke, part VIII, 81b, 82a:

> For a man cannot by his act make such authority, power, or warrant not countermandable, which is by the law and of its own nature countermandable; as if I make a (a) letter of attorney to make a livery, or to sue an action, & c. in my name; or if I assign auditors to take an account; or if I made one my factor; or if I submit myself to an arbitrament; although these are made by express words irrevocable, or that I grant or am bound that all these shall stand irrevocably, yet they may be revoked.

This Court has referred to the unilateral revocation rule only in cases before the Legislature enacted the Michigan Arbitration Act (MAA), MCL 600.5001 *et seq*., and virtually always in confusing dicta. As the Court of Appeals explained in dicta in *Hetrick v David A Friedman, DPM, PC,* 237 Mich App 264, 272-275; 602 NW2d 603 (1999) (emphasis in original), this Court's jurisprudence regarding the rule has been inconsistent at best:

Our Supreme Court's nineteenth century decisions *did not* consistently hold that common-law arbitration agreements are revocable whereas statutory agreements are not. In some cases, the Court at least suggested that *either type of arbitration* was revocable at the will of either party (which is arguably consistent with the nineteenth century statute, which did not provide that arbitration agreements were irrevocable). In *McGunn v Hanlin*, 29 Mich 475 (1874), the Court held that a common-law arbitration agreement that did not contain a covenant not to sue could not be enforced. *Id.*, 480. However, the Court expressly declined to consider "whether a *statutory* agreement, before the arbitrators have acted, stands on a different basis," thereby leaving the possibility that even statutory agreements were revocable. *Id.* In *Chippewa Lumber Co v Phenix Ins Co*, 80 Mich 116; 44 NW 1055 (1890), the Court broadly stated that arbitration agreements in general are unenforceable—without analysis, without reference to any arbitration statute, and without any distinction between statutory and common-law arbitration. *Id.*, 120. Notwithstanding this sweeping declaration, the Court ultimately held that the parties' arbitration agreement—which utilized arbitration only as a condition precedent to filing a lawsuit—was enforceable.[6] *Id.*, 120-121. Because the Court ultimately enforced the limited arbitration agreement, its statement that an agreement to submit all matters to binding arbitration would have been unenforceable is dicta, not a binding statement of law.[1] *Edelberg v Leco Corp*, 236 Mich App 177; 599 NW2d 785 (1999). Moreover, because these cases blurred the distinction between

[1] The *Chippewa Lumber* Court held that the arbitration agreement was enforceable and not unilaterally revocable because the agreement made arbitration a condition precedent to bringing suit. *Chippewa Lumber, supra* at 120-122. This Court has similarly held in several other cases that an agreement containing a clause making arbitration a condition precedent to filing suit or rescission of the contract is enforceable and not unilaterally revocable. See, e.g., *Ripley v Lucas*, 267 Mich 682; 255 NW 356 (1934); *Baumgarth v Firemen's Fund Ins Co*, 152 Mich 479; 116 NW 449 (1908); *Norton v Hayden*, 109 Mich 682; 67 NW 909 (1896).

common-law and statutory arbitration agreements, neither case warrants application of the unilateral revocation rule today, under the MAA.

* * *

The Supreme Court implicitly rejected the unilateral revocation rule in *Frolich v Walbridge-Aldinger Co*, 236 Mich 425, 429; 210 NW 488 (1926). There, the Court stated that the parties' arbitration agreement was "not in conformity with our statutory requirements (3 Comp Laws 1915, § 13646 *et seq.*) and makes no reference to the act, *but in any event it is an agreement for a common-law arbitration*." *Frolich, supra,* 429 (emphasis added). However, the Court *did not refuse to enforce the arbitration agreement on the ground that a common-law arbitration agreement was revocable by either party*. Instead, the Court held that the plaintiff was entitled to bring a lawsuit because the defendant failed to comply with the arbitration agreement by cooperating with the plaintiff's effort to arbitrate. *Id.*, 432. Indeed, it can be inferred from the *Frolich* decision that the Court would have enforced the parties' common-law arbitration agreement if the defendant had honored the terms of the agreement.

In *Siewek v F Joseph Lamb Co*, 257 Mich 670; 241 NW 807 (1932), the Court implicitly distinguished between statutory and common-law arbitration agreements, and stated that the latter were revocable *unless they came under one of two exceptions*: arbitration as condition precedent to a lawsuit, or arbitration relating to construction, paving, or installation contracts.[7] *Id.*, 676. Again, the Court's reliance on an obsolete statute and two obsolete exceptions renders its statement of the unilateral revocation rule irrelevant under the MAA and modern, proarbitration public policy.[2] *Rembert* [*v Ryan Family Steak Houses, Inc*, 235 Mich App 118, 132-133; 596 NW2d 208 (1999)].

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[2] Further, the *Siewek* Court's statement that "the general rule that a [common-law] arbitration agreement is not a bar to action" is dicta. *Siewek, supra* at 676.

[6] Interestingly, the Court described this arbitration procedure as "*an expeditious, inexpensive, and proper method, if not a better one than is afforded by a suit.*" *Chippewa Lumber, supra*, 121 (emphasis added).

[7] See also *Detroit v A W Kutsche & Co*, 309 Mich 700, 708; 16 NW2d 128 (1944).

Thus, the common-law rule is not firmly entrenched in our jurisprudence, but is instead an aberration primarily based on conflicting case law and nonbinding dicta.

In 1961, our Legislature enacted the MAA, modeling it on the Uniform Arbitration Act, which requires the enforcement of arbitration agreements. MCL 600.5011. Since the enactment of the MAA, this case is the Court's first opportunity to consider the validity of the common-law unilateral revocation rule. While the Court of Appeals recognized the rule in *Tony Andreski, Inc v Ski Brule, Inc*, 190 Mich App 343, 350; 475 NW2d 469 (1991), and *E E Tripp Excavating Contractor, Inc v Jackson Co*, 60 Mich App 221, 243; 230 NW2d 556 (1975), these cases have been sharply criticized.[3] In *Tony Andreski, Inc, supra* at 350-351, Judge GRIFFIN dissented, expressing his disagreement with Michigan's "anachronistic" common-law rule. The *Hetrick* panel thereafter criticized the rule and called for an end to it:

> The rule is the last vestige of that bygone judicial age when arbitration agreements were regarded as unlawful attempts to oust the courts of jurisdiction. This rule serves no useful purpose today, particularly when the overwhelming public policy of this state favors arbitration to resolve a wide variety of disputes. As this Court held in *Rembert,*

[3] Additionally, the *E E Tripp Excavating Contractor* panel did not apply the unilateral revocation rule because the defendant did not unambiguously manifest its intent to revoke the arbitration agreement. *Id.* at 249.

> *supra*, 133, "our Legislature and our courts have strongly endorsed arbitration as an inexpensive and expeditious alternative to litigation." Indeed, even the *E E Tripp* Court, which revived the unilateral revocation rule for common-law arbitration, observed that judicial jealousy of arbitration had become obsolete. *E E Tripp Excavating Contractor, Inc, supra* at 246-247. We see no reason to adhere to an antediluvian principle recited as dicta in the days of Ulysses S. Grant's presidency and Queen Victoria's reign. We would therefore enforce common-law arbitration agreements on the same terms as any other contract, and consign the unilateral revocation rule to legal history's dustbin. [*Hetrick, supra* at 276-277.]

I agree with Judge GRIFFIN in his dissent in *Tony Andreski, Inc,* and with the *Hetrick* panel that the unilateral revocation rule appears to serve no purpose in today's proarbitration legal climate. Even accepting the Court of Appeals statement in *E E Tripp Excavating Contractor, supra* at 243, that "historically, common-law arbitration agreements could be revoked or repudiated at will by a party any time prior to announcement of the award," the purpose behind the rule is no longer valid. As our Court of Appeals has recognized, the unilateral revocation rule originated at a time when courts disfavored arbitration as an ouster of our jurisdiction over legal claims. See *Hetrick, supra* at 271 ("The origins of the unilateral revocation rule lie in the nineteenth century, when American law disfavored arbitration as second-rate justice at best, or an unlawful usurpation of judicial authority at worst."); *E E Tripp Excavating Contractor, supra* at 244 ("The most widely espoused justification for the rule is that specific enforcement of an arbitration agreement improperly ousts the courts of jurisdiction. Attempts by contract to foreclose judicial inquiry were against public policy."). As *E E Tripp Excavating Contractor, supra* at 244, noted, the most

common policy arguments for the unilateral revocation rule are no longer relevant:

> Criticism of the unilateral revocation rule has mushroomed. . . .
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> * * *
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> The heavily case-loaded courts are no longer jealous of their jurisdiction. Where the parties, by a fair agreement, have adopted a speedy and inexpensive means by which to have their disagreements adjusted, we see no public policy reasons for the courts to stand in their way. On the contrary we have a clear expression of public policy in the legislative enactments which provide for statutory arbitration.

In most states, the common-law rule permitting unilateral revocation of arbitration has been altered by statute. *La Stella v Garcia Estates, Inc*, 66 NJ 297; 331 A2d 1 (1975), citing 6 Williston, Contracts (rev ed, 1938), § 1920, Sturges, Commercial Arbitrations & Awards (1930), § 26, and Domke, The Law & Practice of Commercial Arbitration (1968), § 4.01. Many states have rejected or criticized the ouster and revocability doctrines that form the basis for the unilateral revocation rule. See, e.g., *IP Timberlands Operating Co, Ltd v Denmiss Corp*, 726 So 2d 96, 103-105 (Miss, 1998) (rejecting the ouster doctrine and expressly overturning "the former line of case law that jealously guarded the court's jurisdiction"); *Kaiser Foundation Health Plan of the Northwest v Doe*, 136 Or App 566, 577-579; 903 P2d 375 (1995) (holding that agreements to arbitrate may be specifically enforceable under common law and thus directing that judgment on an oral settlement incorporate the parties' agreement to arbitrate any remaining issues); *Wylie Independent School Dist v TMC Foundations, Inc*, 770 SW2d 19, 23 (Tex App, 1989) (holding

that agreements to arbitrate future disputes are specifically enforceable on the basis of policy supporting alternative dispute resolution); *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry v Stine*, 76 Nev 189, 202-214; 351 P2d 965 (1960) (rejecting the common-law rule that agreements to submit all disputes to arbitration were unenforceable, and ruling instead that an agreement to arbitrate a future dispute was valid and enforceable); *Rueda v Union Pacific R Co*, 180 Or 133, 166; 175 P2d 778 (1946) ("The rule that 'parties cannot stipulate beforehand to submit their rights generally to the judgment of a designated third party for a final determination' is unsound. The rule that such agreements oust the courts of jurisdiction has an unworthy genesis, is fallacious in reasoning and has been followed merely because of ancient precedent."); *Hoboken M R Co v Hoboken R Warehouse & Steamship Connecting Co*, 132 NJ Eq 111, 117-119; 27 A2d 150 (1942) (explaining that New Jersey had not adopted the ouster doctrine and that arbitrator's decisions are enforceable); *Park Constr Co v Independent School Dist No 32*, 209 Minn 182, 184-189; 296 NW 475 (1941) (rejecting the notion that arbitration agreements "oust" courts of jurisdiction and overruling earlier decisions that general agreements to arbitrate are void as contrary to public policy); *Ezell v Rocky Mountain Bean & Elevator Co*, 76 Colo 409, 411-413; 232 P 680 (1925) (rejecting the argument that common-law agreements to arbitrate are void as being against public policy as attempts to oust the courts of jurisdiction, and holding that parties who contract to submit to common-law arbitration are bound by that contract).[4]

[4] The Harvard Negotiation Law Review has also urged courts to disavow the traditional unilateral revocation rule:

Arbitration is now favored as an efficient, inexpensive, and fair method of resolving disputes. *Rembert, supra* at 127-133; see also *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150; 393 NW2d 811 (1986) ("It is well-settled that arbitration is a favored means of resolving labor disputes . . . ."); *Detroit v A W Kutsche & Co*, 309 Mich 700, 703; 16 NW2d 128 (1944) ("The general policy of this State is favorable to arbitration . . . . If parties desire arbitration, courts should encourage them.") The unilateral revocation rule does nothing to encourage arbitration other than convince parties aware of the rule that they have nothing to lose, because they can revoke the arbitration

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> It is not appropriate for a court to assume all ADR [alternative dispute resolution] agreements are unenforceable under antiquated "ouster" and "revocability" doctrines that traditionally precluded specific enforcement of pre-dispute agreements to arbitrate. Ouster theory proposed that parties cannot "oust" courts' power to resolve legal claims, and revocability condoned a party's unilateral revocation of an arbitration agreement. These doctrines have no solid basis. Nonetheless, some courts continue to apply them, perhaps due to judicial skepticism of private processes or resentment of the Supreme Court's seemingly pro-arbitration agenda.
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> * * *
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> Courts should not . . . mask their concerns [regarding pro-arbitration policy] in espousals of antiquated ouster and revocability doctrines. These doctrines are based on faulty legal assumptions and misguided jealousies of private processes that threatened courts' domain. [Schmitz, *Refreshing contractual analysis of ADR agreements by curing bipolar avoidance of modern common law*, 9 Harv Negotiation L R 1 (2004), pp 3-4, 28-29.]

See also 12 Corbin, Contracts (interim ed), § 1173, p 330 ("The earlier judicial attitude that regarded the specific enforcement of arbitration as too difficult or otherwise undesirable was already moribund and, by reason of both legislation and popular opinion, should be extinct.").

any time before the award. Rather than encouraging parties aware of the rule to enter arbitration, the unilateral revocation rule discourages it by making arbitration an unreliable method of dispute resolution. In today's legal climate, where arbitration is no longer disfavored, but is an approved and trusted method to resolve disputes, Michigan should no longer countenance a rule that is grounded in distrust of arbitration and discourages parties from relying on arbitration.

Further, the rule tends to benefit those who are aware of it, such as lawyers and other sophisticated parties. It can be harmful to nonlawyers and less sophisticated parties who have no knowledge of the legal rule and are blindsided by it.[5] While the unilateral revocation rule exists, an unknowing party who enters an arbitration agreement may expend substantial amounts of time and money by participating in the arbitration process, only to have the other party revoke the agreement immediately before the arbitrator renders an award. The rule thus is a trap for the unwary. It discourages good-faith participants and leads to disillusionment of parties who are trapped by its application.

[5] The unilateral revocation rule is not common knowledge among laymen. Even research might not uncover the existence of the rule. For example, the American Arbitration Association's (AAA) "Beginner's Guide to Alternative Dispute Resolution" does not mention the unilateral revocation rule. Instead, the AAA guide merely explains that arbitration awards are final: "AAA arbitration awards are final, binding, and legally enforceable, subject only to limited review by the courts. Of course, parties may also agree in advance that awards will be advisory only." The AAA's "Drafting Dispute Resolution Clauses—A Practical Guide" states, "To be fully effective, 'entry of judgment' language in domestic cases is important." However, the guide does not warn a drafter of the possible consequences of omitting such a clause from the agreement. Thus, even if an unsophisticated party looks to the AAA guides, that party will not discover the existence of the unilateral revocation rule.

I dispute the majority's contention that parties entering into an arbitration agreement would be left without options without a unilateral revocation rule. Instead, I believe that the unilateral revocation rule undermines our contract doctrine by unfairly *limiting* the options available to contracting parties. This Court has stated that arbitration agreements are grounded in contract. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 98; 323 NW2d 1 (1982). " '[T]he arbitration promise is itself a contract. The parties are free to make that promise as broad or as narrow as they wish . . . .' " *Port Huron Area School Dist, supra* at 151 n 6, quoting *United Steelworkers v American Mfg Co*, 363 US 564, 570; 80 S Ct 1343; 4 L Ed 2d 1403 (1960) (Brennan, J., concurring). Thus, parties to an arbitration contract should be bound by the same contract principles as parties to any other contract. Under general contract principles, a valid contract is enforceable and may not be revoked unilaterally.[6] Unless a

[6] Indeed, this Court has reiterated on numerous occasions its commitment to enforcing unambiguous contracts as they are written. See, e.g., *Rory v Continental Ins Co*, 473 Mich 457, 491; 703 NW2d 23 (2005) ("Consistent with our prior jurisprudence, unambiguous contracts . . . are to be enforced as written unless a contractual provision violates law or public policy."); *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 380; 666 NW2d 251 (2003) ("Our obligation to respect and enforce the parties' unambiguous contract absent mutual assent to modify that contract precludes us from [permitting unilateral modification of the contract]."); *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003) ("This approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principles 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."); *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) (" 'The general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and

contract condition causes a contract to be void or voidable, such as coercion or fraud, the terms of an arbitration agreement, like any other contract, should be upheld. The parties should not be required to include a provision specifically stating that the arbitration is irrevocable. The revocation rule limits the parties' freedom to contract by precluding them from entering a common-law agreement to arbitrate that would be enforceable and irrevocable.

Conversely, parties should also be free to include in their common-law arbitration agreement a clause allowing either party to unilaterally revoke the agreement. Thus, a decision to abrogate the unilateral revocation rule would not limit the options of contracting parties by creating a situation where common-law arbitration agreements could never be unilaterally revoked. The parties are limited only by the terms by which they themselves choose to be bound. Accordingly, I do not believe that the unilateral revocation rule is necessary to either protect the right to bring suit or provide parties flexibility in the event of a dispute.

In sum, I believe that the common-law rule allowing unilateral revocation of arbitration agreements is based on the outdated notions that arbitration is an unfavorable means of resolving disputes and that arbitration ousts the courts of their rightful jurisdiction over disputes. The courts are no longer jealous of their jurisdiction, and arbitration is now a favored method of dispute resolution. The unilateral revocation rule has a questionable history in Michigan jurisprudence and has not been recognized by this Court since the Legislature

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fairly made shall be held valid and enforced in the courts.' "). These cases make clear that the unilateral revocation rule is an anomaly in our otherwise consistent case law affirming the freedom to contract and the enforceability of unambiguous agreements.

enacted the MAA in 1961. Abrogation of the rule would not limit the options of parties entering arbitration agreements, but would instead encourage arbitration and allow parties the freedom to agree by contract to revocable or irrevocable arbitration as they see fit. Arbitration agreements are contracts and should be governed by the same contractual principles as other agreements. Therefore, I urge the Legislature to consider the wisdom of retaining the common-law unilateral revocation rule in its current form.

YOUNG, J., concurred with CORRIGAN, J.

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Leave to Appeal Denied August 10, 2005:

BROOKSIDE CROSSING, LLC v EATON COUNTY DRAIN COMMISSIONER, No. 128918. Pursuant to MCR 7.302(F) and (G)(1), this denial order constitutes the final decision in this case, and no motion for reconsideration will be accepted for filing. Court of Appeals No. 262969.

Appeal Dismissed August 12, 2005:

PRUCHNO v PRUCHNO, No. 126858. Appeal dismissed upon stipulation of the parties, with prejudice and without costs. Leave to appeal was granted at 472 Mich 881. Court of Appeals No. 245583.

Leave to Appeal Denied August 12, 2005:

In re FOX (FISHER v FISHER), No. 128992; Court of Appeals No. 258993.

Leave to Appeal Denied August 26, 2005:

O'DONNELL v KAUFMAN, No. 129230; Court of Appeals No. 262923.

Summary Dispositions August 30, 2005:

KOSMAL v AMERITECH, No. 127064. By order dated April 26, 2005, the application for leave to appeal was held in abeyance pending the decision in *Bailey v Oakwood Hosp & Med* Ctr (Docket No. 125110). Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this matter to the Workers' Compensation Appellate Commission for further proceedings consistent with the decision in *Bailey*. Court of Appeals No. 254936.

PEOPLE v WILLIAM, No. 127614. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court, and remand this case to that court for resentencing in light of *People v Hendrick*, 472 Mich 555 (2005), and *People v Babcock*, 469 Mich 247 (2003). Court of Appeals No. 256642.

SNYDER v MIDWEST MOBILE HOMES, INC, No. 127770. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We do not retain jurisdiction. Court of Appeals No. 256270.

PEOPLE v BROWDER, No. 127796. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court, and remand this case to that court for resentencing in light of *People v Hendrick*, 472 Mich 555 (2005), and *People v Babcock*, 469 Mich 247 (2003). We do not disturb that part of the Court of Appeals order that remands this case to the trial court on the issue of sentence credit. Court of Appeals No. 250378.

SAVITSKIE v GAGNON, No. 128082. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 256881.

PEOPLE v HANSON, No. 128450. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The prosecutor is directed to file with the Court of Appeals copies of the plea transcript, sentencing transcript(s), and judgment of sentence. We do not retain jurisdiction. Court of Appeals No. 258495.

Leave to Appeal Denied August 30, 2005:

PEOPLE v MESI, No. 126688; Court of Appeals No. 255348.

PEOPLE v STEINHAUS, No. 126785; Court of Appeals No. 255120.

PEOPLE v CONNER, No. 127498; Court of Appeals No. 257766.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

MOORE v STATE OF MICHIGAN, No. 127504; Court of Appeals No. 249111.

PEOPLE v STANDLICK, No. 127513; Court of Appeals No. 244713.

PEOPLE v ALAN HARRIS, No. 127523; Court of Appeals No. 242766.

PEOPLE v SIMMONS, No. 127593; Court of Appeals No. 257327.

PEOPLE v JACOB MARTIN, No. 127595; Court of Appeals No. 248147.

PEOPLE v MICHAEL LEE JOHNSON, No. 127621; Court of Appeals No. 256766.

ERICSON v ERICSON, Nos. 127625, 127626; Court of Appeals Nos. 255995, 257904.

MCPHAIL v ATTORNEY GENERAL, No. 127650; Court of Appeals No. 248126.

HOTCHKISS v OLOFSON, No. 127682; Court of Appeals No. 256466.

DOWNTOWN PLYMOUTH VENTURES, LLC v PLYMOUTH FINANCIAL CORPORATION, No. 127685; Court of Appeals No. 248567.

PEOPLE v COURTNEY, No. 127735; Court of Appeals No. 249189.

BZDOK v CITY OF MARQUETTE, No. 127746; Court of Appeals No. 249767.

DOCKERTY v DEPARTMENT OF CORRECTIONS, No. 127762; Court of Appeals No. 256551.

CURTNER v MCNICHOLAS, No. 127784; Court of Appeals No. 258345.

HARVEY v MENDOLA, No. 127806; Court of Appeals No. 256318.

SHREE, LLC v LEHMAN & VALENTINO, PC, No. 127818; Court of Appeals No. 249321.

AMAN v VER HAGE MOTOR SALES COMPANY, No. 127820; Court of Appeals No. 249079.

TROUTEN v AUTOZONE, INC, No. 127825; Court of Appeals No. 232690 (on remand).

NICKLAS v KOELLING and NICKLAS v EAGLE, Nos. 127826, 127827; Court of Appeals Nos. 248870, 248871.

PEOPLE v ARMANDO AYALA, No. 127855; Court of Appeals No. 249827.

PEOPLE v STOCKWELL, No. 127865; Court of Appeals No. 259026.

PEOPLE v FARMER, No. 127870; Court of Appeals No. 246776.

PEOPLE v REITZ, No. 127876; Court of Appeals No. 250253.

PEOPLE v HASKINS, No. 127877; Court of Appeals No. 259070.

TOBIN GROUP, LLP v GENESEE COUNTY, No. 127884; Court of Appeals No. 248663.

PEOPLE v JOHN SMITH, No. 127913; Court of Appeals No. 256456.

PEOPLE v HARPER, No. 127914; Court of Appeals No. 246109.

PEOPLE v ESTERS, No. 127916; Court of Appeals No. 246112.

PEOPLE v MCSWAIN, No. 127920; Court of Appeals No. 249206.

PEOPLE v REIF, No. 127926; Court of Appeals No. 256531.

PEOPLE v BACHI, No. 127927; Court of Appeals No. 250254.

DUTHLER v DUTHLER, No. 127930; Court of Appeals No. 242317.

PEOPLE v KAREN BOES, No. 127936; Court of Appeals No. 248289.

PEOPLE v KAMAL BROWN, No. 127937; Court of Appeals No. 251614.

PEOPLE v TYRONE RICHARDSON, No. 127946; Court of Appeals No. 244067.

PORTER v CITY OF KALAMAZOO, No. 127965; Court of Appeals No. 257590.

PEOPLE v JAMES JONES, No. 127970; Court of Appeals No. 244062.

PEOPLE v CREER, No. 127973; Court of Appeals No. 250328.

PEOPLE v BYNUM, No. 127974; Court of Appeals No. 248095.

PEOPLE v ABCUMBY, No. 127976; Court of Appeals No. 249961.

BUNKER HILL TOWNSHIP v ALLEN, No. 127980; Court of Appeals No. 249353.

STEHLIK v TUBBS, No. 127990; Court of Appeals No. 249717.

PEOPLE v PATRICK, No. 127993; Court of Appeals No. 244312.

WOOLSEY v CASCO TOWNSHIP, No. 127999; Court of Appeals No. 250498.

PEOPLE v ROBERT GIBSON, No. 128013; Court of Appeals No. 249428.

PEOPLE v HENRY PARKER, No. 128020; Court of Appeals No. 258897.

HALL v GENERAL MOTORS CORPORATION, No. 128027; Court of Appeals No. 257878.

PEOPLE v DWAYNE HALL, No. 128028; Court of Appeals No. 251050.

PEOPLE v WALCHAK, No. 128030; Court of Appeals No. 249839.

PEOPLE v CHAPMAN, No. 128033; Court of Appeals No. 248291.

PEOPLE v FREDDY LOVE, No. 128037; Court of Appeals No. 250140.

PEOPLE v CAMERON WILLIAMS, No. 128041; Court of Appeals No. 246111.

GITRE v GITRE, No. 128042; Court of Appeals No. 257493.

PEOPLE v JOHNNY COOK, No. 128056; Court of Appeals No. 257069.

PEOPLE v KEGLEY, No. 128058; Court of Appeals No. 259039.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v CRUTCHER, No. 128065; Court of Appeals No. 244277.

PEOPLE v ALFIERO, No. 128068; Court of Appeals No. 258591.

NOLEN v DEPARTMENT OF CORRECTIONS, No. 128072; Court of Appeals No. 259919.

LIBERTY BIDCO INVESTMENT CORPORATION v EMMET COATING SERVICES, INC, No. 128083; Court of Appeals No. 246681.

FROHM v MIPROCOM LIMITED PARTNERSHIP, No. 128084; Court of Appeals No. 257014.

PEOPLE v QUEEN, No. 128095; Court of Appeals No. 250590.

PEOPLE v BIBBS, No. 128117; Court of Appeals No. 248374.

PEOPLE v RAMON RUSSELL, No. 128124; Court of Appeals No. 252737.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v KEENER, No. 128126; Court of Appeals No. 259032.

PEOPLE v FUQUA, No. 128129; Court of Appeals No. 257573.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

MURFF v AMERICAN AXLE & MANUFACTURING, INC, No. 128132; Court of Appeals No. 257497.

PARIS v GREEN, No. 128133; Court of Appeals No. 249740.

PEOPLE v FULLER, No. 128138; Court of Appeals No. 251892.

PEOPLE v LATHAM, No. 128145; Court of Appeals No. 248950.

VANCE v COVENANT MEDICAL CENTER, INC, No. 128149; Court of Appeals No. 248464.

PEOPLE v MARIO JONES, No. 128151; Court of Appeals No. 251206.

PEOPLE v SPENCER HOGAN, No. 128154; Court of Appeals No. 250428.

PEOPLE v CAZIER, No. 128162; Court of Appeals No. 253397.

PEOPLE v LENNY WALKER, No. 128173; Court of Appeals No. 258547.

PEOPLE v JOANN DAVIS, No. 128174; Court of Appeals No. 250911.

PEOPLE v SLEDGE, No. 128177; Court of Appeals No. 249894.

PEOPLE v MICHAEL STINSON, No. 128178; Court of Appeals No. 251311.

PEOPLE v NATHAN PETERSON, No. 128181; Court of Appeals No. 250902.

PEOPLE v PERSON, No. 128182; Court of Appeals No. 258255.

PEOPLE v OONK, No. 128185; Court of Appeals No. 250161.

PEOPLE v RODNEY HUDSON, No. 128187; Court of Appeals No. 258876.

PEOPLE v COWAN, No. 128193; Court of Appeals No. 250838.

PEOPLE v DEVORE, No. 128194; Court of Appeals No. 250073.

PEOPLE v DIANE WILLIAMS, No. 128202; Court of Appeals No. 249138.

PEOPLE v BENTLEY, No. 128203; Court of Appeals No. 251260.

PEOPLE v MARCHBANKS, Nos. 128206, 128426; Court of Appeals Nos. 252186, 259472.

PEOPLE v BALLINGER, No. 128207; Court of Appeals No. 250906.

PEOPLE v HILLIARD, No. 128210; Court of Appeals No. 252521.

MANNING v CITY OF EAST TAWAS, No. 128219; Court of Appeals No. 250759.

PEOPLE v HOLLIS, No. 128222; Court of Appeals No. 251008.

PEOPLE v VERNON WILLIAMS, No. 128225; Court of Appeals No. 250396.

CARLSON v DAIMLERCHRYSLER CORPORATION, No. 128228; Court of Appeals No. 257825.

PEOPLE v MARCELL EDWARDS, No. 128229; Court of Appeals No. 249182.

PEOPLE v BEGLEY, No. 128230; Court of Appeals No. 251046.

PEOPLE v JOBEY HENDERSON, No. 128231; Court of Appeals No. 258118.

PEOPLE v ANDRADE, No. 128232; Court of Appeals No. 251410.

PEOPLE v REDER, No. 128234; Court of Appeals No. 259693.

PEOPLE v CREED, No. 128239; Court of Appeals No. 260235.

PEOPLE v LOGAN, No. 128244; Court of Appeals No. 258256.

PEOPLE v MICHAEL HICKS, No. 128249; Court of Appeals No. 250181.

PEOPLE v TERRANCE SMITH, No. 128251; Court of Appeals No. 251456.

PEOPLE v MICHAEL JOHNSON, No. 128252; Court of Appeals No. 257864.

PEOPLE v ANTOINE MCKAY, No. 128256; Court of Appeals No. 251889.

PEOPLE v MCWATTERS, No. 128260; Court of Appeals No. 252102.

PEOPLE v MCKINNEY, No. 128266; Court of Appeals No. 250929.

PEOPLE v SHORTY, No. 128267; Court of Appeals No. 250370.

PEOPLE v SHAVONNE DAVIS, No. 128268; Court of Appeals No. 250901.

PEOPLE v TATJUAN HILL, No. 128270; Court of Appeals No. 250592.

PEOPLE v SHEA, No. 128279; Court of Appeals No. 251452.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v BRACKEN, No. 128280; Court of Appeals No. 250589.

PEOPLE v ENNIS, No. 128293; Court of Appeals No. 250511.

PEOPLE v CREECH, No. 128295; Court of Appeals No. 257752.

PEOPLE v GARNER, No. 128298; Court of Appeals No. 251010.

PEOPLE v REGINALD YOUNG, No. 128299; Court of Appeals No. 251262.

PEOPLE v HAMAOUI, No. 128303; Court of Appeals No. 247032.

PEOPLE v WEAVER, No. 128304; Court of Appeals No. 251890.

PEOPLE v GREGORY MYLES, No. 128306; Court of Appeals No. 250686.

PEOPLE v HAROLD ALLEN, No. 128307; Court of Appeals No. 251451.

PEOPLE v SEAN HAMMOND, No. 128311; Court of Appeals No. 252845.

PEOPLE v HOSKINS, No. 128317; Court of Appeals No. 260288.

PEOPLE v HOPSON, No. 128318; Court of Appeals No. 250157.

PEOPLE v RICHARD SHAW, No. 128321; Court of Appeals No. 252489.

PEOPLE v UNDERWOOD, No. 128336; Court of Appeals No. 250595.

PEOPLE v LAKE, No. 128385; Court of Appeals No. 251403.

PEOPLE v COFFER, No. 128420; Court of Appeals No. 250494.

PEOPLE v ROE, No. 128431; Court of Appeals No. 250031.

PEOPLE v BONNER, No. 128457; Court of Appeals No. 254093.

GLH TRUCKING, INC v R&R HEAVY HAULERS, INC, No. 128459; Court of Appeals No. 250601.

PEOPLE v JAMAL KING, No. 128463; Court of Appeals No. 253270.

PEOPLE v TROUT, No. 128469; Court of Appeals No. 251613.

PEOPLE v SONES, No. 128470; Court of Appeals No. 251709.

PEOPLE v SZYMANSKI, No. 128471; Court of Appeals No. 252378.

PEOPLE v STEPHEN CARROLL, No. 128484; Court of Appeals No. 252302.

PEOPLE v TOOTHMAN, No. 128486; Court of Appeals No. 259870.

PEOPLE v COURTNEY FORD, No. 128489; Court of Appeals No. 254003.

OTTAWA COUNTY v FAMILY INDEPENDENCE AGENCY, No. 128591; reported below: 265 Mich App 496.

PEOPLE v GROSS, No. 128705; Court of Appeals No. 252590.

PEOPLE v CONELY, No. 128714; Court of Appeals No. 250576.

PEOPLE v JONATHAN DAVIS, No. 128738; Court of Appeals No. 253604.

PEOPLE v AMEY, No. 128821; Court of Appeals No. 250599.

MONTCALM FIBRE COMPANY, INC v ADVANCED ORGANICS, No. 128848; Court of Appeals No. 249642.

EMBREY v EMBREY, No. 128875; Court of Appeals No. 260284.

BOTSFORD GENERAL HOSPITAL v DEPARTMENT OF COMMUNITY HEALTH, No. 128888. The motion to file a brief amicus curiae is granted. Court of Appeals No. 257500.

GILLER v GILLER, No. 128895; Court of Appeals No. 258775.

PEOPLE v FLANNIGAN, No. 128905; Court of Appeals No. 252192.

In re WARNKE, *In re* OLLIE, and *In re* FESSLER (FAMILY INDEPENDENCE AGENCY v OLLIE), Nos. 129054, 129055, 129073, 129074; Court of Appeals Nos. 254909, 255181, 257565.

PERKINS v LEAPHART, No. 129195; Court of Appeals No. 263280.

In re DOMAIKA (FAMILY INDEPENDENCE AGENCY v DOMAIKA), No. 129217; Court of Appeals No. 259854.

Interlocutory Appeal

Leave to Appeal Denied August 30, 2005:

WALCZAK v MID-MICHIGAN MEDICAL CENTER MIDLAND, No. 128942; Court of Appeals No. 257716.

Reconsideration Denied August 30, 2005:

PEOPLE v DOUGLAS ROGERS, No. 127035. Leave to appeal denied at 472 Mich 911. Court of Appeals No. 257492.

OCWEN FEDERAL BANK, FSB v INTERNATIONAL CHRISTIAN MUSIC MINISTRY, INC, No. 127171. See 472 Mich 923. Court of Appeals No. 249081.

PEOPLE v SCHAUER, No. 127186. Leave to appeal denied at 472 Mich 923. Court of Appeals No. 247721.

KELLY, J. I would grant reconsideration and, on reconsideration, would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v MICHAEL SMITH, No. 127295. Leave to appeal denied at 472 Mich 915. Court of Appeals No. 254723.

PEOPLE v MCNEAL, No. 127305. Leave to appeal denied at 472 Mich 915. Court of Appeals No. 248341.

PEOPLE v FRANK MILLER, No. 127314. Leave to appeal denied at 472 Mich 915. Court of Appeals No. 255908.

PEOPLE v LUCEY, No. 127339. Leave to appeal denied at 472 Mich 916. Court of Appeals No. 253982.

KELLY, J. I would grant reconsideration and, on reconsideration, would remand this case to the Court of Appeals for rehearing before a panel that does not include the judge who sentenced defendant at the trial court level.

PEOPLE v GUTIERREZ, No. 127359. Leave to appeal denied at 472 Mich 937. Court of Appeals No. 256373.

PEOPLE v CORDALL NEAL, No. 127371. Leave to appeal denied at 472 Mich 916. Court of Appeals No. 246031.

GRATTAN TOWNSHIP v KENNEDY, No. 127410. Leave to appeal denied at 472 Mich 917. Court of Appeals No. 254808.

PEOPLE v NORTHINGTON, No. 127436. Leave to appeal denied at 472 Mich 917. Court of Appeals No. 258711.

PEOPLE v WINSTON, No. 127766. Leave to appeal denied at 472 Mich 919. Court of Appeals No. 257374.

PEOPLE v STEVEN JEFFRIES, No. 127776. Leave to appeal denied at 472 Mich 920. Court of Appeals No. 249059.

PEOPLE v JEROME KELLY, No. 127864. Leave to appeal denied at 472 Mich 920. Court of Appeals No. 255691.

Leave to Appeal Denied September 9, 2005:

ZAMMIT v MEADOWBROOK INSURANCE CARRIER, No. 127892; Court of Appeals No. 248776.

IWANSKA v NIELSEN, No. 129312; Court of Appeals No. 263084.

In re METZ (DEPARTMENT OF HUMAN SERVICES v OUSNAMER), No. 129353; Court of Appeals No. 263239.

Reconsideration Denied September 14, 2005:

TRAXLER v ROTHBART, No. 125948. See 473 Mich 888. Court of Appeals No. 243492.

MARKMAN, J. I would grant reconsideration.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal September 15, 2005:

PEOPLE v YAMAT, No. 128724. Pursuant to MCR 7.302(G)(1), we direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of arguments made in application papers. Court of Appeals No. 257923.

Summary Dispositions September 15, 2005:

PEOPLE v GRIFFIN, No. 125700. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Isabella Circuit Court for resentencing, within 56 days of the date of this order, consistent with *People v Hendrick*, 472 Mich 555 (2005). The motion for immediate

consideration is granted. The motion to vacate sentence is denied as moot in light of the relief provided by this order. We do not retain jurisdiction. Court of Appeals No. 252454.

PEOPLE v MICHAEL WARD, No. 126054. By order of October 25, 2004, the application for leave to appeal was held in abeyance pending the decision in *People v Stewart* (Docket No. 124055). Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the March 11, 2004 order of the Court of Appeals and the August 21, 2003 opinion and order of the Washtenaw Circuit Court and remand this case to the Washtenaw Circuit Court for reconsideration in light of our decision in *People v Stewart*, 472 Mich 624 (2005). We do not retain jurisdiction. Court of Appeals No. 251677.

VALENTE v VALENTE, No. 127407. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and remand the case to the Macomb County Probate Court for entry of a judgment consistent with this order. The probate court did not err by disallowing $125,000 of the jury's $194,645 damage award based on a mortgage on real estate that was a trust asset. The jury, in its special verdict, specifically found that the trusts suffered no loss as a result of the mortgage. Plaintiffs therefore suffered no compensable damages from defendant's acts with regard to the mortgage. For the same reason, the probate court abused its discretion in nevertheless awarding plaintiffs interest on the $125,000. Further, we vacate those parts of the Macomb County Probate Court's June 17, 2002, order that (1) purport to transfer title for the property at 300 Pensacola in Venice, Florida, and (2) permit the probate court's order to be recorded as a "document, title, or deed" in any state or foreign jurisdiction for purposes of notice that such a "document, title, or deed" has been "executed, delivered and recorded." While the probate court has authority to order defendant to execute and record a deed to the property, and to enforce that order, it lacks jurisdiction to effect a transfer of title to out-of-state property and to permit recording of its order as a deed in any other state. See *Henkel v Henkel*, 282 Mich 473 (1937). In all other respects, the application for leave to appeal is denied. We do not retain jurisdiction. Court of Appeals No. 242552.

MESHKIN v KOMINSKY, No. 127509. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the opinion of the Court of Appeals, and we reinstate the judgment and order of the trial court in view of *Poch v Urlaub*, 357 Mich 261 (1959). Court of Appeals No. 249916.

LEONARD v HARTFIELD ENTERPRISES, INC, No. 127858. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the Oakland Circuit Court's order granting summary disposition in defendant's favor. The Court of Appeals, having found no actual or constructive notice of a dangerous condition in the area where plaintiff fell, and no evidence of any dangerous condition, clearly erred when it reversed the trial court's decision to grant defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). The location of plaintiff's fall was not a material fact given the absence of

proof showing what caused plaintiff's fall, or showing actual or constructive notice. *Maiden v Rozwood*, 461 Mich 109, 120 (1999). The application for leave to appeal as cross-appellant is denied. Court of Appeals No. 249381.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE v JAYCOX, No. 127896. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals and we remand this case to the Court of Appeals for consideration of the application on its merits. Court of Appeals No. 258227.

PEOPLE v BERNARD THOMPSON, No. 127969. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for resentencing. The circuit court improperly assessed defendant points for Offense Variable 11 on the theory that there were additional sexual penetrations of the victim by defendant "arising out of the sentencing offense." MCL 777.41(2)(a). The record does not establish when the noncharged sexual penetrations occurred, and therefore there is no evidence in this case to support a finding that the additional sexual penetrations arose out of the sentencing offense. Court of Appeals No. 246814.

MOSZYK v CITY OF BAY CITY, No. 128456. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals that affirmed the trial court's grant of summary disposition on plaintiff's claim asserted under the Whistleblower's Protection Act, MCL 15.361 *et seq*., and remand this case to the Court of Appeals for its consideration of the issue that it did not reach. The Court of Appeals erred when it held that the record demonstrated that defendants were in the process of terminating plaintiff's employment for reasons unrelated to the alleged whistleblowing, and that defendants were therefore entitled to summary disposition of the Whistleblower's Protection Act claim. When the facts are viewed in the light most favorable to the non-moving party, *Dressel v Ameribank*, 468 Mich 557, 561 (2003), there is a disputed issue of material fact whether plaintiff's protected activity caused defendants to terminate plaintiff in violation of the Whistleblower's Protection Act. On remand, the Court of Appeals shall consider whether the arbitration of plaintiff's termination precludes plaintiff from pursuing a Whistleblower's Protection Act claim. In all other respects, the application for leave to appeal and cross-application to appeal as cross-appellant are denied. We do not retain jurisdiction. Court of Appeals No. 252273.

PEOPLE v DANSBY, No. 128757. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, and in light of the prosecutor's acknowledgment that the trial court was without authority to set aside defendant's initially imposed sentence for second-degree murder, we vacate the portion of the judgment of the Court of Appeals that denied sentencing relief and remand this case to the Wayne Circuit Court for correction of the judgment of sentence consistent with the initially imposed sentence. In all other respects, the application is denied. Court of Appeals No. 251732.

Leave to Appeal Denied September 15, 2005:

PEOPLE v HELLSTROM, No. 127835; reported below: 264 Mich App 187. TAYLOR, C.J., and CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v QUICKSEY, No. 128014; Court of Appeals No. 258542.

KELLY, J. I would grant leave to appeal.

CITY OF NOVI v NANDA ENTERPRISES, INC, No. 128331; Court of Appeals No. 256389.

In re PETITION BY THE WAYNE COUNTY TREASURER FOR FORECLOSURE OF CERTAIN LANDS FOR UNPAID PROPERTY TAXES (WAYNE COUNTY TREASURER v WESTHAVEN MANOR LIMITED DIVIDEND HOUSING ASSOCIATION), No. 128403; reported below: 265 Mich App 285.

CORRIGAN and MARKMAN, JJ. We would grant leave to appeal.

PEOPLE v HARDEN, No. 128796. Leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court inasmuch as the Offender Tracking Information System indicates that defendant's probation was discharged on September 22, 2004. We take this opportunity, however, to reaffirm that a challenge to the admission of a defendant's statement under the *corpus delicti* rule constitutes a challenge to the admission of evidence, not to the sufficiency of evidence. *People v Konrad*, 449 Mich 263, 269 (1995). A challenge to the admission of evidence must be preserved in the trial court before it may be raised on appeal unless a substantial right of the party is affected. MRE 103(a). Court of Appeals No. 241671.

CAVANAGH, J. I concur with the denial of leave to appeal.

PEOPLE v JENKINS, Nos. 128939, 128940; Court of Appeals Nos. 250912, 250913.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal September 21, 2005:

PAIGE v CITY OF STERLING HEIGHTS, No. 127912. On order of the Court, the motion to file brief amicus curiae is granted. Pursuant to MCR 7.302(G)(l), we direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(l) with respect to defendant's first two issues. The parties shall include among the issues to be addressed at oral argument: (1) whether this Court's decision in *Robinson v Detroit*, 462 Mich 439 (2000), overruled *Hagerman v Gencorp Automotive*, 457 Mich 720 (1998); and (2) whether this case should be remanded to the Workers' Compensation Appellate Commission for a determination of Adam Paige's factual dependency as of the date of his father's death, in accord with *Runnion v Speidel*, 270 Mich 18 (1934). 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. 256451.

Summary Dispositions September 21, 2005:

PEOPLE v ERNEST MOORE, Nos. 121565, 121566. By order of November 4, 2004, the applications for leave to appeal were held in abeyance pending the decision in *People v Hendrick* (Docket No. 126371). On order of the Court, the opinion having been issued on June 14, 2005, 472 Mich 555 (2005), the applications are again considered, and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentences of the Wayne Circuit Court and remand to that court for resentencing in light of *Hendrick* and *People v Babcock*, 469 Mich 247 (2003). Court of Appeals Nos. 239676, 239677.

PEOPLE v MELODY HARRIS, No. 125762. In an order dated June 28, 2005, *Harris v Michigan*, 545 US ___; 125 S Ct 2989 (2005), the Supreme Court of the United States remanded this matter to this Court for further consideration in light of *Halbert v Michigan*, 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005). After further consideration, we vacate this Court's order of June 25, 2004, 470 Mich 882 (2004), and remand this case to the Kent Circuit Court for a determination whether defendant is indigent and, if so, for the appointment of appellate counsel, in light of *Halbert, supra*. Appointed counsel may file an application for leave to appeal with the Court of Appeals, and/or any appropriate post-conviction motions in the trial court, within 12 months of the date of the circuit court's order appointing counsel, in accord with the deadlines in effect at the time defendant was denied counsel. We do not retain jurisdiction. Court of Appeals No. 253152.

CREECH v W A FOOTE MEMORIAL HOSPITAL, INC, PORTER v W A FOOTE MEMORIAL HOSPITAL, INC, WILLIAMS v W A FOOTE MEMORIAL HOSPITAL, INC, MOORE v W A FOOTE MEMORIAL HOSPITAL, INC, and ANSON v W A FOOTE MEMORIAL HOSPITAL, INC, Nos. 126578, 126579, 126581-126590. By order of April 14, 2005, the application for leave to appeal was held in abeyance pending the decision in *Henry v Dow Chemical Co* (Docket No. 125205). The opinion having been issued on July 13, 2005, 473 Mich 63 (2005), the application is again considered, and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration in light of *Henry*, and the cases cited therein, on the issue whether plaintiffs have presented valid tort claims. Court of Appeals Nos. 237437-237446.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE v TIMM, No. 126599. By order of December 29, 2004, the applications for leave to appeal were held in abeyance pending the decision in *People v Hendrick* (Docket No. 126371). The opinion having been issued on June 14, 2005, 472 Mich 555 (2005), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the St. Joseph Circuit Court and remand this case to that court for resentencing in light of *Hendrick* and *People v Babcock*, 469 Mich 247 (2003). Court of Appeals No. 254610.

PEOPLE v CURRENT, No. 127119. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the decision of the Court of Appeals

and defendant's convictions, and we remand this case to the Shiawassee Circuit Court for further proceedings consistent with this order. The trial court erred by utilizing the rape-shield statute, MCL 750.520j, to refuse to admit evidence of the prior sexual assaults on the complainant. "We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation." *People v Hackett*, 421 Mich 338, 348 (1984). This case presents such a situation. Court of Appeals No. 246039.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

SAXTON v STEELCASE, INC, No. 127538. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the June 25, 2004, opinion and order of the Workers' Compensation Appellate Commission and remand this case to the WCAC for reconsideration in light of *Bailey v Oakwood Hosp & Medical Ctr*, 472 Mich 685 (2005). We do not retain jurisdiction. Court of Appeals No. 256867.

PEOPLE v ROBERT JONES, No. 127654. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Delta Circuit Court for a determination whether defendant is indigent and, if so, for the appointment of appellate counsel, in light of *Halbert v Michigan*, 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Appointed counsel may file an application for leave to appeal with the Court of Appeals, and/or any appropriate postconviction motions in the trial court, within 12 months of the date of the circuit court's order appointing counsel, in accordance with the deadlines in effect at the time defendant was denied counsel. See MCR 6.311, 6.429, and 7.205(F)(3). Counsel may, but is not required to, include those issues defendant raised in his application for leave to appeal to this Court. In all other respects, leave to appeal is denied. We do not retain jurisdiction. Court of Appeals No. 257494.

CORRIGAN, J. I would deny leave to appeal.

PEOPLE v FRONEY, No. 128209. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the portion of the judgment of the Court of Appeals that rejected defendant's challenge to the trial court's instruction on his burden to show that his right to possess a weapon had been restored, and we remand this case to the Court of Appeals for reconsideration in light of *People v Perkins*, 473 Mich 626 (2005). *Perkins* held that a defendant bears the burden of producing evidence to establish that the right to possess a firearm has been restored pursuant to MCL 750.224f(2)(b), but if the defendant fails to meet this burden of production, the prosecution is not required to prove lack of restoration beyond a reasonable doubt. This defendant claims that evidence exists from which to infer that his previous conviction was "expunged or set aside" within the meaning of MCL 750.224f(4), and that the trial court thus erred in instructing the jury that "[a] mere assertion by defendant that his rights to carry a firearm were restored is not enough evidence to shift the burden of proof to the prosecution to show that the defendant's rights

to possess a firearm were not restored." In all other respects, the application for leave to appeal is denied. We do not retain jurisdiction. Court of Appeals No. 250324.

PEOPLE v COLBATH, Nos. 128254, 128873. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court for a determination of whether defendant is indigent and, if so, for the appointment of appellate counsel in light of *Halbert v Michigan*, 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Appointed counsel may file an application for leave to appeal with the Court of Appeals, and/or any appropriate postconviction motions in the trial court, within 12 months of the date of the Kent Circuit Court's order appointing counsel, in accord with the deadlines in effect at the time defendant was denied counsel. See MCR 6.311, 6.429, and 7.205(F)(3). Counsel may include among the issues raised, but is not required to include, those issues raised by defendant in his application for leave to appeal to this Court. In all other respects, leave to appeal is denied. We do not retain jurisdiction. Court of Appeals Nos. 251686, 260525.

PEOPLE v SCHUT, No. 128688. Pursuant to MCR 7.302(G)(1), we reverse the judgment of the Court of Appeals and remand this case to the 56-B District Court for reconsideration of whether to bind over defendant on the charge of operating a motor vehicle with a revoked license causing death, in light of this Court's decision in *People v Schaefer*, 473 Mich 418 (2005). We do not retain jurisdiction. Reported below: 265 Mich App 446.

Summary Disposition September 21, 2005, as amended September 30, 2005:

PEOPLE v ADAMY, No. 126916. By order of February 28, 2005, the application for leave to appeal was held in abeyance pending the decision in *People v Hendrick* (Docket No. 126371). The opinion having been issued on June 14, 2005, 472 Mich 555 (2005), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court and remand this case to that court for resentencing in light of *Hendrick* and *People v Babcock*, 469 Mich 247 (2003). Court of Appeals No. 255594.

Leave to Appeal Denied September 21, 2005:

PEOPLE v JASON WHITE, Nos. 125312, 125314; Court of Appeals Nos. 249185, 249218.

PEOPLE v BLAND, No. 127156; Court of Appeals No. 251135.

PEOPLE v DEMOND HARRIS, No. 128040; Court of Appeals No. 249891.

CAVANAGH and KELLY, JJ. We would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

PEOPLE v RENO, No. 128116; Court of Appeals No. 256872.

KELLY, J. I would grant leave to appeal.

PEOPLE v RICHARD GREEN, No. 128272; Court of Appeals No. 256117.
KELLY, J. I would grant leave to appeal.

PEOPLE v QUINTANILLA, No. 128503; Court of Appeals No. 259904.
KELLY, J. I would grant leave to appeal.

In re STRAMAGLIA (FAMILY INDEPENDENCE AGENCY v STRAMAGLIA), No. 129262; Court of Appeals No. 256133.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal September 23, 2005:

MCDOWELL v CITY OF DETROIT, No. 127660. Pursuant to MCR 7.302(G)(1), we direct the clerk to schedule oral argument on whether to grant the application for leave to appeal 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 the Court of Appeals erred in holding that negligent nuisance is an exception to governmental immunity under *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139 (1988), and whether, if a fire begins in the space between an inner and outer wall of leased premises, the fire "trespasses" to the tenant's premises when it spreads beyond the inner wall. The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of arguments in application papers. Reported below: 264 Mich App 337.

PEOPLE v HOULIHAN, No. 128340. Pursuant to MCR 7.302(G)(l), we direct the clerk to schedule oral argument on whether to grant the application for leave to appeal or take other peremptory action permitted by MCR 7.302(G)(l). The parties are directed to file supplemental briefs by October 24, 2005, addressing whether the holding in *Halbert v Michigan,* 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005), retroactively applies to defendant's motion for relief from judgment from his plea-based conviction where the trial court denied his request for the appointment of appellate counsel to assist him in pursuing a direct appeal. In addressing this issue, the parties may benefit from considering *Teague v Lane*, 489 US 288, 356 (1989), *Beard v Banks*, 542 US 406 (2004), and *Howard v United States*, 374 F3d 1068 (CA 11, 2004). We further order the Kent Circuit Court to appoint the State Appellate Defender Office to represent the defendant in this Court. The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae by November 1, 2005. Court of Appeals No. 256534.

Summary Dispositions September 23, 2005:

PEOPLE v LARKIN, No. 128205. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Saginaw Circuit Court for a determination whether defendant is indigent and, if so, for the appointment of appellate counsel, in light of *Halbert v Michigan*, 545

US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Appointed counsel may file an application for leave to appeal with the Court of Appeals, and/or any appropriate postconviction motions in the trial court, within 12 months of the date of the Circuit Court's order appointing counsel, in accord with the deadlines in effect at the time defendant was denied counsel. See MCR 6.311, 6.429, and 7.205(F)(3). We do not retain jurisdiction. Court of Appeals No. 258411.

PEOPLE v CHARLES BELL, No. 128415. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Saginaw Circuit Court for a determination whether defendant is indigent and, if so, for the appointment of appellate counsel, in light of *Halbert v Michigan*, 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Appointed counsel may file an application for leave to appeal with the Court of Appeals, and/or any appropriate postconviction motions in the trial court, within 12 months of the date of the Saginaw Circuit Court's order appointing counsel, in accord with the deadlines in effect at the time defendant was denied counsel. See MCR 6.311, 6.429, and 7.205(F)(3). Counsel may include among the issues raised, but is not required to include, those issues raised by defendant in his application for leave to appeal to this Court. In all other respects, leave to appeal is denied. We do not retain jurisdiction. Court of Appeals No. 259426.

PEOPLE v BENJAMIN O'DONNELL, No. 128587. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate defendant's armed robbery conviction. The decisions in *People v Randolph*, 466 Mich 532 (2002), and *People v Scruggs*, 256 Mich App 303 (2003), are to be given limited retroactive effect, applying only to those cases pending on appeal in which the issue was raised and preserved. *People v Cornell*, 466 Mich 335, 367 (2002); *People v Pasha*, 466 Mich 378, 384 (2002). Court of Appeals No. 252567.

CAVANAGH and KELLY, JJ. We would grant or deny leave to appeal.

Leave to Appeal Denied September 23, 2005:

PEOPLE v WILCOX, No. 129176; Court of Appeals No. 260028.

Leave to Appeal Denied September 28, 2005:

PEOPLE v JOHN SCOTT, No. 124756. The Kalamazoo Circuit Court was directed to conduct an evidentiary hearing and to file a transcript of the hearing and its findings on specified questions regarding certain evidence. Those findings having been filed, the application for leave to appeal is again considered, and it is denied. The motion to expand the record is denied. Court of Appeals No. 248415.

PEOPLE v BOBBY HOWARD, No. 125372. The application for leave to appeal was held in abeyance pending the decision in *People v Perkins*. The opinion having been issued, 473 Mich 626 (2005), the application for leave to appeal the December 23, 2003, judgment of the Court of Appeals is again considered, and it is denied. Court of Appeals No. 240915.

PEOPLE v WEEMS, No. 127302. The application for leave to appeal was held in abeyance pending the decision in *People v Perkins*. The opinion having been issued, 473 Mich 626 (2005), the application for leave to appeal the September 23, 2004, judgment of the Court of Appeals is again considered, and it is denied. Court of Appeals No. 247435.

PEOPLE v MANUEL, No. 127349; Court of Appeals No. 248647.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v CORDELL PRICE, No. 127548; Court of Appeals No. 248100.

PEOPLE v LYONS, No. 127573; Court of Appeals No. 250581.

PEOPLE v WHEETLEY, No. 127576; Court of Appeals No. 249237.

KMART CORPORATION v GARZONI, No. 127603; Court of Appeals No. 255408.

MARKMAN, J., did not participate.

PEOPLE v RANDALL, No. 127622. The motions for immediate consideration and for peremptory reversal are denied. Court of Appeals No. 249892.

PEOPLE v NATHANIEL LEE, No. 127783; Court of Appeals No. 245455.

PEOPLE v STADLER, No. 127787. The miscellaneous motion is granted. Court of Appeals 245895.

PEOPLE v CHARLES FIELDS, No. 127800; Court of Appeals No. 259160.

HINKLE v CESSNA AIRCRAFT COMPANY, No. 127829; Court of Appeals No. 247099.

PEOPLE v GARVIN, No. 127859; Court of Appeals No. 248954.

In re BERTLING TRUST (ESTHER WIGGINS BERTLING TRUST v CAULEY), No. 127866; Court of Appeals No. 250555.

PEOPLE v SHEDRICK LEE, No. 127880. The motion for stay and to show cause regarding the court reporter is denied. Court of Appeals No. 248428.

KING v WESTFIELD INSURANCE COMPANY, No. 127887; Court of Appeals No. 247451.

DIFALCO v DOCK, No. 127902; Court of Appeals No. 250675.

SESSA v HARRISON CHARTER TOWNSHIP, No. 127903. The motion to file brief amicus curiae is granted. Court of Appeals No. 249485.

PEOPLE v DIGNA, No. 127904; Court of Appeals No. 249903.

PEOPLE v NATURALITE, No. 127910. The miscellaneous motions are denied. Court of Appeals No. 250534.

PEOPLE v CALDERON-HERNANDEZ, No. 127931; Court of Appeals No. 250230.

PEOPLE v LAWS, No. 127949; Court of Appeals No. 245454.

VALENTINE v WILTSE, No. 127964; Court of Appeals No. 251362.

PEOPLE v RURKA, No. 127978. The motion concerning docket entries, motion for appointment of counsel, and motions to remand are denied. Court of Appeals No. 251315.

PEOPLE v HUNT, No. 127987; Court of Appeals No. 252178.

NORTHWOODS DEVELOPMENT, LLC v FORSTYNER, No. 127992; Court of Appeals No. 247190.

PEOPLE v STAPULA, No. 127994; Court of Appeals No. 250026.

BAHAR v AMERITECH MICHIGAN, Nos. 128032, 128146; Court of Appeals Nos. 249263, 260127.

PEOPLE v SCHNEIDER, No. 128036; Court of Appeals No. 257498.

LIEDEL v HOLLAND, No. 128043; Court of Appeals No. 249772.

METROPOLITAN SOCIETY FOR CRIPPLED CHILDREN & ADULTS v STATE OF MICHIGAN, No. 128046; Court of Appeals No. 257526.

STRATTON v KRYWKO, No. 128050; Court of Appeals No. 248669.

CHARLEVOIX COUNTY BUILDING DEPARTMENT v BARKLEY, No. 128053; Court of Appeals No. 256198.

PEOPLE v GEORGE ALEXANDER, No. 128055; Court of Appeals No. 256827.

PEOPLE v SHEDRICK SMITH, No. 128071; Court of Appeals No. 250329.

PEOPLE v ROSS PETERSON, No. 128075; Court of Appeals No. 258720.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

WOLF v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 128076; Court of Appeals No. 257390.

BALINSKI ESTATE v WILLIAM BEAUMONT HOSPITAL, No. 128086; Court of Appeals No. 257096.

VAN SICKLE v ANDERSON, Nos. 128087, 128088; Court of Appeals Nos. 248351, 248447.

PEOPLE v TRAPP, No. 128113; Court of Appeals No. 249499.

RITZER v LOCKPORT-FABIUS-PARK TOWNSHIP FIRE DEPARTMENT, No. 128119; Court of Appeals No. 253262.

WAYNE OAKLAND CONTRACTING, INC v CITY OF GARDEN CITY, No. 128144; Court of Appeals No. 248387.

ABDELLA v TESSMAR, No. 128157; Court of Appeals No. 248851.

PEOPLE v RONELL GREEN, No. 128164; Court of Appeals No. 250436.

PEOPLE v XAVIER MILTON, No. 128165; Court of Appeals No. 250821.

THOMPSON v ROYAL OAK CHARTER TOWNSHIP, No. 128166; Court of Appeals No. 256533.

PEOPLE v DWAYNE ROBERTSON, No. 128169; Court of Appeals No. 246941.

PEOPLE v MARCUS WILLIAMS, No. 128186; Court of Appeals No. 249427.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v SHAVERS, No. 128214; Court of Appeals No. 257426.

PEOPLE v HOLZ, No. 128217; Court of Appeals No. 258213.

PEOPLE v KRUPINSKI, No. 128226; Court of Appeals No. 258937.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

WATT v HETH, No. 128227; Court of Appeals No. 245910.

PEOPLE v TROTTER, No. 128235; Court of Appeals No. 259308.

CHAMBERLAIN v SAFECO INSURANCE COMPANY, No. 128237; Court of Appeals No. 250246.

HARRIS v FORD MOTOR COMPANY, No. 128238; Court of Appeals No. 250983.

SCHMALTZ v GREYSTONE BUILDERS, INC and SMITH v GREYSTONE BUILDERS, INC, Nos. 128240, 128241; Court of Appeals Nos. 237991, 237992 (on remand).

PEOPLE v HUTCHINSON, No. 128243. Immediate consideration is denied. Court of Appeals No. 259920.

PEOPLE v CHRISTOPHER HOWARD, No. 128247; Court of Appeals No. 251017.

COBURN v RICHFIELD INDUSTRIES, No. 128248; Court of Appeals No. 257906.

PEOPLE v ALVIN JOHNSON, No. 128253; Court of Appeals No. 258219.

PEOPLE v MATT, No. 128257; Court of Appeals No. 248765.

PEOPLE v PATRICK BATES, No. 128265; Court of Appeals No. 258541.

PEOPLE v WADE, No. 128269; Court of Appeals No. 249269.

PEOPLE v JAMES JACKSON, No. 128271; Court of Appeals No. 250139.

ZWERK v ZWERK, Nos. 128274, 128275; Court of Appeals Nos. 247527, 253660.

PEOPLE v RONALD THOMAS, No. 128277; Court of Appeals No. 247853.

PIERCE v CITY OF LANSING, No. 128278; reported below: 265 Mich App 174.

PRENTIS FAMILY FOUNDATION v BARBARA ANN KARMANOS CANCER INSTITUTE, Nos. 128281, 128282; reported below: 266 Mich App 39.

PEOPLE v RAPOZA, No. 128292; Court of Appeals No. 259574.

PEOPLE v ANTONIO FRENCH, No. 128297; Court of Appeals No. 250904.

PEOPLE v CHRISTINE JACKSON, Nos. 128308, 128309; Court of Appeals Nos. 236360, 236361.

BAILEY v THE DETROIT EDISON COMPANY, No. 128316; Court of Appeals No. 250068.

PEOPLE v ELIEZER PEREZ, No. 128320; Court of Appeals No. 258852.

PEOPLE v HENRY PETERS, No. 128324; Court of Appeals No. 259465.

PEOPLE v WENDELL GREEN, No. 128325. The motion to remand is denied. Court of Appeals No. 252727.

PEOPLE v CLINTON COLLIER, No. 128329; Court of Appeals No. 251409.

PEOPLE v CHARLES, No. 128330. The motion to add issues is denied. Court of Appeals No. 252031.

PEOPLE v MARKS, No. 128334; Court of Appeals No. 257916.
CAVANAGH, J. I would grant leave to appeal.

PEOPLE v RICKEY WILLIAMS, No. 128335; Court of Appeals No. 258679.

KERRY STEEL, INC v FRIEDMAN, No. 128343; Court of Appeals No. 249805.

RODRIGUEZ v MEXICAN INDUSTRIES IN MICHIGAN, INC, No. 128345; Court of Appeals No. 258000.

PEOPLE v RODGERS, No. 128350; Court of Appeals No. 250908.

CASSONE v CASSONE, No. 128351; Court of Appeals No. 260201.

PROSE v SUN AND SKI MARINA, No. 128352; Court of Appeals No. 245823.

PEOPLE v KENNEDY, No. 128358; Court of Appeals No. 251372.

PEOPLE v MIA WILLIAMS, No. 128361; Court of Appeals No. 251049.

PIGG v GENERAL STEEL ERECTORS, INC, No. 128366; Court of Appeals No. 258414.

PEOPLE v PLAIR, No. 128370; Court of Appeals No. 251535.

ANTHONY v DELAGRANGE REMODELING, INC and DELAGRANGE REMODELING, INC v ANTHONY, Nos. 128377, 128449; Court of Appeals Nos. 250022, 252644.

PEOPLE v DENNIS PAYNE, No. 128378; Court of Appeals No. 248708.

PEOPLE v ARTHUR HILL, No. 128379; Court of Appeals No. 260094.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

DENHOF v CITY OF GRAND RAPIDS, No. 128380; Court of Appeals No. 255606.

PEOPLE v INGRAM, No. 128384; Court of Appeals No. 251615.

PEOPLE v CARL TRAMMELL, No. 128386; Court of Appeals No. 249895.

PEOPLE v CALVIN SMITH, No. 128388; Court of Appeals No. 259962.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v DALTON, No. 128389; Court of Appeals No. 251511.

PEOPLE v RALSTON, No. 128391; Court of Appeals No. 250993.

PEOPLE v PARSONS, No. 128394; Court of Appeals No. 259473.

PEOPLE v ROBERT HUNTER, No. 128399; Court of Appeals No. 259724.

PEOPLE v DAVID CARTER, No. 128406; Court of Appeals No. 250429.

PEOPLE v KENNEY, No. 128408; Court of Appeals No. 251018.

PEOPLE v SHAFFER, No. 128411; Court of Appeals No. 252848.

PEOPLE v ASARO, No. 128412; Court of Appeals No. 254765.

PEOPLE v ANTHONY ANDERSON, No. 128413; Court of Appeals No. 253124.

PEOPLE v CEDRIC JACKSON, No. 128414; Court of Appeals No. 252191.

PEOPLE v CHARLES CLARK, No. 128421; Court of Appeals No. 251351.

PEOPLE v SMASH, No. 128422; Court of Appeals No. 258858.

PEOPLE v RUSSELL THOMAS, No. 128428; Court of Appeals No. 251011.

ZBORIL v FARKUS, No. 128430; Court of Appeals No. 250760.

PEOPLE v COURTNEY HALL, No. 128432; Court of Appeals No. 251179.

PEOPLE v COYNE, No. 128442; Court of Appeals No. 251325.

PEOPLE v MCCREE, No. 128444; Court of Appeals No. 252101.

COUCH v CORRELL, No. 128445; Court of Appeals No. 256899.

PEOPLE v SZAFRANIEC, No. 128446; Court of Appeals No. 258719.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

STRATTON v CITY OF FLINT, No. 128448; Court of Appeals No. 248669.

PEOPLE v LONG, No. 128453; Court of Appeals No. 252733.

YOUNG & YOUNG, LLC v DENNANY, No. 128454; Court of Appeals No. 251359.

PEOPLE v ANTONIO MCMANN, No. 128458; Court of Appeals No. 250612.

PEOPLE v PATRICK WILLIAMS, No. 128464; Court of Appeals No. 252543.

PEOPLE v WILLIE BROOKS, No. 128465; Court of Appeals No. 249021.

PEOPLE v ARMSTRONG, No. 128472; Court of Appeals No. 252519.

PEOPLE v GENDRON, No. 128477; Court of Appeals No. 251509.

MITCHELL v ALLSTATE INSURANCE COMPANY and AMERISURE MUTUAL INSURANCE COMPANY v ALLSTATE INSURANCE COMPANY, Nos. 128479, 128480; Court of Appeals Nos. 251755, 251756.

PEOPLE v DUNNETT, No. 128488. The motion for immediate consideration is granted. Court of Appeals No. 261093.

PEOPLE v WARE, No. 128504; Court of Appeals No. 251048.

PEOPLE v SWANIGAN, No. 128658; Court of Appeals No. 250439.

PEOPLE v REGINALD WALKER, No. 128669; Court of Appeals No. 249406.

PEOPLE v DAVID HUDSON, No. 128678; Court of Appeals No. 252851.

PEOPLE v TYREE STINSON, No. 128684; Court of Appeals No. 254006.
KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v EWING, No. 128693; Court of Appeals No. 252558.

PEOPLE v MCDANIEL, No. 128701; Court of Appeals No. 252040.

PEOPLE v CHRISTOPHER HICKS, No. 128760. The motions to extend time and to add issues are denied. The motion for appointment of counsel in this Court is denied as moot. Court of Appeals No. 260672.

PEOPLE v DAVID BUTLER, No. 128792; Court of Appeals No. 253181.

PEOPLE v COMBS, No. 128797; Court of Appeals No. 250507.

PEOPLE v SALTER, No. 128891; Court of Appeals No. 253401.

PEOPLE v WILLIE MCQUEEN, No. 128903; Court of Appeals No. 255124.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal September 29, 2005:

CROUCHMAN v MOTOR CITY ELECTRIC COMPANY, No. 127871. Pursuant to MCR 7.302(G)(1), we direct the clerk 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 the Court of Appeals erred in concluding that there is coverage where the automobile involved in the accident is not owned by the insured but is furnished to, or available for regular use by, the insured. The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of arguments in application papers. Court of Appeals No. 248419.

Summary Dispositions September 29, 2005:

FERGUSON v PIONEER STATE MUTUAL OF MICHIGAN, No. 129386. The motion for immediate consideration is granted. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the August 16, 2005, order of the Court of Appeals and order that proceedings in the Genesee Circuit Court are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. We do not retain jurisdiction. Court of Appeals No. 260876.

Leave to Appeal Denied September 29, 2005:

CONCERNED CITIZENS OF ACME TOWNSHIP v ACME TOWNSHIP, No. 127487. The motions to extend time to file reply briefs are granted. Court of Appeals No. 256403.

PEOPLE v CULHANE, No. 128250. On order of the Court, the application for leave to appeal is considered, and it is denied. Court of Appeals No. 251163.

KELLY, J. (*concurring*). I concur in denying leave. This Court has consistently held that the credibility of a witness may be considered at a preliminary examination. The magistrate has not only the right but the duty to pass judgment on the credibility of the witness. *People v Paille #2*, 383 Mich 621 (1970).

In this case, defendant indicated that he never had the intent to permanently deprive his girlfriend of the money, and he actually returned the entire sum. The district court judged defendant's credibility and found him credible. The prosecution did not offer evidence to rebut defendant's claimed lack of intent to permanently deprive beyond noting the taking itself. This raises only the inference of guilt and amounts to little more than a scintilla of evidence. Therefore, the trial court based its decision on the only evidence it had, and it did not abuse its discretion in refusing to bind defendant over.

CORRIGAN, J. (*dissenting*). I dissent from this denial of leave. I would grant leave to consider Judge ZAHRA's dissent. The complainant agreed to lend $200 to her boyfriend, defendant. Instead, defendant helped himself to $500, without the complainant's consent for the additional $300. Defendant returned the money about two weeks later, but only after the

complainant had notified the police about defendant's behavior. Defendant told her that he took the money so that she would call him.

The district court apparently abused its discretion by refusing to bind over defendant for trial on the charge of larceny in a building under MCL 750.360. While a magistrate may "consider the credibility of witnesses, we have also instructed examining magistrates to not refuse to bind a defendant over for trial when the evidence conflicts or raises reasonable doubt of the defendant's guilt." *People v Yost*, 468 Mich 122, 128 (2003) (citations omitted). See also the very helpful article by Randon and Gardner, *Evaluating witness credibility in preliminary examinations*, 84 Mich Bar J 35, 36 (2005) ("[F]or the purpose of the preliminary examination, testimony should be credited unless it is incredible or implausible as a matter of law.").

Here, a factual question remained regarding whether defendant intended to permanently deprive the complainant of her money. Instead of sending this question to a jury and limiting the inquiry only to the existence of probable cause, the district court apparently abused its discretion by resolving all inferences in favor of defendant. Accordingly, I would grant leave to consider whether to reverse the circuit court order and remand the case to the district court for entry of an order binding defendant over on the charge of larceny in a building, as well as to consider the well-taken points made by Judge Mark A. Randon and Mr. Timothy Gardner, Jr., *supra*, regarding the applicable legal standards.

YOUNG, J. I join the statement of Justice CORRIGAN.

In re WHEAT (FAMILY INDEPENDENCE AGENCY v AMERSON), No. 129487; Court of Appeals No. 260200.

Order Granting Oral Argument in Cases Pending on Application for Leave to Appeal October 6, 2005:

VILLAGE OF LINCOLN v VIKING ENERGY OF LINCOLN, INC, No. 127144. 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 file supplemental briefs within 28 days of the date of this order, and are directed to include among the issues briefed: (1) is the issue whether the ordinance was properly enacted moot; (2) does the doctrine of *Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482 (2000), lack meaningful standards for consistent application and is it consistent with the City and Village Zoning Act, MCL 125.581 *et seq.*; and (3) has defendant Viking Energy abandoned the procedural challenge to the ordinance by failing to raise it pursuant to MCL 125.585(11). The motion to appear pro hac vice is granted. Court of Appeals No. 246319.

Summary Dispositions October 6, 2005:

HILEMAN v TRAILER EQUIPMENT, INC, No. 127886. In lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 257001.

DAUDERT v DAUDERT, No. 127950. In lieu of granting leave to appeal, we vacate in part the decisions of the Court of Appeals and the Kalamazoo Circuit Court. The Court of Appeals did not err in concluding that the Austin Grove property constituted a marital asset, but did err in failing to remand the case to the trial court in light of its conclusion. We remand this case to the Kalamazoo Circuit Court for further consideration in light of this order. On remand, the Kalamazoo Circuit Court is to decide whether there is to be a new division of property and, if there is to be a new division, to make such a division; to articulate the reasons for the court's decisions; and to determine the amount of spousal support, if any, that continues to be appropriate under MCL 552.23. In all other respects, leave to appeal is denied. We do not retain jurisdiction. Court of Appeals No. 248779.

PEOPLE v TOMMY BROWN, No. 128199. The application for leave to appeal was held in abeyance pending the decision in *People v Houston* (Docket No. 126025). The opinion having been issued on July 26, 2005, 473 Mich 399 (2005), the application is again considered and, in lieu of granting leave to appeal, we reverse the January 27, 2005, judgment of the Court of Appeals and remand this case to the Genesee Circuit Court for resentencing. As we held in *Houston*, under the circumstances of this case, offense variable 3 should be scored at 25 points. We do not retain jurisdiction. Reported below: 265 Mich App 60.

PEOPLE v MATIQUEKA WILLIAMS, No. 128367. Defense counsel was directed to answer the Wayne County Prosecuting Attorney's application for leave to appeal. The answer having been filed, the application for leave to appeal the February 8, 2005, judgment of the Court of Appeals is again considered and, in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reasons stated in the dissenting opinion and reinstate the defendant's convictions and sentences. Court of Appeals No. 244903.

D'AGOSTINI v CLINTON GROVE CONDOMINIUM ASSOCIATION, No. 128438. In lieu of granting leave to appeal, we reverse the decision of the Court of Appeals and reinstate the judgment of the Macomb Circuit Court, for the reasons stated in the dissenting opinion. See *Kenny v Kaatz Funeral Home, Inc,* 472 Mich 929 (2005). Court of Appeals No. 250896.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v COUTURIER, No. 128717. In lieu of granting leave to appeal, we vacate the Court of Appeals judgment and remand this case to that Court for (1) consideration of whether, under the standard set forth in *People v Carines*, 460 Mich 750 (1999), for unpreserved constitutional error, the circuit court erred in limiting cross-examination of a witness regarding a note that she allegedly wrote, and (2) for consideration of issues previously raised by defendant but not addressed by the Court of Appeals. In all other respects, the application for leave to appeal and the application for leave to appeal as cross-appellant are denied. We do not retain jurisdiction. Court of Appeals No. 252175.

MCNAMARA v FARMER, No. 129283. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the order of the Luce Circuit Court. See *Girard v Wagenmaker*, 437 Mich 231 (1991); *Aichele v Hodge*, 259 Mich App 146 (2003). Court of Appeals No. 260575.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

In re DUBOV (PEOPLE v DUBOV), No. 129404. In lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We further order that the stay entered by this Court on September 2, 2005, remains in effect until completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Court of Appeals No. 264326.

Leave to Appeal Granted October 6, 2005:

CITY OF TAYLOR v THE DETROIT EDISON COMPANY, No. 127580. The parties shall address what powers the city has over utilities under its constitutional authority to exercise reasonable control over its streets, whether that authority invariably allows the city to shift the costs of relocation of utility equipment to the utility, and how the city's constitutional authority should be reconciled with the Michigan Public Service Commission's broad authority to regulate utilities. The motions for leave to file briefs amicus curiae are also considered, and they are granted. Reported below: 263 Mich App 551.

GRIMES v DEPARTMENT OF TRANSPORTATION, No. 127901; Court of Appeals No. 249558.

Leave to Appeal Denied October 6, 2005:

PEOPLE v ROZIER, No. 127813; Court of Appeals No. 250027.

CAVANAGH, WEAVER, and KELLY, JJ. We would remand this case to the Court of Appeals for further consideration.

SAMMUT v CITY OF BIRMINGHAM, No. 128031; Court of Appeals No. 250322.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

NUMERICK v KRULL, No. 128315; reported below: 265 Mich App 232.

CAVANAGH, J. I would grant leave to appeal.

MACLACHLAN v CITY OF LANSING, No. 128467; Court of Appeals No. 252221.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

ULRICH v DEPARTMENT OF TRANSPORTATION, No. 128767; Court of Appeals No. 252525.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal October 7, 2005:

PEOPLE v LEWIS, No. 127261. Pursuant to MCR 7.302(G)(1), we direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). We further order the Kent Circuit Court, in accordance with Administrative Order No. 2003-03, to determine whether the defendant is indigent and, if so, to appoint Peter J. Ellenson to represent the defendant at oral argument in this Court. The parties shall include among the issues to be addressed at oral argument the defense claim of ineffective assistance of counsel. The motion to remand remains under advisement. Court of Appeals No. 244589.

MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND v FARMINGTON INS AGENCY, LLC, No. 127834. Pursuant to MCR 7.302(G)(1), we direct the clerk 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 Farmington Insurance Agency owed a duty to Distel in relation to the certificate of insurance, where Farmington Insurance Agency did not send the certificate of insurance to Distel and otherwise had no contact with Distel. The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of arguments in application papers. Court of Appeals No. 249013.

MACLACHLAN v CAPITAL AREA TRANSPORTATION AUTHORITY, No. 128131. Pursuant to MCR 7.302(G)(1), we direct the clerk 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 the Court of Appeals erred in reversing the trial court's conclusion that defendant city of Lansing was entitled to summary disposition based on governmental immunity. The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of arguments in application papers. Court of Appeals No. 252221.

COOK v HARDY, No. 128333. Pursuant to MCR 7.302(G)(1), we direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of arguments in application papers. Court of Appeals No. 250727.

In re SPRENKLE-HILL ESTATE (HILL v FLINT), No. 128364. Pursuant to MCR 7.302(G)(1), we direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties may file supplemental briefs

within 28 days of the date of this order, but they should avoid submitting mere restatements of arguments in application papers. Reported below: 265 Mich App 254.

Summary Dispositions October 7, 2005:

WILSON v SINAI GRACE HOSPITAL, No. 126705. The application for leave to appeal was held in abeyance pending the decision in *Fisher v W A Foote Mem Hosp* (Docket No. 126333). An order denying the application for leave to appeal in *Fisher* having been issued on July 29, 2005, 473 Mich 888 (2005), the application is again considered. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the April 29, 2004, judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for dismissal of the complaint. The case is moot, given its specific facts, and the issue is not likely to recur yet evade judicial review, in light of the Medical Records Access Act, MCL 333.26261 *et seq*. Court of Appeals No. 243425.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PITSCH v BLANDFORD, No. 127057. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, reinstate plaintiff's cause of action, and remand this case to the Kent Circuit Court for further proceedings. Inasmuch as defendant could have waived his statute of limitations affirmative defense, MCR 2.111(F)(3), it does not appear to offend any established public policy for defendant to take a less drastic step of tolling a period of limitations by agreement. See *Rory v Continental Ins Co*, 473 Mich 457, 470-471 (2005). The parties' unambiguous agreement to toll the period of limitations is to be enforced as written. The Court of Appeals independent assessment of the "reasonableness" of the parties' tolling agreement was unwarranted. *Id*. at 470. Because defendant was not entitled to judgment as a matter of law, we also vacate the award of attorney fees. We do not retain jurisdiction. Reported below: 264 Mich App 28.

CAVANAGH, J. I would reverse the judgment of the Court of Appeals, reinstate plaintiff's cause of action, and remand this case to the Kent Circuit Court for further proceedings without the further statement found in the majority's order.

KELLY, J. I join the statement of Justice CAVANAGH.

Leave to Appeal Denied October 7, 2005:

PEOPLE v KEITH WILSON, No. 128017; Court of Appeals No. 257718.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v JAMAL ATKINS, No. 128039; Court of Appeals No. 259194.

KELLY, J. I would grant leave to appeal.

PEOPLE v KORTE, No. 128363; Court of Appeals No. 249660.

PEOPLE v HASSELBRING, No. 129304. The motion for immediate consideration is granted. Court of Appeals No. 257846.

CAVANAGH and KELLY, JJ. We would vacate the stay.

In re POSEY (FAMILY INDEPENDENCE AGENCY v POSEY), No. 129497; Court of Appeals No. 260532.

Leave to Appeal Denied October 12, 2005:

PEOPLE v HARRINGTON, No. 129652. The motion for immediate consideration is granted. The motion for a stay of proceedings is denied. Court of Appeals No. 265614.

Summary Disposition October 13, 2005:

GRAHAM v FLEX N GATE FORMING TECHNOLOGIES, INC, No. 128141. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Workers' Compensation Appellate Commission for consideration of the issue whether there was substantial evidence in support of the magistrate's finding that plaintiff's cervical condition is work-related—an issue that was raised by defendants in their brief to the commission, but was not addressed by that body. We do not retain jurisdiction. Court of Appeals No. 257482.

Leave to Appeal Denied October 13, 2005:

In re MARCHYOK ESTATE (MARCHYOK v CITY OF ANN ARBOR), No. 125900; reported below: 260 Mich App 684.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

WEST v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 127007. By order of April 26, 2005, the application for leave to appeal was held in abeyance pending the decision in *Rory v Continental Ins Co* (Docket No. 126747). On order of the Court, the opinion having been issued on July 28, 2005, 473 Mich 457 (2005), the application for leave to appeal the August 3, 2004, judgment of the Court of Appeals is again considered, and it is denied. Court of Appeals No. 251003.

CORRIGAN and MARKMAN, JJ. We would remand this case to the Court of Appeals for reconsideration in light of *Rory v Continental Ins Co*, 473 Mich 457 (2005), and *Devillers v Auto Club Ins Ass'n*, 473 Mich 562 (2005).

HARGREAVES v GENOA LODGING, LLC, No. 127343; Court of Appeals No. 249433.

LAFUENTE v CHERRY HILL LANES NORTH, No. 127750; Court of Appeals No. 249551.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

HELBER v CITY OF ANN ARBOR, ANDREWS v CITY OF ANN ARBOR, PALMER v CITY OF ANN ARBOR, and JACOBSEN v CITY OF ANN ARBOR, Nos. 127830-127833; Court of Appeals Nos. 247700-247703.

KELLY, J. I would grant leave to appeal.

BIERI v LINE INVESTMENTS, LLC, No. 127882; Court of Appeals No. 248410.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

FLORES v E C KORNEFFEL COMPANY, No. 127895; Court of Appeals No. 250042.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v MILTON, No. 127952; Court of Appeals No. 258447.

PEOPLE v BRUNAS, No. 127967; Court of Appeals No. 252926.

KELLY, J. I would remand this case to the Wayne Circuit Court for resentencing pursuant to *People v Babcock*, 469 Mich 247 (2003), and *People v Daniel*, 462 Mich 1, 7-8 (2000), and would direct that this case be reassigned to another judge for resentencing.

PEOPLE v SCHWEIGER, No. 127971; Court of Appeals No. 258873.

KELLY, J. I would remand this case to the Eaton Circuit Court for an evidentiary hearing.

WHITAKER v METRO INDUSTRIAL CONTRACTING, INC, No. 127998; Court of Appeals No. 256978.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v FLOOD, No. 128023; Court of Appeals No. 248157.

KELLY, J. I would vacate the Court of Appeals opinion and remand this case to the Court of Appeals for consideration and discussion of the issues in defendant's supplemental brief.

ARCHER-HALL v VARIETY FOOD SERVICES, INC, No. 128047; Court of Appeals No. 257740.

PEOPLE v ROSENBERG, No. 128099; Court of Appeals No. 251930.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

BURGIE v LILEIKIS, No. 128120; Court of Appeals No. 250666. CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal because I believe the Court of Appeals misconstrued *Robinson v Detroit*, 462 Mich 439 (2000), and failed to properly view the facts in the light most favorable to the plaintiff, as is required in summary disposition motions.

LYLE v DAIMLERCHRYSLER CORPORATION, No. 128130; Court of Appeals No. 257689.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

PEOPLE v PICKFORD, No. 128163; Court of Appeals No. 259512.

PEOPLE v SISTRUNK, No. 128183; Court of Appeals No. 249494.

PEOPLE v LARRY STONE, No. 128190; Court of Appeals No. 259153.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v ALMOND, No. 128212; Court of Appeals No. 250438.

PEOPLE v HEISER, No. 128236; Court of Appeals No. 258833.

PEOPLE v KINT, No. 128341. The motion to amend the application and the motion for miscellaneous relief are also denied. Court of Appeals No. 251147.

PEOPLE v KELLEZI, No. 128346; Court of Appeals No. 259103.

PEOPLE v CLIFFORD L LEWIS, JR, No. 128395; Court of Appeals No. 248953.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

GOODROW v DELPHI AUTOMOTIVE SYSTEMS CORPORATION, No. 128461; Court of Appeals No. 258342.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v ADRON FLOYD, No. 128698; Court of Appeals No. 261625.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal October 14, 2005:

NATIONAL WINE & SPIRITS, INC v STATE OF MICHIGAN, No. 126121. Pursuant to MCR 7.302(G)(1), we direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. The motion to strike is denied as moot. Court of Appeals No. 243524.

HEIKKILA v NORTH STAR TRUCKING, INC, Nos. 127780, 127823, 127836. Pursuant to MCR 7.302(G)(1), we direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument the questions whether plaintiff presented a genuine issue of material fact regarding: (1) the duty owed plaintiff's decedent by the slag contractor, the truck driver, and the truck owner, and (2) proximate causation regarding all defendants. The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 246761.

PEOPLE v JOEZELL WILLIAMS, II, Nos. 128294, 128533. Pursuant to MCR 7.302(G)(1), we direct the clerk to schedule oral argument on whether to grant the applications or take other peremptory action permitted by MCR

7.302(G)(1). We further order the Wayne Circuit Court to appoint Neil J. Leithauser to represent the defendant in this Court. The parties shall file supplemental briefs within 28 days of the date of this order, and are directed to include among the issues briefed: (1) whether *People v Bigelow*, 229 Mich App 218 (1998), was decided correctly, (2) whether, if the rule in *Bigelow* is followed, but the felony-murder conviction is reversed or vacated on appeal or in habeas proceedings, there are important real-world consequences that flow from the prior vacating of the predicate felony conviction underlying the subject felony-murder conviction, and (3) in particular, whether a previously vacated predicate felony conviction can be "revived" if the felony-murder conviction is reversed or vacated on appeal or in habeas proceedings. The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae on the issues stated above. Reported below: 265 Mich App 68.

JAMES v AUTO LAB DIAGNOSTICS & TUNE UP CENTERS, No. 128355. Pursuant to MCR 7.302(G)(1), we direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 257993.

Summary Dispositions October 14, 2005:

PERRY v FARM BUREAU INSURANCE COMPANY, No. 126183. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Genesee Circuit Court for entry of an order granting summary disposition in favor of defendant, pursuant to the holding in *Rory v Continental Ins Co*, 473 Mich 457 (2005). Court of Appeals No. 252208.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. I would grant leave to appeal to reconsider *Rory v Continental Ins Co*, 473 Mich 457 (2005).

KELLY, J. I join the statement of Justice WEAVER.

PEOPLE v NOVAK, No. 128223. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted of (1) whether defendant's use of a toy gun to commit the armed robbery is accounted for by the sentencing guidelines, MCL 777.31, (2) in any event, whether the facts of this case constitute substantial and compelling reasons to depart from the sentencing guidelines range, and (3) if so, whether the extent of the trial court's departure was justified by those reasons. See MCL 769.34(3); *People v Babcock*, 469 Mich 247 (2003). We do not retain jurisdiction. Court of Appeals No. 259543.

WEAVER, J. (*dissenting*). I dissent from the order remanding this case to the Court of Appeals for consideration as on leave granted. Applying the analysis of my partial dissent and partial concurrence in *People v Babcock,* 469 Mich 247, 280-284 (2003), I would deny leave. The trial

court satisfied the requirement for "a substantial and compelling reason" for its departure from the sentencing guidelines, and its decision did not venture beyond the range of principled outcomes under the circumstances.

Leave to Appeal Denied October 14, 2005:

HELLEBUYCK v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 126188; reported below: 262 Mich App 250.

CAVANAGH and WEAVER, JJ. We would grant leave to appeal.

KELLY, J. I would grant leave to appeal to reconsider *Rory v Continental Ins Co*, 473 Mich 457 (2005).

NELSKI v AMERITECH, No. 127211; Court of Appeals No. 244644.

MARKMAN, J. (*dissenting*). Plaintiff was a victim of identity theft. As a result, defendants reported false financial information on her credit report. Plaintiff brought this suit against defendants, alleging defamation. The trial court subsequently granted defendants' motion for summary disposition, concluding that this claim was preempted by the Fair Credit Reporting Act (FCRA), 15 USC 1681 *et seq*. The Court of Appeals reversed and remanded for further proceedings, concluding that plaintiff's defamation claim was not preempted and that plaintiff had sufficiently pleaded a cause of action. Judge WHITE concurred, concluding that it was unclear whether plaintiff could sustain a defamation action under the FCRA, i.e., whether plaintiff could prove that defendants acted with "malice or willful intent to injure . . . ." In a split decision, the Court of Appeals denied defendants' motion for reconsideration.

15 USC 1681h(e) provides:

> Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of *defamation*, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report[,] except as to false information furnished with *malice or willful intent to injure* such consumer. [Emphasis added.]

Plaintiff's complaint alleges that "Defendants acted in a libelous, slanderous and defamatory manner in terms of reporting and/or publishing false financial records" and that "Plaintiff was declined credit from two separate companies due to negligent reporting/publishing and/or willful and wanton disregard as to reporting/publishing by Defendants." Her complaint says nothing of "malice or willful intent to injure," and there appears to be utterly no evidence in support of such an allegation.

Therefore, plaintiff has not adequately pleaded a state cause of action pursuant to the FCRA. Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the trial court's order that granted defendants' motion for summary disposition.

SCOTT v ELECTRONIC DATA SYSTEMS CORPORATION, No. 127581; Court of Appeals No. 248458.

BIELAT v SOUTH MACOMB DISPOSAL AUTHORITY, No. 127667; Court of Appeals No. 249147.

PEOPLE v MCNALL, No. 127878; Court of Appeals No. 258226.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

MORRISON v MACOMB HOSPITAL CENTER, No. 128264; Court of Appeals No. 258341.

PEOPLE v MICHAEL BAILEY, No. 128342; Court of Appeals No. 251405.

PEOPLE v KONKUS, No. 128357. The motion for immediate consideration is granted. The motion for stay of proceedings is denied. Court of Appeals No. 260205.

KELLY, J. (*dissenting*). I would grant leave to appeal to consider the jurisprudentially significant issue raised here.

Defendant was arrested by a Farmington Hills police officer in another municipality. Generally, an officer acting outside his or her jurisdiction has only the authority of a private person. *People v Hamilton*, 465 Mich 526 (2002). The Legislature provided exceptions to this rule in MCL 764.2a(1), but none applies to this case.

For instance, the Farmington Hills officer was not chasing defendant when they left the officer's jurisdiction. The officer, who was following defendant, did not stop him until defendant committed a traffic infraction outside the officer's jurisdiction. Nor was the officer acting in conjunction with an officer from the other jurisdiction. Although one happened by during the stop, the Farmington Hills officer acted completely on his own.

Because the arrest was not authorized under MCL 764.2a(1), I believe that a significant question arises whether the evidence that the officer seized should have been suppressed. An average citizen does not have the authority to make an investigatory stop. If the officer could act only as a private citizen, he had no right to collect evidence.

I would grant leave for a full discussion of this issue.

PEOPLE v DANIEL HENRY, No. 128360; Court of Appeals No. 250165.

In re BRITT (FAMILY INDEPENDENCE AGENCY v BILBREY), No. 129524; Court of Appeals No. 260216.

In re MILES (FAMILY INDEPENDENCE AGENCY v BRINTLEY), No. 129591; Court of Appeals No. 260212.

Leave to Appeal Granted October 19, 2005:

FORD MOTOR COMPANY v CITY OF WOODHAVEN, Nos. 127422-127424; Court of Appeals Nos. 246378, 246379, 246579.

COWLES v BANK WEST, No. 127564; reported below: 263 Mich App 213.

REED v BRETON and KUENNER v BRETON, Nos. 127703, 127704; reported below: 264 Mich App 363.

CAVANAGH, J., did not participate.

COBLENTZ v CITY OF NOVI, No. 127715; reported below: 264 Mich App 450.

GREENE v A P PRODUCTS, LTD, Nos. 127718, 127734. Among the issues to be briefed, the parties are specifically directed to address the following: (1) whether the Court of Appeals erred in using a subjective, rather than an objective, standard in its analysis of the open and obvious doctrine, (2) whether the Court of Appeals erred in concluding that the product at issue was not a "simple" product, (3) whether the Court of Appeals erred in failing to recognize plaintiff as a sophisticated user as defined by MCL 600.2945(j), and (4) whether aspiration of this product is a foreseeable misuse, and whether the material risk of the misuse is or should be obvious to a reasonably prudent product user. Persons or groups interested in the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 264 Mich App 391.

PEOPLE v ANSTEY, No. 128368. The parties are directed to include among the issues to be briefed: (1) whether dismissal is the proper remedy for the denial of an independent chemical test in violation of MCL 257.625a(6)(d); and (2) whether this Court's decision in *People v Koval*, 371 Mich 453 (1963), was correctly decided. Court of Appeals No. 255416.

PEOPLE v PEALS, No. 128376; Court of Appeals No. 251406.

PEOPLE v DERROR, No. 129269. The motion to add an issue is granted. The application for leave to appeal is granted, limited to the issues whether carboxy THC is a schedule 1 controlled substance within the meaning of MCL 257.625(8) and whether, in a prosecution under MCL 257.625(4), (5), and (8), the prosecutor must prove beyond a reasonable doubt that defendant knew the ingestion of the controlled substance may cause intoxication. In all other respects, the application is denied. The application for leave to appeal as cross-appellant is denied. The motion for stay is denied as moot, in light of the trial court already having granted a stay. The clerk of the Court is directed to place this case on the January 2006 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than November 30, 2005, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than December 28, 2005. We further order that this case be argued and submitted to the Court together with the case of *People v Kurts* (Docket No. 129364). Reported below: 268 Mich App ___.

PEOPLE v KURTS, No. 129364. The clerk of the Court is directed to place this case on the January 2006 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than November 30, 2005, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than December 28, 2005. We further order that this case be argued and submitted to the Court together with the case of *People v Derror* (Docket No. 129269). Reported below: 268 Mich App 67.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal October 19, 2005:

PINE OAKS, LLC v DEVRIES, No. 127856. Pursuant to MCR 7.302(G)(l), we direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(l). The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. The Real Property Law Section of the State Bar of Michigan is invited to file a brief amicus curiae on the questions presented. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 249163.

Summary Dispositions October 19, 2005:

PEOPLE v HAWORTH, No. 128038. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence imposed by the Grand Traverse Circuit Court and remand this case to that court for reconsideration in light of *People v Hendrick*, 472 Mich 555 (2005). Court of Appeals No. 259064.

PEOPLE v LAWSON, No. 128359. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals, and we remand this case to the Court of Appeals for it to further consider whether the constitutional error in this case was harmless beyond a reasonable doubt. The Court of Appeals shall make its determination in a manner consistent with the process of assessment described in *People v Shepherd*, 472 Mich 343, 347-348 (2005), and *People v Mateo*, 453 Mich 203, 215 (1996). In all other respects the application is denied. We do not retain jurisdiction. Court of Appeals No. 251331.

WEAVER, J. I would deny leave to appeal.

Leave to Appeal Denied October 19, 2005:

PEOPLE v DAVID DANIELS, No. 126940; Court of Appeals No. 247558.

CORRIGAN, J. (*dissenting*). I continue to adhere to the views set forth in my dissenting statement in *People v Curvan*, 473 Mich 896, 897 (2005).

NOYCE v THOMPSON-MCCULLY COMPANY, No. 127089; Court of Appeals No. 247927.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

CITY COUNCIL FOR CITY OF DETROIT v MAYOR OF THE CITY OF DETROIT, No. 127442; Court of Appeals No. 248724.

WEAVER and CORRIGAN, JJ. We would grant leave to appeal to consider Judge BANDSTRA's dissent.

VERIZON NORTH, INC v PUBLIC SERVICE COMMISSION, No. 127590; reported below: 263 Mich App 567.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v BAUGH, No. 127611; Court of Appeals No. 247548.

MCNAMARA v HORNER, No. 127888. This denial is without prejudice to the parties' right to file a proper motion with the trial court to seek clarification or enforcement of its prior orders. Court of Appeals No. 256763.

PEOPLE v EDWARD BELL, No. 127981. Though we conclude in this case that the reinstruction of the jury in counsel's presence cured the prejudice presumed to result from substantive communications with the jury in counsel's absence, *People v France*, 436 Mich 138, 143 (1990), the trial court is reminded to adhere to MCR 6.414(A) in the future. Court of Appeals No. 247714.

REAM v BURKE ASPHALT PAVING, No. 128196; Court of Appeals No. 238824 (on remand).

PEOPLE v GARVIN, No. 128339; Court of Appeals No. 249864.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PATENGE v ESTATE OF KNIGHT, No. 128375; Court of Appeals No. 238893 (on remand).

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v LEWANDOWSKI, No. 128452. The motion for appointment of appellate counsel in this Court is denied because defendant is not entitled to appointed counsel in a second-tier appeal. *Ross v Moffitt*, 417 US 600, 610-612, 615-618 (1974); *Halbert v Michigan*, 545 US __, ___, ___ & n 2, ___; 125 S Ct 2582, 2587-2588, 2590 & n 2, 2592; 162 L Ed 2d 552, 560-562, 564 & n 2, 565-566 (2005). Court of Appeals No. 259102.

CAVANAGH and KELLY, JJ. We would deny leave to appeal without the further statement found in the majority's order.

HALE v BORGESS MEDICAL CENTER, No. 128478; Court of Appeals No. 258386.

PEOPLE v WINGATE, No. 128772; Court of Appeals No. 249617.

PEOPLE v KEITH L CLARK, JR, No. 128839; Court of Appeals No. 249618.

PEOPLE v NEWBY, No. 128883; Court of Appeals No. 253766.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

CIARAMITARO v AAA MICHIGAN, No. 128963. Court of Appeals No. 261904.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

Summary Dispositions October 20, 2005:

HELVIE v HIDDEMA, No. 127968. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the trial court for entry of a judgment of no cause of action for the reasons stated in the Court of Appeals dissent. We do not retain jurisdiction. Court of Appeals No. 250417.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v MICHIELUTTI, No. 128902. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and remand this case to the Macomb Circuit Court for entry of the original sentence. The Court of Appeals erred when it held that the March 1, 2003, amendments of MCL 333.7401 of the controlled substances act constitute a substantial and compelling reason to depart below the mandatory minimum sentences imposed by the former version of the act. The Court of Appeals also erred when it held that resentencing is required whenever a sentencing court fails to address on the record each factor articulated by a defendant as constituting a substantial and compelling reason for departure. MCL 769.34(10). In all other respects, the application for leave to appeal and the application for leave to appeal as cross-appellant are denied. Reported below: 266 Mich App 223.

CAVANAGH, J. I would deny leave to appeal.

CORRIGAN, J. (*concurring in part and dissenting in part*). I concur with the partial reversal of the judgment of the Court of Appeals as set forth in the lead order. I would, however, remand this case to the sentencing court for a determination whether defendant's case presents substantial and compelling reasons to depart below the mandatory minimum in accordance with *People v Fields*, 448 Mich 58, 62, 77-79 (1995). I reject as legally erroneous the sentencing court's statement that a defendant's cooperation must be successful "such that the criminal enterprise is diminished" in order for a defendant to benefit.

At the time of defendant's sentencing, MCL 333.7401(4) stated that a "court may depart from the minimum term of imprisonment . . . if the court finds on the record that there are substantial and compelling reasons to do so." In *People v Clark*, 185 Mich App 127, 133 (1990), the Court of Appeals held that a defendant's cooperation with law enforcement may, in some circumstances, be so "substantial and compelling" as to warrant a sentence below the statutory minimum. It noted that the extent of the defendant's cooperation must be objective and verifiable. *Id.* The *Clark* case did not include any criterion regarding the success or failure of the defendant's cooperation. In *People v Stewart*, 472 Mich 624, 633 (2005), this Court held that a defendant who has provided to law

enforcement information that was found to be neither useful nor relevant can be considered to have cooperated with law enforcement if that defendant never had any relevant or useful information to provide. We construed explicit statutory language in so doing. But we also noted that "cooperate" is defined as " 'to work together; 1) to act or work together with one another or others for a common purpose.' " *Id.* at 636, quoting *Webster's New World Dictionary, Second College Edition*. We further noted that "cooperation would include conduct such as participating in a controlled drug buy or a sting operation, or engaging in some other conduct to work with law enforcement toward a common goal." *Stewart, supra* at 636. Nothing in the definition of cooperation includes "success" as an element.

I believe the question whether a defendant's efforts at cooperation must actually succeed in affecting the criminal enterprise presents a pure question of law. Sentencing courts should operate according to a uniform standard, not varying viewpoints, in this regard. A defendant should not be denied the benefit of his cooperation because the cooperation yielded no fruits. For example, a cooperative defendant might agree to go undercover in an attempt to purchase narcotics. The defendant's efforts, however, do not diminish the criminal enterprise if the drug dealer becomes nervous and decides not to make the sale. The drug dealer's behavior should not affect whether the defendant may benefit from his cooperative efforts. A defendant takes a risk in participating in undercover operations. He thus should be permitted to benefit from his cooperation if it is objective and verifiable. In *People v Atkins*, 397 Mich 163, 173 (1976), this Court stated that "[i]t would be atypical if an addict-informer did not have an expectation of consideration for his cooperation in a given case. The well of informer cooperation would soon run dry if law enforcement consistently adhered to a policy of no consideration." Likewise, if trial courts ignore cooperative efforts because those efforts are ultimately unsuccessful, defendants may become reluctant to cooperate with law enforcement. Moreover, if courts "exercise their discretion" to require that cooperation must succeed, some cooperating defendants may be incentivized to fabricate information to make a stronger case for the prosecution.

For the above reasons, I would vacate defendant's sentence and remand to the trial court for resentencing.

KELLY, J. (*dissenting*). I would deny leave to appeal. I believe that the Court of Appeals reached the correct conclusion in this case. Contrary to the majority's characterization, the Court of Appeals did not require the sentencing court to address each factor articulated by defendant. It merely stated that the sentencing court should make an adequate record to support meaningful review, especially regarding factors that have been deemed substantial and compelling in the past.

I also agree with Justice CORRIGAN that we should view cooperation with law enforcement more favorably. A defendant often runs considerable risk in making attempts to cooperate. Therefore, a defendant should not be denied the benefit of that cooperation just because it did not produce the desired results.

Finally, I would affirm the Court of Appeals holding regarding the effect of ameliorative changes made by the Legislature to MCL 333.7401. The fact that certain mandatory minimum sentences were eliminated could constitute an objective and verifiable reason to depart downward from the guidelines' minimum sentence in some cases. The decision should be left to the discretion of the trial court.

Leave to Appeal Denied October 20, 2005:

YOUSIF V MONA, No. 126594; Court of Appeals No. 246680 (on remand).

MARKMAN, J. (*dissenting).* While at defendant's—her brother's—home, plaintiff tripped on a loose carpet thread loop and injured herself. As a result, she brought this action against defendant. The trial court subsequently granted summary disposition in favor of defendant, and the Court of Appeals reversed, concluding that genuine issues of fact existed. This Court remanded to the Court of Appeals for it to articulate these genuine issues of fact. I dissented, indicating that I would reverse the judgment of the Court of Appeals and reinstate the order of the trial court.

On remand, the Court of Appeals majority held that genuine issues of fact existed regarding "whether the carpet loop at issue represented an unreasonable risk of harm about which defendant had a duty to warn plaintiff." The Court of Appeals dissent concluded that "plaintiff has failed to show that defendant should have realized that the carpet pull in question presented an unreasonable risk of harm requiring a warning by defendant to his guests."

I agree with the dissent and would reverse the Court of Appeals judgment and reinstate the order of the trial court for the reasons previously set forth in my dissenting statement, 472 Mich 900 (2005):

> Because a loose carpet thread loop is not a "hidden danger," *James v Alberts*, 464 Mich 12, 19 (2001), and because a homeowner does not owe an obligation to an invitee to scour his or her premises to ensure that there are no loose carpet thread loops in his or her home, I do not believe that any "unreasonable risk of harm" was posed to the plaintiff. *Preston v Sleziak,* 383 Mich 442, 453 (1970), overruled on other grounds by *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591 (2000). A host "has no duty to reconstruct his premises . . . for those accepting his hospitality. The guest assumes ordinary risks that come with the premises." *Stitt*, *supra* at 603. A loose carpet thread loop is an ordinary risk in a carpeted home, and a homeowner has no duty to rid his or her home of every loose carpet thread loop before inviting another for a visit. Social guests are licensees who "assume the ordinary risks associated with their visit." *James, supra* at 19.
>
> As in *Barrett v Discount Tire & Battery* [472 Mich 902 (2005)], the Court of Appeals here lost sight of the fact that legal decisions are designed to increase the predictability and certainty of every-

day life. Such decisions have practical consequences. What is the appropriate response to the Court of Appeals decision on the part of a reasonable homeowner in Michigan (at least one who happens to have a rug or carpet somewhere within his or her premises) who wishes to avoid litigation? Must he or she remove all rugs and carpets from the premises? Must he or she inspect each rug or carpet loop by loop in order to determine whether any are loose or of an excessive diameter? Must he or she apprise visitors while they are on the front porch that there is carpeting within the home and that a guest enters at the guest's own risk? Will a sign warning of the possibility of errant carpet loops be sufficient? Will Berber, but not Persian, rugs and carpets subject homeowners to heightened liability? The Court of Appeals decision would expose homeowners to the risk of litigation for accidents arising from the most mundane, the most open and obvious, conditions of the ordinary home, conditions regarding which there has been no unreasonable conduct at all on the part of the homeowners.

What is the rule of personal conduct and obligation that the Court of Appeals would impose upon homeowners by its decision in this case?

YOUNG, J. I join the statement of Justice MARKMAN.

ENSINK v MECOSTA COUNTY GENERAL HOSPITAL, No. 126882. The applications for leave to appeal as cross-appellant are denied. Reported below: 262 Mich App 518.

CAVANAGH, KELLY, and MARKMAN, JJ. We would grant leave to appeal.

KLEIN v KIK, No. 127911; reported below: 264 Mich App 682.

CAVANAGH, KELLY, and MARKMAN, JJ. We would grant leave to appeal.

REINHARDT v DIOCESE OF LANSING, No. 128474; Court of Appeals No. 257912.

WEAVER, J. I would grant leave to appeal.

KELLY, J. (*dissenting*). Because the Court of Appeals decision is based on its decision in *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632 (2004), and because I believe *Doe* was wrongly decided, I would reverse the Court of Appeals decision in this case. The trial court's denial of summary disposition for defendant should be affirmed.

DOE v ROMAN CATHOLIC ARCHBISHOP OF THE ARCHDIOCESE OF DETROIT, No. 128475; reported below: 264 Mich App 632.

WEAVER, J. I would grant leave to appeal.

KELLY, J. (*dissenting*). I agree with the dissenting opinion of Court of Appeals Judge HAROLD HOOD. The limitations periods applicable to this claim may be tolled under MCL 600.5855 if the identity of another tortfeasor, the defendant, is fraudulently concealed, which is what

plaintiff alleges occurred here. The decision of the Court of Appeals should be reversed and the trial court's denial of summary disposition for defendant affirmed.

LOPEZ v WORKERS' COMPENSATION APPELLATE COMMISSION, No. 129653. The motion for immediate consideration is granted. Court of Appeals No. 263842.

KELLY, J. I would grant leave to appeal.

MARKMAN, J. (*dissenting*). I would grant leave to appeal in this case for the reasons stated in my dissent in *Sanchez v Eagle Alloy, Inc,* 471 Mich 851 (2004). I am not yet persuaded that the Legislature intended illegal aliens to be entitled to workers' compensation benefits.

Summary Disposition October 26, 2005:

PHOENIX INVESTMENT HOLDING COMPANY, INC v NOSAN & SILVERMAN HOMES, LLC, No. 126561. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals and reinstate in part the May 7, 2002, order of the Oakland Circuit Court, as to plaintiffs' count II. The circuit court properly dismissed count II because the liquidated damages provision also applied to nonmonetary default, such as the failure to enter into excavation contracts. We remand this case to the Oakland Circuit Court for further proceedings consistent with this order and the nonvacated portion of the Court of Appeals judgment. Court of Appeals No. 246398.

Leave to Appeal Granted October 27, 2005:

ANTRIM COUNTY TREASURER v STATE OF MICHIGAN, No. 127212. The parties are directed to include among the issues briefed: (1) whether the state defendants have standing to prosecute this appeal, and (2) whether a lessee of mineral rights who has leased the rights from the surface estate owner is (a) entitled to notice in foreclosure proceedings under the General Property Tax Act, MCL 211.78k(5)(e), or (b) has a "severed" mineral interest that is unaffected by foreclosure proceedings involving the surface estate. The motion to file an amicus curiae brief is granted. We invite amicus briefing from interested persons and organizations, including the Real Property Law Section of the State Bar of Michigan and the Michigan Oil and Gas Association. Reported below: 263 Mich App 474.

WEAVER, J. I concur in the order granting leave to appeal, but write separately because it appears unnecessary to include among the issues to be briefed the question whether the state of Michigan, defendant-appellant, has standing to pursue this appeal.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal October 27, 2005:

PITTS v BEAM, No. 128374. Pursuant to MCR 7.302(G)(1), we direct the Clerk to schedule oral argument on whether to grant the application or

take other peremptory action permitted by MCR 7.302(G)(1). The parties are directed to file supplemental briefs, within 28 days of the date of this order, which shall address whether the allegation in plaintiff's October 16, 2002, Complaint for Paternity that "the Defendant was not married at the time of conception [of the minor child], nor at the time of the birth of the minor child," constitutes fraud on the court within the meaning of MCR 2.612(C)(2), and whether this issue was abandoned by defendant on appeal to the Court of Appeals. The parties should avoid submitting mere restatements of the arguments made in their application papers. We invite the Family Law Section of the State Bar of Michigan to file an amicus curiae brief on this issue. Court of Appeals No. 260426.

Application Dismissed October 31, 2005:

DOCKETT v KRAMER ENERTAINMENT AGENCY, INC, No. 128404. Appellant having filed a motion to dismiss the pending application and having represented that appellee does not oppose the relief sought, the motion is considered and it is granted. The application and appellee's pending motion to correct judgment are dismissed with prejudice and without costs. Court of Appeals No. 252463.

Summary Dispositions October 31, 2005:

PEOPLE v RIDER, No. 128890. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Jackson Circuit Court, which has already appointed appellate counsel by order of August 11, 2005, for further proceedings. Appointed counsel may file an application for leave to appeal with the Court of Appeals, and/or any appropriate postconviction motions in the trial court, within 12 months of the date of the Jackson Circuit Court's order appointing counsel. Counsel may include among the issues raised, but is not required to include, those issues raised by defendant in his application for leave to appeal to this Court. In all other respects, leave to appeal is denied. We do not retain jurisdiction. Court of Appeals No. 260336.

PEOPLE v NERO, No. 129098. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Kent Circuit Court for a determination whether defendant is indigent and, if so, for the appointment of appellate counsel within 56 days of this order in light of *Halbert v Michigan*, 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Appointed counsel may file an application for leave to appeal with the Court of Appeals, and/or any appropriate postconviction motions in the trial court, within 12 months of the date of this order, in accordance with the deadlines in effect at the time defendant was denied counsel. MCR 7.205(F)(3), MCR 6.311, and MCR 6.429. Counsel may, but is not required to, include those issues defendant raised in his application for leave to appeal to this Court. In all other respects, leave to appeal is denied. We do not retain jurisdiction. Court of Appeals No. 259954.

Leave to Appeal Denied October 31, 2005:

PEOPLE v HOLLIDAY, No. 126701; Court of Appeals No. 246265.

PEOPLE v MAKIDON, No. 126759. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motions to remand for evidentiary hearings and for appointment of counsel are denied. Court of Appeals No. 253774.

PEOPLE v BUCKLAND, No. 127586; Court of Appeals No. 251534.

PEOPLE v MICHAEL JAMES, No. 127633. The motion for peremptory reversal is denied. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 258254.

PEOPLE v MARC KING, No. 127756. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for appointment of counsel is also denied. Court of Appeals No. 256406.

PEOPLE v VILLAREAL, No. 127781. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is also denied. Court of Appeals No. 256769.

PEOPLE v JEFFREY SHAW, No. 127791. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256155.

PEOPLE v WORTINGER, No. 127793. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is also denied. Court of Appeals No. 256347.

WRIGHT v DAIMLERCHRYSLER CORPORATION, No. 127798; Court of Appeals No. 249408.

PEOPLE v PURIFOY, No. 127799. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255486.

PEOPLE v ROPER, No. 127803. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257721.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v CALHOUN, No. 127808. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257114.

PEOPLE v BRYAN ROGERS, No. 127814. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255078.

PEOPLE v MEARL JONES, No. 127838. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 256770.

PEOPLE v COLVIN, No. 127841. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256074.

PEOPLE v GEORGE KNIGHT, No. 127850. The motion to add issue and motion to supplement ineffective assistance of counsel claim are granted. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256830.

PEOPLE v NATHAN REID, No. 127851. The motion to add new ground for appeal is granted. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258187.

PEOPLE v DOUGLAS WOODARD, No. 127923. The motions for miscellaneous relief are denied. Court of Appeals No. 247182.

PEOPLE v FULBRIGHT, No. 127948. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motions for stay, for immediate consideration, and to remand for an evidentiary hearing are denied. Court of Appeals No. 257258.

PEOPLE v RICHARD NIXON, No. 127966. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256248.

PEOPLE v MYERS, No. 127972. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255687.

PEOPLE v NIJAI FLOYD, No. 127975. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254665.

PEOPLE v BIGBY, No. 127977. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand to the trial court for an evidentiary hearing is denied. Court of Appeals No. 255102.

VILLAGE OF NEWBERRY v MCMILLAN TOWNSHIP, No. 127979; Court of Appeals No. 252052.

PEOPLE v FOX, No. 127982. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255024.

PEOPLE v CHIAPPINI, No. 127984. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). The motion to expand argument is denied. Court of Appeals No. 259952.

KELLY, J. I would grant the motion to expand argument and hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v CREAR, No. 127988. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256113.

PEOPLE v DOWDY, No. 127995. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is denied. Court of Appeals No. 255527.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v OWENS, No. 127996. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 256795.

HAQUE v WILLIAM BEAUMONT HOSPITAL, No. 128015. The application for leave to appeal as cross-appellant is denied. Court of Appeals No. 250128.

PEOPLE v POREMBA, No. 128016. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257002.

PEOPLE v STANLEY, No. 128021. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 260056.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v JAJO, No. 128022; Court of Appeals No. 259569.

PEOPLE v MICHAEL B WILLIAMS, No. 128024. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258835.

PEOPLE v TERRANCE POWELL, No. 128048. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258612.

PEOPLE v MACLAM, No. 128057. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256045.

FLORES v ATOFINA CHEMICALS, INC, No. 128064; Court of Appeals No. 249988.

PEOPLE v CLAYTON MILLER, No. 128067. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258659.

PEOPLE v PRINCE, No. 128069. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257176.

PEOPLE v TERRANCE BROWN, No. 128079. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256972.

PEOPLE v RIDGEWAY, No. 128091. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255217.

PEOPLE v MICHAEL HARRIS, Nos. 128092, 128093. Defendant's motions for peremptory reversal and for remand for an evidentiary hearing are denied. Court of Appeals Nos. 248247, 253337.

PEOPLE v MCCLOUD, No. 128094. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257006.

PEOPLE v JOHN O'DONNELL, No. 128096. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 259310.

PEOPLE v PAUL A MONROE, No. 128097; Court of Appeals No. 259615.

PEOPLE v WREGGLESWORTH, No. 128098. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 259785.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v LANCE EVANS, No. 128103. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255347.

PEOPLE v RYAN FREEMAN, No. 128105; Court of Appeals No. 258590.

PEOPLE v BAHODA, No. 128106. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255925.

PEOPLE v LODRICK PARKER, No. 128111. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255674.

PEOPLE v WILLIE JEFFRIES, No. 128140. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 258514.

PEOPLE v BUNKLEY, No. 128171. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is also denied. Court of Appeals No. 255118.

PEOPLE v MAN LEWIS, JR, No. 128172. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 259267.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v WOOD, No. 128175; Court of Appeals No. 259045.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

DIETRICH & ASSOCIATES v ROGERS, No. 128179; Court of Appeals No. 250702.

PEOPLE v CLAUDIA FORD, No. 128184; Court of Appeals No. 259127.

PEOPLE v WARREN DAWSON, No. 128191. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 259348.

PEOPLE v THERIOT, No. 128198; Court of Appeals No. 246023.

PEOPLE v JOSEPH K WHITE, III, No. 128213. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258638.

PEOPLE v LAMAR CAMPBELL, No. 128216. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). The motion for bond is also denied. Court of Appeals No. 260444.

PEOPLE v BLAIR, No. 128220; Court of Appeals No. 259040.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v JEFFERY SMITH, No. 128233; Court of Appeals No. 259726.

PEOPLE v RUSSELL RICHARDS, No. 128245; Court of Appeals No. 258216.

PEOPLE v MOFFETT, No. 128246; Court of Appeals No. 258490.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v GARRETT, No. 128259; Court of Appeals No. 260352.

PEOPLE v MICHAEL ANDERSON, No. 128261; Court of Appeals No. 258307.

PEOPLE v SOTO, No. 128262. The Court of Appeals did not clearly err by dismissing defendant's application for leave to appeal. Because defendant failed to file the application for leave to appeal within 12 months of the date of the entry for the September 30, 2002, order as required by MCR 6.509(A) and MCR 7.205(F)(3), the Court of Appeals properly dismissed the application. Court of Appeals No. 260896.

FLOYD v DEPARTMENT OF CORRECTIONS, No. 128300. The motion for immediate consideration and the motion for bail are also denied. Court of Appeals No. 259517.

PEOPLE v MICHAEL R WILLIAMS, No. 128305; Court of Appeals No. 256903.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v CHANDLER, No. 128310; Court of Appeals No. 250745.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v BECK, No. 128312; Court of Appeals No. 260175.

PEOPLE v BARRY, No. 128314; Court of Appeals No. 259035.

PEOPLE v PHILLIP JONES, No. 128319. The motion for immediate consideration is granted. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). The motion for bond and the motion to remand are also denied. Court of Appeals No. 261181.

PEOPLE v BURTON, No. 128326; Court of Appeals No. 259398.

PEOPLE v RUSHELL, No. 128328; Court of Appeals No. 246022.

PEOPLE v WASNICH, No. 128337; Court of Appeals No. 259771.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v TONY BERRY, No. 128344; Court of Appeals No. 249430.

PEOPLE v MIDDLETON, No. 128347; Court of Appeals No. 251587.

PEOPLE v MICHELLE MILLER, No. 128369; Court of Appeals No. 255752.

PEOPLE v JENSEN, No. 128371; Court of Appeals No. 251590.

PEOPLE v TERRANCE THOMAS, No. 128372; Court of Appeals No. 250323.

PEOPLE v DYER, No. 128383; Court of Appeals No. 252305.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v CHANIKA MOORE, No. 128387; Court of Appeals No. 252304.

PEOPLE v MCNALLY, No. 128390; Court of Appeals No. 252849.

PEOPLE v JESSE JONES, No. 128396. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 258965.

PEOPLE v CHRISTOPHER JAMES, No. 128398; Court of Appeals No. 259673.

PEOPLE v FAIR, No. 128405; Court of Appeals No. 250325.

PEOPLE v CORBETT, No. 128409. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 260383.

PEOPLE v MASON, No. 128410; Court of Appeals No. 251513.

REGAL PACKING, INC v STATE TAX COMMISSION, No. 128418; Court of Appeals No. 258156.

PEOPLE v LINCOLN, No. 128419; Court of Appeals No. 249838.

PEOPLE v MARIO RICHARDSON, No. 128423; Court of Appeals No. 258354.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v TIBBS, No. 128425. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 260611.

PEOPLE v WINGFIELD, No. 128435; Court of Appeals No. 251353.

GORA v MACOMB CIRCUIT JUDGE, No. 128436; Court of Appeals No. 260232.

In re MCCORMICK ESTATE (BRAVERMAN v MCCORMICK), No. 128443; Court of Appeals No. 250361.

GILLEYLEN v HARRINGTON, No. 128481. The motion for appointment of counsel is denied. Court of Appeals No. 260010.

BURDA BROTHERS, INC v WAYNE COUNTY PROSECUTOR, No. 128482; Court of Appeals No. 250487.

PEOPLE v DOUGLAS, No. 128485; Court of Appeals No. 258660.

PEOPLE v ELLIS L ROBINSON, JR, No. 128490; Court of Appeals No. 248098.

PEOPLE v ARANCIBIA-LOPEZ, No. 128492; Court of Appeals No. 261210.
KELLY, J. I would grant leave to appeal.

PEOPLE v RUECKERT, No. 128496; Court of Appeals No. 250829.
KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v WETHINGTON, No. 128497; Court of Appeals No. 258639.
KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v DEVON JAMES, No. 128498; Court of Appeals No. 251719.

PEOPLE v MARTIN STEWART, No. 128499; Court of Appeals No. 259876.

PEOPLE v CURTIS CLARK, No. 128500. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258175.

PEOPLE v HANNA, No. 128502. Defendant's motion for stay of proceedings is denied. Court of Appeals No. 252363.

PEOPLE v ANTHONY WARD, No. 128505; Court of Appeals No. 251407.

PEOPLE v GRESEHOVER, No. 128506; Court of Appeals No. 251457.

PEOPLE v POWERS, No. 128507; Court of Appeals No. 259727.

PEOPLE v MAYBERRY, No. 128508; Court of Appeals No. 242186.

PEOPLE v WYNN, No. 128509; Court of Appeals No. 251350.

PEOPLE v MICHALAK, No. 128517; Court of Appeals No. 259575.

RUTHERFORD v LEDUC, No. 128522. The motion to admit pro hac vice is granted. Court of Appeals No. 260391.

PEOPLE v MONTES, No. 128523; Court of Appeals No. 223539.
KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v BRIAN GREEN, No. 128525; Court of Appeals No. 260174.

PEOPLE v KURILIK, No. 128526. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257253.

PEOPLE v KELLEY, No. 128527; Court of Appeals No. 259248.

PEOPLE v BOLEN, No. 128528; Court of Appeals No. 252514.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v MACON, No. 128529. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for stay of proceedings is denied. Court of Appeals No. 257609.

PEOPLE v ASKEW, No. 128531; Court of Appeals No. 249835.

PEOPLE v COSTIEL, No. 128532. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is denied. Court of Appeals No. 258613.

PEOPLE v STOKES, No. 128534. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is denied. Court of Appeals No. 258406.

PEOPLE v BARKER, No. 128535; Court of Appeals No. 253403.

PEOPLE v LOUKAS, No. 128536; Court of Appeals No. 258045.

PEOPLE v OMAR WALKER, No. 128538; Court of Appeals No. 251354.

PEOPLE v DORMEL JACKSON, No. 128539; Court of Appeals No. 249615.

NORTHERN MICHIGAN TITLE CO OF ANTRIM-CHARLEVOIX v BARLETT, No. 128542; Court of Appeals No. 248751.

PEOPLE v JUAN WALKER, No. 128543; Court of Appeals No. 239711.

MAY v MCN OIL & GAS COMPANY, No. 128545; Court of Appeals No. 251769.

PEOPLE v ARMENDAREZ, No. 128546. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257064.

PEOPLE v WESTBERG, No. 128548. The motion to remand is denied. Court of Appeals No. 250334.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v LOWERY, No. 128549. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The miscellaneous motion is denied. Court of Appeals No. 258589.

PEOPLE v LINDAHL, No. 128550; Court of Appeals No. 251170.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v MICHAEL EMERY, No. 128551; Court of Appeals No. 251973.

PEOPLE v CORBIN, No. 128555; Court of Appeals No. 258717.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v TIMOTHY CARTER, No. 128557; Court of Appeals No. 250937.

KENNEDY v FRANKWOOD MANAGEMENT CO, INC, No. 128558. The motion to enlarge the record on appeal is denied. Court of Appeals No. 251565.

PEOPLE v MARK RICHARDSON, No. 128559. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258892.

PEOPLE v FISHER, No. 128562. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 258988.

PEOPLE v JEFFREY ARTHUR, No. 128563; Court of Appeals No. 258836.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v FREDDIE WILLIAMS, No. 128564; Court of Appeals No. 253299.

PEOPLE v MICHAEL BROWN, No. 128565; Court of Appeals No. 251712.

PEOPLE v SPENCER, No. 128567; Court of Appeals No. 252594.

PEOPLE v ELDER, No. 128574; Court of Appeals No. 248287.

PEOPLE v ROSALES, No. 128575; Court of Appeals No. 258716.

PEOPLE v JACK CRAWFORD, No. 128576. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257491.

PEOPLE v TYRONE BROWN, No. 128578; Court of Appeals No. 250916.

PEOPLE v FRAZIER, No. 128581. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257760.

PEOPLE v ADRIAN HAMILTON, No. 128583. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261421.

PEOPLE v KEVIN THOMAS, No. 128588. The defendant's motion to remand is denied. Court of Appeals No. 252596.

PEOPLE v ANDREW SIMS, No. 128593; Court of Appeals No. 259653.

PEOPLE v BELLMAN, No. 128594; Court of Appeals No. 250930.

PEOPLE v NANCY KING, No. 128595. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256623.

PEOPLE v TALLMAN, No. 128596; Court of Appeals No. 259470.

PEOPLE v PATRICK GRAY, No. 128598. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257954.

KINCHLOE v DEPARTMENT OF CORRECTIONS, No. 128600; Court of Appeals No. 261206.

WRIGHT v HURLEY MEDICAL CENTER, No. 128603; Court of Appeals No. 258723.

PEOPLE v JUSTIN PERROU, No. 128607. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255856.

PEOPLE v RONALD E JONES, II, No. 128608; Court of Appeals No. 259882.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v RICHARD, No. 128609; Court of Appeals No. 251330.

PEOPLE v PROCTOR, No. 128613. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258217.

PEOPLE v T J ROBINSON, III, No. 128615; Court of Appeals No. 251810.

PEOPLE v CHRISTOPHER JOHNSON, No. 128616; Court of Appeals No. 253796.

PEOPLE v WAYNE WILSON, JR, No. 128619. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 261247.

PEOPLE v MEEK, No. 128628; Court of Appeals No. 259425.

PEOPLE v CURL, No. 128630; Court of Appeals No. 251652.

PEOPLE v ERNEST NEAL, JR, No. 128631. The motion to add issue is granted. The motion to remand is denied. Court of Appeals No. 250296.

PEOPLE v ELLIOTT, No. 128632; Court of Appeals No. 251741.

PEOPLE v HINTON, No. 128633; Court of Appeals No. 252544.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v JACK COOPER, No. 128642; Court of Appeals No. 251531.

PEOPLE v BLACK, No. 128644; Court of Appeals No. 259694.

PEOPLE v BOBBY WILLIAMS, No. 128645; Court of Appeals No. 253123.

PEOPLE v ANTHONY COOPER, No. 128650; Court of Appeals No. 250583.

PEOPLE v ERNEST ALLEN, No. 128660; Court of Appeals No. 252547.

PEOPLE v ARTHUR JONES, No. 128661; Court of Appeals No. 251877.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v KRUEGER, No. 128665; Court of Appeals No. 260555.

VARGAS v KAYDON CORPORATION, No. 128668; Court of Appeals No. 259645.

PEOPLE v CRUZ, No. 128671; Court of Appeals No. 252311.

PEOPLE v WALTERS, No. 128673. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257924.

PEOPLE v RICHARD LEWIS, No. 128675; Court of Appeals No. 251880.

PEOPLE v GARRISON, No. 128679; Court of Appeals No. 260569.

RUSH v MGM GRAND DETROIT, LLC, No. 128682; Court of Appeals No. 248861.

PEOPLE v GILL, No. 128686; Court of Appeals No. 261009.

CANYON CONSTRUCTION, INC v STEPHENS, No. 128692; Court of Appeals No. 259208.

PEOPLE v RIGGINS, No. 128695; Court of Appeals No. 251453.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v FREY, No. 128706; Court of Appeals No. 259958.

PEOPLE v CHARMEL ALLEN, No. 128707. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 260888.

PEOPLE v KINT, No. 128716. The motion to amend the application is granted. Court of Appeals No. 259670.

HARRIS v DAIMLERCHRYSLER CORPORATION, No. 128718; Court of Appeals No. 259415.

PEOPLE v SCHARR, No. 128720; Court of Appeals No. 259036.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v COOLEY, No. 128723; Court of Appeals No. 253688.

JENKS v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 128725; Court of Appeals No. 251522.

PEOPLE v AYERS, No. 128726; Court of Appeals No. 261007.

PEOPLE v PANOUSOPOULOS, No. 128729; Court of Appeals No. 257430.

PEOPLE v STRAHAN, Nos. 128739, 128981; Court of Appeals Nos. 261148, 262089.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v IVAN HAWKINS, No. 128743; Court of Appeals No. 253395.

PEOPLE v VELEZ, No. 128746; Court of Appeals No. 255581.

BROOKS v MONROE CIRCUIT JUDGE, No. 128750; Court of Appeals No. 261177.

PEOPLE v JUAREZ, No. 128751; Court of Appeals No. 253751.

OSTRANDER v OSTRANDER, No. 128752; Court of Appeals No. 250883.

PEOPLE v RICHARD BROWN, No. 128761; Court of Appeals No. 258733.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v MCPHAIL, No. 128762; Court of Appeals No. 259055.

CRANBROOK PROFESSIONAL BUILDING, LLC v POURCHO, No. 128763; Court of Appeals No. 251422.

PEOPLE v STOCKMAN, No. 128764; Court of Appeals No. 251711.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v TEKESTE, No. 128783; Court of Appeals No. 260354.

PEOPLE v CHARLES LEWIS, No. 128785; Court of Appeals No. 259422.

PEOPLE v DERRICK COLEMAN, No. 128799; Court of Appeals No. 259516.

PEOPLE v RODERICOL MURPHY, No. 128800; Court of Appeals No. 251975.

PEOPLE v PELTON, No. 128808; Court of Appeals No. 260027.

PEOPLE v HORONZY, No. 128809; Court of Appeals No. 253747.

PEOPLE v WREN, No. 128812; Court of Appeals No. 260684.

PEOPLE v KEVIN THOMPSON, No. 128813; Court of Appeals No. 260691.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v PIERCE, No. 128815. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257398.

KELLY, J., did not participate.

PEOPLE v WIMBLEY, No. 128817; Court of Appeals No. 252983.

PEOPLE v ISAAC, No. 128819; Court of Appeals No. 252306.

PEOPLE v DWAYNE GIBSON, No. 128823; Court of Appeals No. 259577.

PEOPLE v SUMMERS, No. 128824; Court of Appeals No. 259613.

PEOPLE v LOCKETT, No. 128831; Court of Appeals No. 249831.

PEOPLE v CACCAMO, No. 128833; Court of Appeals No. 255336.

PEOPLE v ORLANDO GLOVER, No. 128834; Court of Appeals No. 251874.

PEOPLE v LAWRENCE EVANS, No. 128835. The motion for appointment of counsel is denied. Court of Appeals No. 260930.

PEOPLE v CLARK WILLIAMS, No. 128836; Court of Appeals No. 248911.
KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v TERRY MCCALL, No. 128837; Court of Appeals No. 260608.

PEOPLE v MULLINS, No. 128838; Court of Appeals No. 253617.

PEOPLE v ELROD, No. 128840; Court of Appeals No. 260607.

PEOPLE v MINGO, No. 128851; Court of Appeals No. 261424.

PEOPLE v MICHAEL PARKS, No. 128866; Court of Appeals No. 251808.
KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v MORRIS, No. 128885; Court of Appeals No. 260345.
KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v HONSINGER, No. 128904; Court of Appeals No. 261109.

PEOPLE v HOFFMAN, No. 128914; Court of Appeals No. 252513.

PEOPLE v BRITT, No. 128917; Court of Appeals No. 252314.

PEOPLE v LOVEJOY, No. 128923; Court of Appeals No. 252860.

PEOPLE v EDGHILL, No. 128927; Court of Appeals No. 261527.

PEOPLE v BALL, No. 128929; Court of Appeals No. 261106.

PEOPLE v BOHNARD, No. 128935; Court of Appeals No. 261166.

PEOPLE v HNATIUK, No. 128943; Court of Appeals No. 261208.

PEOPLE v FORRIS, No. 128944; Court of Appeals No. 261608.

PEOPLE v DEANDRE CARTER, No. 128956; Court of Appeals No. 253942.

PEOPLE v GARY PETERS, No. 128958. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 262060.

PEOPLE v JAMES HILL, Nos. 128960, 128961. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals Nos. 259800, 259801.

PEOPLE v OAKIE, No. 128962; Court of Appeals No. 259796.

PEOPLE v CANNIZZARO, No. 128965; Court of Appeals No. 260234.

PEOPLE v LESELIE MCDONALD, No. 128966; Court of Appeals No. 254124.

PEOPLE v KEVIN CAMPBELL, No. 128970; Court of Appeals No. 249886.

PEOPLE v WALTER, No. 128972; Court of Appeals No. 260143.

PEOPLE v GALVIN, No. 128974; Court of Appeals No. 253406.

PEOPLE v SHIRLEY HAYWOOD, No. 128976; Court of Appeals No. 261016.

PEOPLE v MATTHISEN, No. 128977; Court of Appeals No. 253295.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v WARLAW-BROWN, No. 128983; Court of Appeals No. 252374.

PEOPLE v COZELL BERRY, No. 128984. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 262192.

PEOPLE v ANTHONY NEAL, No. 128985. The motion to amend or supplement and to remand is denied. Court of Appeals No. 252098.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v TORREY BROWN, No. 128986; Court of Appeals No. 252103.

PEOPLE v BANK, No. 128987; Court of Appeals No. 252182.

PEOPLE v FERNSEMER, No. 128988; Court of Appeals No. 250770.

PEOPLE v SWAIZER, No. 128989; Court of Appeals No. 253443.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v KEISHA JACKSON, No. 128990; Court of Appeals No. 260526.

PEOPLE v FULTZ, No. 128991; Court of Appeals No. 261286.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v KOKOWICZ, No. 128997, 128999; Court of Appeals No. 253180, 251746.

PEOPLE v GALLAGHER, No. 129001; Court of Appeals No. 262194.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v TERRANCE WILLIAMS, No. 129005; Court of Appeals No. 254907.

PEOPLE v ETHERIDGE, No. 129006; Court of Appeals No. 254866.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v ROLAND, No. 129009; Court of Appeals No. 251608.

PEOPLE v SIESLING, No. 129010; Court of Appeals No. 254484.

PEOPLE v NORWOOD, No. 129011; Court of Appeals No. 259427.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v CRUTCHER, No. 129013; Court of Appeals No. 250609.

PEOPLE v PURNELL, No. 129014; Court of Appeals No. 261815.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v DARRICK SMITH, No. 129015; Court of Appeals No. 261287.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v LAPLAUNT, No. 129024; Court of Appeals No. 261172.

PEOPLE v DEREK NASH, No. 129026; Court of Appeals No. 254862.

PEOPLE v DUNLAP, No. 129027. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). The motion to expand the record is denied. Court of Appeals No. 262643.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v TAYLOR, Nos. 129028, 129029; Court of Appeals Nos. 254888, 254889.

PEOPLE v PRYOR, No. 129036; Court of Appeals No. 248093.

PEOPLE v LOPEZ, No. 129045. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259502.

DUTHLER v DUTHLER, No. 129046; Court of Appeals No. 242317.

PEOPLE v SHUFORD, No. 129048; Court of Appeals No. 261361.

PEOPLE v TERRANCE HARDIN, No. 129051; Court of Appeals No. 252878.

PEOPLE v BRUCE, No. 129058; Court of Appeals No. 260427.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v LEDESMA, No. 129060. The motion to amend the application for leave to appeal is denied. Court of Appeals No. 260509.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v LESTER L RICHARDS, JR, No. 129061; Court of Appeals No. 261762.

PEOPLE v KUKICH, No. 129063; Court of Appeals No. 252981.

PEOPLE v SHEARS, No. 129064; Court of Appeals No. 252396.

PEOPLE v WILLIS WILLIAMS, No. 129076; Court of Appeals No. 251317.

PEOPLE v ROBBIE WHITE, Nos. 129079, 129081; Court of Appeals Nos. 261812, 261813.

PEOPLE v JANES, No. 129089; Court of Appeals No. 253610.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v KENNETH TRAMMELL, No. 129095; Court of Appeals No. 259793.

PEOPLE v ROBBIN JOHNSON, No. 129096; Court of Appeals No. 260443.

PEOPLE v PESQUERA, No. 129097. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259199.

OSWORTH v BARNES GROUP, INC, No. 129100; Court of Appeals No. 260254.

PEOPLE v MOZA, No. 129101; Court of Appeals No. 261260.

PEOPLE v DARELL BARNES, No. 129107; Court of Appeals No. 254100.

PEOPLE v PEOPLES, No. 129111; Court of Appeals No. 262897.

PEOPLE v CASSADIME, No. 129116; Court of Appeals No. 260752.

PEOPLE v RICKY HOGAN, No. 129117; Court of Appeals No. 260709.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v TIMOTHY JOHNSON, No. 129140; Court of Appeals No. 259311.

PEOPLE v ANTHONY WALKER, No. 129142; Court of Appeals No. 252785.

PEOPLE v DOMINIQUE WARD, No. 129145; Court of Appeals No. 262253.

PEOPLE v SKOVER, No. 129148. The motion for immediate consideration is granted. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260619.

PEOPLE v ADAMS, No. 129159; Court of Appeals No. 252723.

PEOPLE v HAYES, No. 129169; Court of Appeals No. 260251.

PEOPLE v SANTIAGO SMITH, No. 129171; Court of Appeals No. 252551.

PEOPLE v HILTON, No. 129181; Court of Appeals No. 254002.

PEOPLE v JOY JOHNSON, No. 129187; Court of Appeals No. 252721.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v CAIN, No. 129189; Court of Appeals No. 252599.

PEOPLE v ELLIS, No. 129193; Court of Appeals No. 252368.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v JAMES TERRY, No. 129205; Court of Appeals No. 252554.

PEOPLE v HAMIN DIXON, No. 129211; Court of Appeals No. 252559.

PEOPLE v ELBERT SCOTT, No. 129216; Court of Appeals No. 251512.

PEOPLE v THOMAS YOUNG, No. 129235; Court of Appeals No. 261674.

PEOPLE v JAMES MONTGOMERY, No. 129236; Court of Appeals No. 254529.

PEOPLE v GONZALEZ, No. 129244; Court of Appeals No. 254942.

PEOPLE v DOMINOWSKI, No. 129245; Court of Appeals No. 253118.

ROBRAHN v JOHNSON, No. 129466. The motion for immediate consideration is granted. Court of Appeals No. 256083.

CAVANAGH, J., did not participate.

Interlocutory Appeal

Leave to Appeal Denied October 31, 2005:

PEOPLE v STARKS, No. 128842; Court of Appeals No. 261249.

Reconsideration Denied October 31, 2005:

JACOBS v ATTORNEY GRIEVANCE COMMISSION, No. 127272.

ABE v MICHIGAN STATE UNIVERSITY, No. 127545. Leave to appeal denied at 473 Mich 881. Court of Appeals No. 256365.

PEOPLE v VENDEVILLE, No. 127671. Leave to appeal denied at 472 Mich 943. Court of Appeals No. 248161.

Summary Dispositions November 2, 2005:

NEWMAN EQUITIES v MERIDIAN TOWNSHIP, No. 127533. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals opinion but affirm the result on alternative grounds. Contrary to the view expressed by the Court of Appeals majority, the court may not consider whether there is a "legitimate difference of opinion" regarding the reasonableness of two zoning schemes. Instead, the court must determine that the zoning approved by the referendum is unreasonable.

See, e.g., *Kropf v Sterling Hts*, 391 Mich 139, 156-157 (1974). Reported below: 264 Mich App 215.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

WILLIAMS v FAIRLANE MEMORIAL CONVALESCENT HOME, No. 127775. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We do not retain jurisdiction. Court of Appeals No. 256976.

S & M MACHINERY, INC v PARAVIS INDUSTRIES, INC, No. 128373. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We direct that Court to consider both the procedural and substantive aspects of the case. We do not retain jurisdiction. Court of Appeals No. 258309.

Leave to Appeal Denied November 2, 2005:

DICKSHOTT v ANGELOCCI, No. 127104; Court of Appeals No. 241722.

KELLY, J. I would remand this case to the Oakland Circuit Court for further proceedings.

PEOPLE v MOTTEN, No. 127420; Court of Appeals No. 246417.

PEOPLE v WAGNER, No. 127544; Court of Appeals No. 245091.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

STIGLMAIER v DETROIT ENTERTAINMENT, LLC and STOLMAN v DETROIT ENTERTAINMENT, LLC, Nos. 127566, 127567; Court of Appeals Nos. 246465, 246466.

KELLY, J. I would grant leave to appeal.

MIMS v POLICE OFFICER HINES, No. 127624; Court of Appeals No. 256645.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v ENGELBERT, No. 127646; Court of Appeals No. 257133.

KELLY, J. I would remand this case for resentencing.

PEOPLE v REICHERT, No. 127844. The issue raised in the application is moot. Court of Appeals No. 257654.

PEOPLE v BECHTOL, No. 127863. The motion to remand for an evidentiary hearing is also denied, without prejudice to defendant's right to seek postappeal relief pursuant to MCR 6.500. Court of Appeals No. 246345.

PEOPLE v LESLEY, No. 127879; Court of Appeals No. 249417.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v MOSES, No. 128006; Court of Appeals No. 249781.

KUPER v METROPOLITAN HOSPITAL, No. 128029; Court of Appeals No. 250952.

CAVANAGH, KELLY, and MARKMAN, JJ. We would grant leave to appeal.

NARTRON CORPORATION v GENERAL MOTORS CORPORATION, No. 128044. The application for leave to appeal as cross-appellant is denied. The motion for peremptory reversal is denied as moot. Court of Appeals No. 245942.

MAKKI v FARMERS INSURANCE EXCHANGE, No. 128049; Court of Appeals No. 249547.

KELLY, J. I would reverse the decision of the Court of Appeals and remand the case to the trial court.

THOMPSON v STATE EMPLOYEES' RETIREMENT SYSTEM, No. 128100; Court of Appeals No. 255251.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

JACKSON-RABON v STATE EMPLOYEES' RETIREMENT SYSTEM, No. 128108; reported below: 266 Mich App 118.

In re PETITION FOR PROPERTY TAX EXEMPTION (T C SPANN BIBLE INSTITUTE v CITY OF WESTLAND), No. 128135; Court of Appeals No. 257034.

GOWER v HARKEMA, Nos. 128158, 128159, 128602; Court of Appeals Nos. 256824, 257967, 257970.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v LANGSTON ROGERS, No. 128224; Court of Appeals No. 250509.

KELLY, J. I would remand this case to the Court of Appeals for reconsideration in light of *People v Russell*, 471 Mich 182 (2004).

PEOPLE v HULON, No. 128468; Court of Appeals No. 247489 (on remand).

LOMAX v DELTA TUBE & FABRICATING CORPORATION, No. 128476; Court of Appeals No. 258744.

Reconsideration Denied November 2, 2005:

WYATT v OAKWOOD HOSPITAL, Nos. 128276, 128288, 128301. Remanded for consideration by the Court of Appeals at 472 Mich 929. Court of Appeals No. 258235, 258237, 258241.

CAVANAGH and KELLY, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

Leave to Appeal Granted November 3, 2005:

VAN TIL v ENVIRONMENTAL RESOURCES MANAGEMENT, INC, No. 128283. The parties shall include among the issues briefed whether the trial court had jurisdiction to determine whether plaintiff was an employee, or whether that question must first be resolved in the workers' compensation adjudicatory system. See *Reed v Yackell*, 473 Mich 520, 542 (2005) (CORRIGAN, J., dissenting). We further order that this case be argued and submitted to the Court together with the case of *Jacobs v Technidisc, Inc* (Docket No. 128715), at such future session of the Court as both cases are ready for submission. The Michigan Trial Lawyers Association, Michigan Defense Trial Counsel, Inc., the Workers' Compensation Law Section of

the State Bar of Michigan, and other interested parties are invited to file amicus briefs. Court of Appeals No. 250539.

JACOBS V TECHNIDISC, INC, No. 128715. The parties shall include among the issues briefed: (1) whether the trial court has jurisdiction to determine at what rate workers' compensation benefits shall be paid, see *Reed v Yackell*, 473 Mich 520, 542 (2005) (CORRIGAN, J., dissenting); (2) whether the December 8, 1993, consent judgment constituted a determination of the workers' compensation benefit rate and the obligation to pay the benefit; (3) if so, whether the trial court had the jurisdiction to issue such a judgment; and (4) whether a trial court judgment in a third-party action is subject to modification when an employee's entitlement to workers' compensation under the compensation act changes. We further order that this case be argued and submitted to the Court together with the case of *VanTil v Environmental Resources Mgt, Inc* (Docket No. 128283), at such future session of the Court as both cases are ready for submission. The Michigan Trial Lawyers Association, Michigan Defense Trial Counsel, Inc., the Workers' Compensation Law Section of the State Bar of Michigan, and other interested parties are invited to file amicus briefs. Court of Appeals No. 258271.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal November 3, 2005:

GORE V FLAGSTAR BANK, FSB, No. 127669. Pursuant to MCR 7.302(G)(1), we direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 248919.

Summary Dispositions November 3, 2005:

DEAN V CHILDS, No. 126393. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, for the reasons stated by dissenting Court of Appeals Judge GRIFFIN, we reverse in part the Court of Appeals judgment and remand this case to the Oakland Circuit Court for entry of an order granting defendant Childs's motion for summary disposition of plaintiff's state law claims. We do not retain jurisdiction. Reported below: 262 Mich App 48.

CAVANAGH, J. I dissent from this Court's peremptory reversal order and would grant leave to appeal.

KELLY, J. I would grant leave to appeal.

HUBBARD V NATIONAL RAILROAD PASSENGER CORPORATION, No. 127240. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment that reverses the Wayne Circuit Court's grant of defendant's motion for summary dispo-

sition on plaintiff's Federal Employers' Liability Act claim, for the reasons stated by dissenting Court of Appeals Judge ZAHRA. We reinstate the order of the Wayne Circuit Court granting defendant's motion for summary disposition. Court of Appeals No. 246165.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE v BLACKSTON, No. 129397. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to that court for reconsideration of the issue whether the trial court's error, if any, in excluding the statements in question was harmless beyond a reasonable doubt. The court should fully evaluate the harmless error question by considering the volume of untainted evidence in support of the jury verdict, not just whether the declarants were effectively impeached with other inconsistent statements at the first trial. If the court concludes that the error was harmless, it should consider defendant's remaining allegations of error. We do not retain jurisdiction. Court of Appeals No. 245099.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

Leave to Appeal Denied November 3, 2005:

GRAND TRUNK WESTERN RAILROAD, INC v AUTO WAREHOUSING COMPANY, No. 126609; reported below: 262 Mich App 345.

CORRIGAN and MARKMAN, JJ. We would reverse in part the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for further proceedings consistent with Court of Appeals Judge WILDER's dissent.

GRADY v CARAMAGNO FOODS COMPANY, No. 128089; Court of Appeals No. 256920.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

In re WELSH (DEPARTMENT OF HUMAN SERVICES v WELSH), No. 129734; Court of Appeals No. 261123.

Reconsideration Denied November 3, 2005:

DEPARTMENT OF CIVIL RIGHTS *ex rel* BURNSIDE v FASHION BUG OF DETROIT, No. 126254. Reversed and remanded to the Wayne Circuit Court for entry of judgment in favor of defendant at 473 Mich 863. Court of Appeals No. 240325.

CAVANAGH, J. (*dissenting*). I would grant reconsideration. On reconsideration, I would deny leave to appeal for the reasons stated in my dissent to the order reversing the judgment of the Court of Appeals.

WEAVER J. (*dissenting*). I would grant reconsideration. On reconsideration, I would deny leave to appeal for the reasons stated in my dissent to the order reversing the judgment of the Court of Appeals in this case. 473 Mich 863, 874 (2005) (WEAVER, J. dissenting).

KELLY, J. (*dissenting*). I would grant reconsideration. On reconsideration, I would deny leave to appeal for the reasons stated in my dissent of July 21, 2005.

CARPENTER v SIMONIAN, No. 126966. Leave to appeal denied at 472 Mich 893. Court of Appeals No. 247258.

MARKMAN, J. (*concurring*). Notwithstanding plaintiff's invocation of the "rigorously literal" interpretative philosophy of this Court in support of his effort to obtain relief, I reject this characterization and reaffirm my own position that it is not the duty of the judge to construe the language of the law "literally" or "flexibly," "broadly" or "narrowly," "liberally" or "conservatively," but merely "reasonably." In pursuit of a "reasonable" interpretation, I agree with the Court of Appeals that MCL 436.1801(2) does not permit dramshop liability to be imposed upon a business that sells alcohol to a minor who subsequently furnishes that alcohol to another minor, who then injures someone. To impose such liability is to give insufficient meaning, in my judgment, to the Legislature's use of "directly" in this provision.

FARMERS INSURANCE EXCHANGE v BAILER, No. 127559. Leave to appeal denied at 473 Mich 861. Court of Appeals No. 248179.

MARKMAN, J. I would grant the motion for reconsideration and, on reconsideration, would reverse on the basis that the umbrella insurance policy at issue unambiguously excludes the insured's resident-relatives from coverage.

Summary Dispositions November 9, 2005:

PEOPLE v CALLOWAY, No. 128115. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court with directions to consider and decide defendant's motion for testing of biological material pursuant to MCL 770.16, which was filed with defendant's motion for relief from judgment. While the Wayne Circuit Court ruled upon the latter motion, it failed to rule upon the motion for testing of biological material. We do not retain jurisdiction. Court of Appeals No. 256096.

HILL v CITY OF WARREN, No. 128511. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Among the issues to be considered, the Court of Appeals shall consider whether *Pohutski v City of Allen Park*, 465 Mich 675 (2002), affects the class certification issue in this case. *Pohutski* held that § 7 of the governmental tort liability act, MCL 691.1407, does not permit a trespass-nuisance exception to governmental immunity, but ruled that this holding would be applied only to cases brought on or after April 2, 2002. In light of *Pohutski,* are issues relating to putative plaintiffs unnamed as of April 2, 2002, sufficiently disparate from issues relating to plaintiffs who were named as of April 2, 2002, to the extent that certification of a single class containing both groups of plaintiffs would be inappropriate under MCR 3.501(A)(1)? We do not retain jurisdiction. Court of Appeals No. 259706.

KELLY, J. I would deny leave to appeal.

PEOPLE v CHAABAN, No. 128516. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment with regard to defendant Chaaban and remand this case to the Wayne Circuit Court for a new trial. In *Faretta v California*, 422 US 806, 807 (1975), the United States Supreme Court held that a defendant "has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so." The trial court erroneously denied defendant's unequivocal request to represent himself in violation of *Faretta*. See *People v Russell*, 471 Mich 182 (2004). Court of Appeals No. 253513.

WARD v ROONEY-GANDY, No. 128586. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the order of the Jackson Circuit Court dismissing plaintiff's complaint with prejudice for the reasons stated in the Court of Appeals dissent. Reported below: 265 Mich App 515.

KELLY, J. I would deny leave to appeal.

PASSARO v TAGLIA, FETTE, DUMKE & WHITE, PC, No. 128641. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 257553.

MORGAN v LAROY, No. 128769. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the judgment of the Kalamazoo Circuit Court, for the reasons stated by the Kalamazoo Circuit Court. See *Kenny v Kaatz Funeral Home, Inc,* 472 Mich 929 (2005). Court of Appeals No. 253789.

CAVANAGH, J. I would deny leave to appeal

KELLY, J. I would grant leave to appeal.

PEOPLE v WELSH, No. 129209. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the issue whether defendant's third-degree criminal sexual conduct convictions are supported by sufficient evidence in light of *People v Carlson*, 466 Mich 130, 140 (2002), and the applicable statutory text that requires "force or coercion." MCL 750.520d(1)(b) and MCL 750.520b(1)(f)(i)-(v). In all other respects, leave to appeal is denied. We do not retain jurisdiction. Court of Appeals No. 252561.

Leave to Appeal Denied November 9, 2005:

FISH v MICROSOFT CORPORATION, No. 126928. The motion to file a reply brief is granted. Court of Appeals No. 255491.

WEAVER and KELLY, JJ. We would grant leave to appeal.

PEOPLE v KENNETH KOCHER, II, No. 128008; Court of Appeals No. 246413.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

CHAHBAZI v CHAHBAZI, No. 128429; Court of Appeals No. 259047.

JEFFERS v DORIES, No. 128437; Court of Appeals No. 250199.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

EDWARDS v JOHNSON, No. 128544; Court of Appeals No. 251158.

CAVANAGH, J. I would reverse the judgment of the Court of Appeals by order.

KELLY, J. I would grant leave to appeal.

PEOPLE v RONALD JACKSON, No. 128778; Court of Appeals No. 254640.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v RICKMAN, No. 128818; Court of Appeals No. 259346.

KELLY, J. I would remand this case to the Court of Appeals for consideration as on leave granted, of defendant's claim that he is entitled to withdraw his guilty plea because his plea bargain was illusory. MCR 6.311(C).

PEOPLE v CLEOTIS JONES, JR, No. 129082; Court of Appeals No. 252850.

PEOPLE v PRIELIPP, No. 129208; Court of Appeals No. 261754.

KELLY, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal November 10, 2005:

WIATER v GREAT LAKES RECOVERY CENTERS, INC, No. 128139. Pursuant to MCR 7.302(G)(1), we direct the clerk 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 this danger was open and obvious, (2) which party has the burden to prove that a special aspect exists, and (3) whether defendant's failure to undertake measures to diminish the alleged risk itself constituted a "special aspect" under *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516 (2001). The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 250384.

PEOPLE v PIPES and PEOPLE v KEY, Nos. 129152, 129154. Pursuant to MCR 7.302(G)(1), we direct the clerk to schedule oral argument on whether to grant the applications 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 the offers of proof by defendant Key and by defendant Pipes that they were going to testify constitutes a waiver of the right to claim a confrontation error. The parties may file supplemental briefs within 28 days of the date of this

order, but they should avoid submitting mere restatements of the arguments made in their application papers. We note that attorney Jonathan B.D. Simon is presently representing defendant Key in this Court. We direct attorney Daniel J. Rust, who represented defendant Pipes in the Court of Appeals, to represent defendant in this Court pursuant to MCR 6.425(F)(1)(c)(iv). Court of Appeals Nos. 247718, 247719.

Summary Dispositions November 10, 2005:

STOKAN v HURON COUNTY, Nos. 126706, 126707. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reasons stated in the dissenting opinion in the Court of Appeals, and we remand this case to the Huron Circuit Court for entry of judgment in favor of defendant and for reconsideration of the mediation sanctions issue. Court of Appeals Nos. 242645, 243489.

KELLY, J. (*dissenting*). Plaintiff, a former Huron County sheriff, qualified for retirement benefits from the defendant county. But the county refused to provide him retirement health care benefits because he was not actively under the county's health care plan on the date that he retired.

Eligibility for retirement health care benefits is set forth in the county's Resolution 23-83. Both the trial court and the Court of Appeals majority found that the resolution entitled plaintiff to health care benefits upon retirement. I agree.

Plaintiff was a Huron County elected official when Resolution 23-83 took effect. The resolution was enacted as an incentive for him and other county employees to forgo salary increases. Under it, a county employee becomes eligible for the county's health care benefits once the county has employed him or her the requisite number of years. However, the benefits are not available until an employee retires.

The majority on this Court reads the resolution to grant health care benefits only to those retirees who were actively in the health care plan at the time of their retirement. But the resolution does not clearly state that retirees like plaintiff who were not county employees at the time of retirement are ineligible for health care benefits upon retirement.

This Court should not read into Resolution 23-83 an intent to strip plaintiff and other retirees who are similarly situated of their health care benefits. Like current employees who are retiring, they took reduced salaries in return for the promise of health care benefits upon retirement. Resolution 23-83 can and should be read to provide them their promised health care benefits.

In re FORFEITURE OF BAIL BONDS (PEOPLE v GREGORY MOORE), Nos. 127699, 127700, 127701, 127702. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals Nos. 257871, 259048, 259049, 259050.

MARKMAN, J. (*concurring*). I concur in the decision to remand this case to the Court of Appeals for consideration as on leave granted. I write

separately only to offer additional guidance to that Court.

MCL 765.28(1) was amended on April 1, 2003, and provides, in pertinent part:

> After the default is entered, the court . . . *shall* give each surety immediate notice not to exceed 7 days after the date of the failure to appear. The notice shall be served upon each surety in person or left at the surety's last known business address. [Emphasis added.]

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 (2005). Here, defendant Shepard failed to appear for sentencing on September 9, 2003. Thus, the mandatory language of the amended statute applied to his case. Yet the trial court did not provide notice to the surety until March 16, 2004—well after the required seven-day notice period had elapsed. The trial court reduced the amount to be forfeited from $20,000 (the original amount of the bond) to $18,400 as a proportional reduction in response to its delay.

On remand, the Court of Appeals should consider the statute, and whether the trial court's decision to simply reduce the amount forfeited under the bond fully comports with the requirements of the statute.

Leave to Appeal Denied November 10, 2005:

DAYMON v FUHRMAN, No. 127425; Court of Appeals No. 249007.

TAYLOR, C.J. (*dissenting*). I would grant leave to appeal to consider Judge MURRAY's conclusion in his dissent that piercing the corporate veil was improper where plaintiffs failed to prove a causal link between any wrong committed by defendant and the plaintiffs' injury.

CORRIGAN, J. (*dissenting*). I would grant leave to appeal to consider Judge MURRAY's dissent.

Defendant was the president and sole stockholder of E-Z Living Homes, Inc., a company that was in the business of selling manufactured or mobile homes. E-Z Living became insolvent and ceased operations in April 1998. At that time, defendant took control of the corporation's remaining assets. E-Z Living was not formally dissolved until 2000.

In June 1998, plaintiffs sued E-Z Living, alleging that the manufactured home that they had purchased in 1996 was defective. Plaintiffs obtained a default judgment in October 1998. Plaintiffs were unable to collect on the judgment because of the corporation's insolvency. In December 2000, plaintiffs brought this suit to pierce the corporate veil and hold defendant personally liable for the judgment.

Following trial, the trial court held that it was appropriate to pierce the corporate veil because defendant had used the corporation as his "alter ego" by using it to pay his personal bills over a long period without shareholder loans or corporate record documentation. The court further found that defendant's " 'flexible' approach to the corporation's distinct existence had the foreseeable effect of perpetrating a wrong resulting in unjust loss" to plaintiffs.

The Court of Appeals majority, explaining that "cases involving the piercing of a corporate veil are fact intensive and often hinge on the equities of the case," held that the trial court did not err in finding that the corporate veil should be pierced on these facts.

I disagree with the conclusion of the Court of Appeals majority. The majority's decision hinged on a purely equitable standard. Judge MURRAY's dissent pointed out that the corporate veil should not have been pierced because plaintiffs failed to prove a causal link between any wrong committed by defendant and the injury caused to plaintiffs.

In *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457 (1996), the Court of Appeals offered the following standard for piercing the corporate veil:

> " 'First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff.' " [*Id.*, quoting *SCD Chemical Distributors, Inc v Medley,* 203 Mich App 374, 381 (1994) (citation omitted).]

Judge MURRAY persuasively argued that the second and third prongs of this test were not met because there is no evidence that defendant used the corporate entity to commit a wrong that caused an unjust injury or loss to plaintiffs. First, defendant ceased business operations in April 1998, but plaintiffs did not sue defendant until June 1998, nor did plaintiffs obtain the default judgment against E-Z Living until October 1998. There is no evidence that defendant had ceased operations to avoid paying the default judgment. The corporation's insolvency was the reason plaintiffs could not collect on their default judgment.

Further, the corporation's insolvency apparently did not spring from any wrong committed by defendant, but from an accounting error three years earlier that inflated the corporation's accounts receivable. Even if defendant acted improperly, it is undisputed that plaintiffs would not have been able to collect on the default judgment in light of all the secured creditors with priority over plaintiffs. Thus, plaintiffs' injuries did not result from defendant's improper use of the corporate form.

Finally, this case presents a jurisprudentially significant problem. This Court has never adopted clear standards for determining when the corporate veil should be pierced. The most recent comprehensive discussion of piercing a corporate veil appeared in Foodland Distributors, supra. In that case, the Court of Appeals stated that "[t]here is no single rule delineating when the corporate entity may be disregarded." *Foodland Distributors, supra* at 456. Nonetheless, the Court adopted a three-pronged standard for piercing the corporate veil. Id. at 457. This standard has been followed in a number of other Court of Appeals cases involving piercing a corporate veil. It has never been accepted or rejected by this Court. This Court should review the prevailing Court of Appeals standard for piercing the corporate veil and delineate a clear legal standard for our courts to follow.

YOUNG, J. (*dissenting*). I fully concur in Justice CORRIGAN's dissenting statement. While this Court has long recognized that the corporate form may be disregarded in certain circumstances, see, e.g., *Fors v Farrell* 271 Mich 358 (1935), this Court has never adopted a clear test to determine when piercing the corporate veil is appropriate. Because the issue is jurisprudentially significant, and deserves the full attention of this Court, I would grant leave to appeal.

AZZAR v TOLLEY, No. 127601; Court of Appeals No. 249879.

MARKMAN, J. (*dissenting*). Defendant served as general counsel to plaintiff's various companies for many years, assisting with business and personnel matters, and other nonlegal matters. In 1994, defendant proposed the purchase of a 225-acre parcel of land for $312,000. The plan was that defendant would retain 80 acres as the site of his new home, and the other 145 acres would be developed. Plaintiff loaned defendant $98,000, and the deal was commenced. The deal was not otherwise documented. In 1997, defendant conveyed the entire parcel, including defendant's house now built on the land, to his wife in a divorce settlement. Defendant only repaid $11,000 of the loan to plaintiff, and in 1999, plaintiff discharged defendant.

In 2001, plaintiff sued defendant under theories of breach of contract, promissory estoppel, unjust enrichment, and legal malpractice. The trial court granted summary disposition to plaintiff on all the claims except the legal malpractice claim, on which the court granted summary disposition to defendant.

The Court of Appeals reversed the dismissal of the malpractice claim, concluding that the statutory period of limitations had not begun to run until the longstanding relationship between attorney and client ceased. Therefore, the malpractice claim, which was filed within two years of the termination of the relationship, was timely.

However, MCL 600.5838(1) provides:

> [A] claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. [Emphasis added.]

Therefore, contrary to the Court of Appeals determination, the limitations period began to run, not when defendant discontinued serving plaintiff as to *any* matter, but only when defendant discontinued serving plaintiff "as to" the matters out of which the claim for malpractice arose. Although defendant continued to perform various legal and nonlegal tasks for plaintiff until 1999, the loan transaction/land purchase was the "matter[] out of which the claim for malpractice arose . . . ." Therefore, the two-year limitations period began to run, at the latest, in 1997, when the property was conveyed to defendant's wife. Because plaintiff did not file a complaint until 2001, his malpractice claim is time-barred. There-

fore, I would reverse the judgment of the Court of Appeals and reinstate the trial court's order granting summary disposition to defendant.

Summary Disposition November 18, 2005:

PEOPLE v MINIER, No. 128854. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Leelanau Circuit Court for resentencing. The circuit court erred in assessing defendant 5 points on Offense Variable 3 (physical injury to victim) because no "[b]odily injury not requiring medical treatment occurred to a victim" as a result of the first-degree criminal sexual conduct offense for which defendant was sentenced. MCL 777.33(1)(e). The facts cited by the trial court in support of its score related to a prior offense. On remand, the court shall sentence defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). In all other respects leave to appeal is denied. We do not retain jurisdiction. Court of Appeals No. 260473.

Leave to Appeal Denied November 18, 2005:

HESS v CANNON TOWNSHIP, No. 128639; reported below: 265 Mich App 582.

YOUNG, J. (*dissenting*). I respectfully dissent from the order denying leave to appeal and would grant leave. This case raises the jurisprudentially significant question whether a general law township has the constitutional and statutory authority to pass an ordinance that reimburses another township's legal expenses in a dispute in which it is not a party and concerns matters arising outside the township's boundaries.

Grattan Township and Cannon Township are adjacent municipalities in Kent County. Grattan incurred considerable legal expenses while opposing the development of a manufactured home park within its boundaries. Since the proposed site was located on the border between Grattan and Cannon, Cannon believed it had an interest in the outcome of that case. After Cannon unsuccessfully attempted to intervene in Grattan's litigation, it passed a resolution authorizing the disbursement of $90,660 to assist Grattan with its legal expenses. Cannon also signed a written contract with Grattan, agreeing to provide similar disbursements in the future.

Two Cannon Township taxpayers filed suit against the townships, alleging that Cannon's expenditure was unlawful. The trial court granted summary disposition for the townships, finding statutory authority for Cannon's actions pursuant to MCL 41.2. The Court of Appeals affirmed in a split decision.

The Court of Appeals failed to identify an independent statutory or constitutional authority authorizing this particular expenditure. As Judge SMOLENSKI noted in his dissent, Const 1963, art 7, § 17 defines a township as "a body corporate with powers and immunities provided by law." Unlike cities and villages, general law townships lack plenary police power. Their authority is "provided by law."

The majority found statutory authority in MCL 41.2(1)(b), which permits a township "[t]o make contracts necessary and convenient for the exercise of their corporate powers." The power to contract, however, must further the exercise of an existing corporate power. In addition, the township ordinance act, MCL 41.181 *et seq.*, does not supply legal authority since Cannon did not promulgate an ordinance, but entered into a contract to pay the legal fees of an adjoining township. Also, the holding in *Hays v City of Kalamazoo*, 316 Mich 443 (1947), which the majority cited heavily, pertained to a home-rule entity. Because Cannon is not a home-rule entity, the majority's reliance on *Hays* appears inapposite to the instant case.

Finally, and not insignificantly, I also note the important threshold question whether plaintiffs, as taxpayers, had standing to pursue their cause of action. This question was not addressed by the Court of Appeals.

For these reasons, I would grant leave to appeal.

TAYLOR, C.J. I concur in the statement of Justice YOUNG.

Reconsideration Denied November 18, 2005:

PEOPLE v JOSEPH JOHNSON, No. 127958. Leave to appeal denied at 472 Mich 921. Court of Appeals No. 258229.

KELLY and MARKMAN, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

CAVANAGH, J. (*dissenting*). I dissent from the denial of leave. I would grant leave to explore what relief could be afforded this defendant.

In 1981, defendant and a codefendant, both 19 years of age at the time, used a pellet-shooting air rifle to rob a 14-year-old ice cream bicycle vendor of several dollars. Defendant held and brandished the air rifle while his codefendant actually took the money. They both entered guilty pleas to a charge of assault with intent to rob while armed. The codefendant received a sentence of six months in the county jail with work release. Defendant was sentenced to life in prison.

In 1983, this Court remanded this matter to the trial court and directed the sentencing judge to explain the reason for the great disparity in the two sentences. The trial court explained that this defendant had a more extensive, assaultive juvenile record and the public needed him removed from the streets for a number of years. It can be inferred from the trial court's statements that the court expected that the practice in place before the passage of Proposal B of parole eligibility after ten years of a life sentence would provide defendant with review.

Now, 24 years after sentence, defendant again seeks relief from this Court. I would grant leave to explore what relief might be possible. Short of that, I would order the Department of Corrections to show cause why this defendant remains incarcerated.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal November 28, 2005:

PEOPLE v MCCULLER, No. 128161. We direct the clerk 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 file supplemental briefs within 28 days of the date of this order addressing the effect, if any, of *Blakely v Washington*, 542 US 296 (2004), on the prison sentence imposed in this case. The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae on the intermediate sanction cell issue by January 4, 2006. Court of Appeals No. 250000.

Summary Dispositions November 28, 2005:

SORKOWITZ v LAKRITZ, WISSBRUN & ASSOCIATES, PC, No. 126562. Leave to appeal having been granted, 472 Mich 898 (2005), and the briefs and oral argument of the parties having been considered by the Court, we reverse the April 27, 2004, judgment of the Court of Appeals and reinstate the order of the Oakland Circuit Court granting defendants' motion for summary disposition. *Mieras v DeBona*, 452 Mich 278, 303 (1996) (a beneficiary may not "use extrinsic evidence to prove that the testator's intent is other than that set forth in the will"). Reported below: 261 Mich App 642.

KELLY, J. (*dissenting*). The Court should not rule on this case peremptorily. The case raises important issues about legal malpractice and about standing in certain estate planning controversies. It deserves plenary treatment.

Here, the plaintiffs on appeal are beneficiaries, trustees, and estate representatives. They appealed from a grant of summary disposition in favor of defendants, the attorneys who drafted a trust. Their suit claimed that defendants committed malpractice by failing to advise the testators concerning the consequences of not including a "*Crummey* trust" clause[1] in the trust. Plaintiffs contend that the absence of a *Crummey* clause resulted in a trust estate tax liability of between $1 million and $1.5 million. The Court of Appeals majority ruled for plaintiffs, setting aside the trial court's order of summary disposition.

Defendants have appealed to this Court to seek reinstatement of the order of summary disposition, asserting that there is no admissible evidence of malpractice.[2] This Court disposes of the case by relying solely

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[1] *Crummey v Comm'r of Internal Revenue*, 397 F2d 82 (CA 9, 1968). A *Crummey* clause enables beneficiaries annually to withdraw from the trust monies that are then treated as gifts for tax purposes. See *Hatleberg v Norwest Bank Wis*, 283 Wis 2d 234, for a more detailed discussion of *Crummey* clauses.

[2] Defendants assert also that the plaintiffs who are not beneficiaries are not proper parties.

on the four-corners rule expressed in *Mieras v DeBona*, 452 Mich 278 (1996).[3] That reliance is misplaced because it ignores the distinction between erroneous trust preparation and erroneous tax advice in the preparation of a trust. *Mieras* involves the former; this case involves the latter.

It is beyond argument that people seek the advice of a lawyer in the preparation of a trust in large part to safeguard their assets from loss. A major ingredient in the lawyer's advice concerns the tax implications of possible trust provisions. It is also without question that most people wish to avoid the burden of taxes to the extent the law allows. It is far more likely that any given testator intends to avoid taxable events than it is that the testator is indifferent to them. It would be foolish for the Court to ignore these truisms.

In this case, it is claimed that the lack of a *Crummey* clause increased the estate's tax liability by a million dollars or more. But the majority's action today means that no hearing will ever be held to determine if defendants advised the testators about the need for a *Crummey* clause. The adequacy of the tax advice that defendants gave to the decedents will never be plumbed. This is both unwise and unfair to plaintiffs. The Court of Appeals acted correctly in remanding the case to the trial court for further discovery and for identification of the proper parties.

It is obvious that this case raises important questions regarding legal malpractice in the area of estate planning. If courts are limited to the four corners of a trust to find malpractice for negligent tax advice regarding the trust, the attorney giving the advice could escape all liability. As long as the malpractice is not discernible on the face of the document,[4] the attorney will be protected. It seems obvious that such vast protection prejudices the interests of people seeking the expert tax advice of estate planning attorneys specifically and harms the legal profession in general.

I understand the concerns of the attorneys in this practice area. And I do not wish them to have any less protection than that enjoyed by their colleagues in other areas of the law. Conversely, estate planning attorneys should have the same degree of accountability for their errors as do all other attorneys.

I agree with the Court of Appeals majority that the *Mieras* four-corners rule is inapplicable to this case. Unlike *Mieras,* which involved trust preparation, this case involves alleged malpractice for faulty tax advice. The question of standing should be resolved only after further discovery in the trial court. Consequently, summary disposition for defendants was erroneously entered.

MARKMAN, J. (*dissenting*). For the reasons set forth by Justice KELLY, I do not believe that the Court of Appeals decision should peremptorily be

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[3] The four-corners rule states that extrinsic evidence is inadmissible to prove that a testator's intent is other than that set forth in the testator's will or trust.

[4] Such a clearly expressed legal mistake would be rare. Likely, the document would have to contradict itself for the mistake to be found on its face.

reversed. Not to place too fine a point on this dispute, decedents presumably hired defendant law firm to maximize their estate, yet wound up paying an extra $1 million to $1.5 million in taxes because of the absence of a *Crummey* clause. I would add the following to Justice KELLY's statement: (1) I am not persuaded that a testator's intent is accorded maximum respect by a legal malpractice doctrine that denies an estate the ability to look to extrinsic evidence; (2) I am not persuaded that attorneys generally should be immune from malpractice actions for failure to apprise clients of fundamental tax-saving devices; (3) I am not persuaded that the Court of Appeals unreasonably distinguished *Mieras v Debona*, 452 Mich 278, 303 (1996), in terms of disputes between beneficiaries and disputes raising claims of legal malpractice; (4) I am not persuaded that a testator's intent, absent evidence to the contrary, cannot be presumed as desiring that tax burdens upon his or her estate be minimized through the use of reasonable tax-saving devices;[1] and (5) I am not persuaded that *Mieras* is relevantly cited, as it is here by the majority, for the proposition that "a beneficiary may not 'use extrinsic evidence to prove that the testator's intent is other than that set forth in the will.' " While this may be true, plaintiffs do not seek to use extrinsic evidence "to prove that the testator's intent is other than that set forth in the will." Rather, they seek to use such evidence to prove that defendants committed malpractice in failing to advise the decedents about the advantages of a *Crummey* clause. In other words, they seek to use such evidence not to show the testators' intent was different, but rather to show that *because of defendants' negligence*, the testators never formed a different intent.

PULERA v STC BROADCASTING, INC, No. 128599. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the July 24, 2003, opinion and order of the Genesee Circuit Court. Plaintiff admitted in paragraph 10 of his complaint: "Per the terms of the employment contract, plaintiff was to work for Defendant Corporation from April 13, 1998 to December 31, 2000." This admission establishes that the parties' employment contract had a beginning date of April 13, 1998, and an ending date of December 31, 2000. It is undisputed that plaintiff worked for the duration of this period and that defendant paid plaintiff for his work during this period. Defendant therefore had no obligation under the employment contract to pay plaintiff a severance. *New Amsterdam Cas Co v Sokolowski*, 374 Mich 340, 342 (1965) ("If the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning . . . ."). We do not retain jurisdiction. Court of Appeals No. 250409.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

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[1] I am not unaware that there arguably is evidence in this case to suggest that a *Crummey* clause may not have been consistent with the testators' intent. However, I would leave this question for jury resolution rather than granting summary judgment for defendants.

PEOPLE v DENISE POWELL, No. 129192. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to that Court for reconsideration and application of the four-factor test for resolving curtilage questions detailed in *United States v Dunn*, 480 US 294, 301 (1987). Court of Appeals No. 256878.

CORRIGAN, J. (*concurring*). I concur in the order to remand. I write separately to highlight a problem with the Court of Appeals analysis under review. I also write to point out a conflict between the panel's opinion and another unpublished Court of Appeals opinion, as well as a contrary published federal district court case approving identical police behavior in Hamburg Township.

In this case, the police received an anonymous tip that marijuana was being grown at defendant's house. An officer went to defendant's house to see if she could obtain consent to search for the marijuana under the "knock and talk" procedure, a constitutional method for police to obtain consent to search. *People v Frohriep*, 247 Mich App 692, 701 (2001). When the officer knocked on the front door, no one answered. Because the officer heard a dog barking inside the house, she walked around to the backyard to see if anyone was home. Although the officer committed a technical trespass by entering defendant's backyard, " 'a mere "technical trespass" did not transform an otherwise reasonable investigation into an unreasonable search.' " *People v Houze*, 425 Mich 82, 93 (1986) (CAVANAGH, J.), quoting *United States v Conner*, 478 F2d 1320, 1323 (CA 7, 1973).

The officer entered the backyard by walking through the side yard next to defendant's garage. While no sidewalk or path led to the backyard, no fencing or landscaping barred access. As the officer rounded the back corner of the house, she immediately observed marijuana plants in the garden adjacent to the back porch deck. This garden was not visible from the front of the house or the road. Police thereafter arrested defendant for manufacturing marijuana.

The trial court denied defendant's motion to suppress the marijuana after holding an evidentiary hearing. The court found that, in light of the barking dog inside the house and the lack of any indication that the officer should not enter the backyard, the officer properly entered the backyard. The trial court found that the officer entered the backyard not to search for the marijuana, but to find someone to talk to. An appellate court reviews a trial court's findings of fact at a suppression hearing for clear error. *People v Custer*, 465 Mich 319, 325 (2001). Nothing in the record reflects that the court's factual findings were clearly erroneous.

The Court of Appeals nonetheless reversed, holding that in traversing the side yard to round the corner of the house, the officer invaded a portion of the curtilage of defendant's house in which defendant had manifested a reasonable expectation of privacy. The Court of Appeals found that the side yard area "was landscaped to communicate privacy and showed no evidence of use inconsistent with the landscaping." This "finding" is not supported in the record. Indeed, it conflicts with the trial court's finding that defendant did not manifest a reasonable expectation of privacy in her backyard because no fence, sign, or anything else existed

indicating that access to the backyard was prohibited. The Court of Appeals may not ignore a trial court's factual findings and substitute its own findings. *People v Farrow*, 461 Mich 202, 209 (1999).

The Court of Appeals opinion here also conflicted with *People v Pemberton*, unpublished opinion per curiam of the Court of Appeals, issued April 3, 2003 (Docket No. 238522). In *Pemberton, supra,* slip op at 1, the police went to the defendant's home to execute a "knock and talk" after receiving a tip that the defendant was growing marijuana. When no one answered the door, the police went to the rear of the home to see if anyone was outside. *Id.* While walking back to their car after finding no one in the backyard, the officers saw a marijuana plant in a pot. *Id.* The Court of Appeals held that the trial court did not clearly err in finding that (1) the officers acted reasonably when they went into the defendant's backyard to look for the defendant, and (2) the defendant did not have a reasonable expectation of privacy in the rear of his home because the public was not barred from the area and there were no signs instructing the public to stay out. *Id.* at 2. Therefore, the Court of Appeals affirmed the trial court's denial of the defendant's motion to suppress. *Id*. at 3.

The Court of Appeals opinion here also conflicted with a recent published federal district court decision, *Hardesty v Hamburg Twp*, 352 F Supp 2d 823 (ED Mich, 2005). *Hardesty* considered similar facts involving the same police department. In *Hardesty*, the federal district court held that the officers did not violate the defendants' Fourth Amendment rights when they knocked on the front door and, receiving no answer, went onto a deck in the rear of the house and looked through the window.

In *Hardesty,* the district court also discussed a Sixth Circuit case holding that similar police action did not violate the defendant's Fourth Amendment rights:

> In *United States v. Hopper*, 58 Fed. Appx. 619, 623-24, 2003 WL 152316 at *3-4 (6th Cir.2003), the Sixth Circuit found that a raised deck behind the appellant's home was not entitled to any Fourth Amendment warrant protection. In *Hopper*, police officers knocked on the appellant's front door and no one responded, then the officers went around to the back of the house to knock on appellant's back door. *Id.* at 58 Fed. Appx. at 622, 2003 WL 152316, *2. When the officers went around back[,] the police officers observed contraband under a raised deck behind the appellant's home. *Id.* at 58 Fed. Appx. at 622-23, 2003 WL 152316, *2-3. In *Hopper*, the appellant's home, like the Hardestys' home, was not enclosed, furthermore, the appellant, similar to the Hardestys, had not taken any special measures to protect the area from observation. *Id.* at 58 Fed. Appx. at 624, 2003 WL 152316, *3. However, unlike the present case, the appellant in *Hopper* had three "No Trespassing" signs. *Id* at 58 Fed. Appx. at 622, 2003 WL 152316, *2. [*Hardesty, supra* at 829.]

I hope that the panel assigned on remand will consider these problems.

KELLY, J. I would deny leave to appeal.

Leave to Appeal Denied November 28, 2005:

In re DAVID (FAMILY INDEPENDENCE AGENCY v DAVID), Nos. 129765, 129766, 129767; Court of Appeals Nos. 261032, 261033, 261034.

Summary Dispositions November 29, 2005:

SFREDDO v UNIVERSITY OF MICHIGAN REGENTS, No. 127109. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals opinion and remand this case to that Court for reconsideration in light of our holding in *Mayberry v Gen Orthopedics, PC*, 474 Mich 1 (2005). We do not retain jurisdiction. Court of Appeals No. 249912.

PEOPLE v SPARKS, No. 128892. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Antrim Circuit Court and remand this case to that court for resentencing, within 56 days of the date of this order, consistent with *People v Hendrick,* 472 Mich 555 (2005), and *People v Babcock*, 469 Mich 247 (2003). In all other respects, leave to appeal is denied. We do not retain jurisdiction. Court of Appeals No. 262024.

PEOPLE v JEROME HALE, No. 129265. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration under subchapter 6.500 of the Michigan Court Rules. The Court of Appeals mistakenly dismissed defendant's delayed application for leave to appeal from the Wayne Circuit Court's April 26, 2005, order for lack of jurisdiction, citing MCR 6.502(G). The April 26, 2005, order denied relief from defendant's first motion for relief from judgment, which was apparently filed on November 24, 2003. The Wayne Circuit Court's June 15, 2004, order denied relief from defendant's second motion for relief from judgment, which defendant characterized as an amended motion, and which was apparently filed on May 7, 2004. Court of Appeals No. 263293.

PEOPLE v BRIAN STOCKS, SR, No. 129494. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of defendant's challenge to the scoring of Offense Variable 1, MCL 777.31. Court of Appeals No. 263122.

Leave to Appeal Denied November 29, 2005:

YORK v CIVIL SERVICE COMMISSION, No. 127386; reported below: 263 Mich App 694.

PEOPLE v MILES, No. 127661; Court of Appeals No. 257749.

PEOPLE v BOLDEN, No. 127697; Court of Appeals No. 249501.

PEOPLE v LARRY JOHNSON, No. 127797; Court of Appeals No. 256346.

WHITE v REPUBLIC SERVICES, INC, No. 127802; Court of Appeals No. 247928.

JARRETT v DEPARTMENT OF CORRECTIONS, No. 127819; Court of Appeals No. 255079.

PEOPLE v RAEDEKE, No. 127857. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256349.

PEOPLE v RICHARD SANDERS, No. 127860. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256762.

PEOPLE v CALER, No. 127861. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is also denied. Court of Appeals No. 255530.

PEOPLE v POINDEXTER, No. 127867. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is also denied. Court of Appeals No. 256073.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v AMBROSE, No. 127868. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256405.

PEOPLE v PETUSH, No. 127869. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 259316.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v DAVID SILVA, JR, No. 127875. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256902.

PEOPLE v ANTHONY ROBINSON, No. 127934. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255042.

PEOPLE v BRINSON, No. 127935. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is also denied. Court of Appeals No. 256340.

PEOPLE v SPANN, No. 127944. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255138.

PEOPLE v BOLEYJACK, No. 127947. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254965.

PEOPLE v SLEEPER, No. 127986. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256009.

PEOPLE v DE'ANGELO HENDERSON, No. 128001. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256229.

PEOPLE v THOMSON, No. 128002. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255166.

PEOPLE v JULIUS WALKER, No. 128003. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to add issue is also denied. Court of Appeals No. 255740.

PEOPLE v DANIEL REID, No. 128007. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258446.

PEOPLE v NORMAN BELL, III, No. 128019; Court of Appeals No. 258894.

PEOPLE v CASTANEDA, No. 128051; Court of Appeals No. 249702.

PEOPLE v TRACY HAMMOND, JR, No. 128189. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255613.

PEOPLE v HAROLD JONES, No. 128195. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259510.

JOHNSON v GENERAL MOTORS CORPORATION, No. 128208; Court of Appeals No. 257270.

PEOPLE v LAWRENCE ANDERSON, No. 128362; Court of Appeals No. 259786.

AFCON, INC v ELLIS-DON MICHIGAN, INC, No. 128381; Court of Appeals No. 250100.

In re ERVIN TRUST (EVANS v BANK ONE TRUST, COMPANY, NA), Nos. 128401, 128908, 128911; Court of Appeals Nos. 249974, 253745, 253824.

PEOPLE v SCHAUB, No. 128487. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motions for immediate consideration, remand, and appointment of counsel are also denied. Court of Appeals No. 257293.

PEOPLE v TALLEY, No. 128495; Court of Appeals No. 242215.

PEOPLE v ROBAR, No. 128501; Court of Appeals No. 251780.

PEOPLE v CONNOR, No. 128513; Court of Appeals No. 253179.

PEOPLE v HACKNEY, No. 128519; Court of Appeals No. 249216.

RIVER CITY CONSTRUCTION, INC v ABC PAVING COMPANY, No. 128521; Court of Appeals No. 250721.

PEOPLE v COULSON, No. 128547; Court of Appeals No. 251413.

PEOPLE v DOUGLAS WRIGHT, No. 128566; Court of Appeals No. 249627.

PEOPLE v ABRAHAM, No. 128573; Court of Appeals No. 248457.

PEOPLE v KYLE, No. 128580. The motion to remand is denied. Court of Appeals No. 248199.

NAFSO v CITY OF DETROIT, No. 128589. The motion for leave to file brief amicus curiae is granted. Court of Appeals No. 239546 (on remand).

PEOPLE v MCCLOY, No. 128597; Court of Appeals No. 252189.

PEOPLE v WOLFENBARGER, No. 128604; Court of Appeals No. 250430.

PEOPLE v CATALANO, No. 128605; Court of Appeals No. 252802.

PEOPLE v ROBERT CUNNINGHAM, No. 128606; Court of Appeals No. 248741.

PEOPLE v CARL HARRIS, No. 128611; Court of Appeals No. 251578.

JORDAN v GENERAL MOTORS CORPORATION, No. 128612; Court of Appeals No. 258831

ALLSTATE INSURANCE COMPANY v BATCH, No. 128635; Court of Appeals No. 251340.

PEOPLE v WINSTON BROWN, No. 128637. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257433.

YOHN v UNIVERSITY OF MICHIGAN BOARD OF REGENTS, No. 128640. The motions for leave to amend the complaint and to add new parties and events are denied. Court of Appeals No. 252056.

PATTERSON v DAIMLERCHRYSLER CORPORATION, Nos. 128651, 128652, 128758, 128759; Court of Appeals Nos. 259744, 259747.

PEOPLE v MANUEL GONZALES, No. 128672; Court of Appeals No. 258799.

PEOPLE v HARGRAVE, No. 128674. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motions for remand and appointment of counsel are also denied. Court of Appeals No. 257695.

PEOPLE v BILLINGSLEA, No. 128680. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 256973.

KELLY, J. I would grant leave to appeal.

PEOPLE v SHOUCAIR, No. 128681. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257113.

VANZANDT v STATE EMPLOYEES' RETIREMENT SYSTEM, No. 128683; reported below: 266 Mich App 579.

COX v MUSSON SAND & STONE, INC, No. 128687; Court of Appeals No. 251936.

PEOPLE v PABON, No. 128690. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258109.

PEOPLE v OPELTON KELLY, No. 128699. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is also denied. Court of Appeals No. 257073.

PEOPLE v MARIO COLLIER, No. 128700. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258967.

PEOPLE v JOHNIGAN, Nos. 128702, 128703; reported below: 265 Mich App 463.

PEOPLE v CALWISE, No. 128711; Court of Appeals No. 249187.

PEOPLE v DEON DAWSON, No. 128712; Court of Appeals No. 248650.

PEOPLE v TAVARIOUS BROWN, No. 128722; Court of Appeals No. 253246.

In re EVERARD TRUST (STALKER v WARD), No. 128727; Court of Appeals No. 251475.

PEOPLE v LOVELACE, No. 128728; Court of Appeals No. 260371.

PEOPLE v MICHAEL JONES, No. 128731; Court of Appeals No. 257543.

J W MCCULLOUGH v ROUGE STEEL COMPANY, No. 128737; Court of Appeals No. 259238.

ST AMANT v CITY OF TAYLOR, No. 128740; Court of Appeals No. 252656.

PEOPLE v COTA, No. 128745. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258875.

PEOPLE v RIVERS, No. 128753. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257294.

PEOPLE v MESHELL, No. 128771; reported below: 265 Mich App 616.

PEOPLE v MONTEZ COOPER, No. 128773; Court of Appeals No. 251717.

MISSILMANI v CITY OF DETROIT, No. 128775; Court of Appeals No. 249267.

PEOPLE v CLEVELAND EVANS, No. 128781. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258450.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v MCMURTRY, No. 128782. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258107.

PEOPLE v HUNTLEY, No. 128790. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258444.

PEOPLE v KEVIN PERROU, No. 128791. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258218.

PEOPLE v DONTAY MCMANN, No. 128798. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258443.

PEOPLE v MISZEWSKI, No. 128801. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257252.

PRATER v SEZGIN, No. 128802; Court of Appeals No. 255768.

PEOPLE v SPICER, No. 128804. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is denied. Court of Appeals No. 258161.

PEOPLE v CRAIG ATKINS, No. 128805. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258488.

PEOPLE v TRUCHAN, No. 128807. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257717.

PEOPLE v KENNETH STRONG, No. 128810. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257851.

PEOPLE v JAMES ALEXANDER, No. 128811. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257242.

ROCHLEN v LANDAU, No. 128814; Court of Appeals No. 249908.

GRIER v EXCLUSIVE REALTY, No. 128820; Court of Appeals No. 252819.

PEOPLE v SHINHOLSTER-EL, No. 128822; Court of Appeals No. 254239.

SCHIRO v SCHIRO, No. 128826; Court of Appeals No. 252621.

BEAVERS v BARTON MALOW COMPANY, No. 128827; Court of Appeals No. 260475.

NYS v MADONNA UNIVERSITY, No. 128844; Court of Appeals No. 252167.

ALLEN v BALKEMA EXCAVATING, INC, No. 128847; Court of Appeals No. 258523.

HUNTINGTON LEASING COMPANY v MANISTEE INTERMEDIATE SCHOOL DISTRICT, No. 128850; Court of Appeals No. 250942.

PEOPLE v RODERICK BAILEY, No. 128853; Court of Appeals No. 251715.

TONOWSKI v RIHAWI, No. 128856. The application for leave to appeal as cross-appellant is also denied. Court of Appeals No. 249972.

ENGLISH v LORD, No. 128858; Court of Appeals No. 253072.

VALLEY v SODEXHO-MARRIOTT, No. 128862; Court of Appeals No. 260184.

PEOPLE v RAYMOND TUCKER, No. 128865; Court of Appeals No. 259604.

MUNTEANU v MUNTEANU, No. 128867; Court of Appeals No. 252202.

ANR PIPELINE COMPANY v DEPARTMENT OF TREASURY, No. 128889; reported below: 266 Mich App 190.

SWANSON v LIVINGSTON COUNTY, No. 128894; Court of Appeals No. 251483.

PEOPLE v BANKS, No. 128896; Court of Appeals No. 252722.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v LARDIE, No. 128897. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255832.

PEOPLE v JONNARD NELSON, No. 128898; Court of Appeals No. 259873.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

COLLINS v MAES CORPORATION, No. 128912; Court of Appeals No. 251795.

PEOPLE v JOHNNIE THOMAS, No. 128920; Court of Appeals No. 250915.

In re PETITION BY THE WAYNE COUNTY TREASURER FOR FORECLOSURE OF CERTAIN LANDS FOR UNPAID PROPERTY TAXES (WAYNE COUNTY TREASURER v SUMMERS), No. 128930; Court of Appeals No. 259111.

PEOPLE v JOHNELL ALLEN, JR, No. 128932. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 249788.

MOORE v EGAN, No. 128934; Court of Appeals No. 259352.

STONE v GENERAL MOTORS CORPORATION, No. 128938; Court of Appeals No. 260209.

PEOPLE v KEVIN WILLIAMS, No. 128945; Court of Appeals No. 254628.

SNELL v THYSSEN STEEL GROUP, No. 128950; Court of Appeals No. 260270.

ZANTEL MARKETING AGENCY v WHITESELL CORPORATION, No. 128952; reported below: 265 Mich App 559.

CODDINGTON v SPECIALIZED VEHICLES, INC, No. 128967; Court of Appeals No. 260269.

PEOPLE v DARRYL JACKSON, No. 128975. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 261525.

PEOPLE v MICHAEL MARTIN, No. 128979; Court of Appeals No. 249227.

PEOPLE v DONALD DUVALL, No. 129000; Court of Appeals No. 252720.

HURON VALLEY NIGHT HAWKS v MANCHESTER TOWNSHIP, No. 129004; Court of Appeals No. 251643.

CAMBURN v MACON TOWNSHIP, No. 129017; Court of Appeals No. 260197.

JOHNSON v JOHNSON, No. 129022. The motion for evidentiary hearing is also denied. Court of Appeals No. 261611.

METRO COMMUNICATIONS INC v DETROIT SMSA LIMITED PARTNERSHIP, No. 129031; Court of Appeals No. 249171.

PEOPLE v JACK HALL, No. 129034; Court of Appeals No. 258449.

PEOPLE v CHINN, No. 129039; Court of Appeals No. 250149.

PEOPLE v PETER TAYLOR, No. 129052. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259354.

SAMPLES v WEST, No. 129056. The application for leave to appeal as cross-appellant is also denied. Court of Appeals No. 255516.

WINGER CONCRETE PRODUCTS, INC v MILDREN, No. 129059; Court of Appeals No. 254511.

VAN SICKLE v DEPARTMENT OF TREASURY, No. 129066; Court of Appeals No. 260068.

PEOPLE v TURNPAUGH, No. 129068. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259336.

PEOPLE v QUASNEY, No. 129071. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259152.

PEOPLE v LUTETTUS PERRY, No. 129078; Court of Appeals No. 261309.

CAVANAGH, J. I would reverse and reinstate the original trial court's sentence.

PEOPLE v WOMACK, No. 129080; Court of Appeals No. 254007.

PEOPLE v JERMAINE CAMPBELL, No. 129083; Court of Appeals No. 255256.

PEOPLE v BABEL, No. 129091; Court of Appeals No. 255018.

PEOPLE v STRADWICK, No. 129094. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259671.

PEOPLE v KIM PARKS, No. 129099; Court of Appeals No. 262552.

PEOPLE v GEORGE BENTON, JR, No. 129102. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259100.

PEOPLE v NORMAN GRAY, No. 129103. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259133.

PEOPLE v SYLVESTER MITCHELL, No. 129110; Court of Appeals No. 261307.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v SCHAAR, No. 129115; Court of Appeals No. 253944.

PEOPLE v POTTER, No. 129120; Court of Appeals No. 253716.

PEOPLE v COULTER, No. 129121; Court of Appeals No. 254343.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v HUGHES, No. 129124; Court of Appeals No. 260944.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v RAYMOND DUVALL, JR, No. 129130; Court of Appeals No. 252487.

PEOPLE v TRACY BARNES, No. 129131; Court of Appeals No. 255639.

PEOPLE v WALLACE ROBINSON, No. 129132; Court of Appeals No. 260780.

PEOPLE v TUDOR, No. 129139. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259063.

PEOPLE v MERRIWETHER, No. 129141. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259007.

PEOPLE v MARK THOMPSON, No. 129143; Court of Appeals No. 251588.

PEOPLE v LEWIS NIXON, JR, No. 129144; Court of Appeals No. 261381.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v BULLOCK, No. 129146. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259167.

PEOPLE v CLEMONS, No. 129147. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259309.

PEOPLE v TAJUAN RAY, No. 129157. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259773.

PEOPLE v EDGAR MARTINEZ, No. 129158. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for appointment of counsel is denied. Court of Appeals No. 259005.

PEOPLE v BRUCE HOWARD, No. 129160. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to correct is denied. Court of Appeals No. 259953.

PEOPLE v LAWRENCE ROBINSON, No. 129174; Court of Appeals No. 260060.

PEOPLE v ROBERT ANDERSON, No. 129179; Court of Appeals No. 252308.

TAYLOR v DEPARTMENT OF CORRECTIONS, No. 129182; Court of Appeals No. 262767.

PEOPLE v TYRONE CURTIS, No. 129191; Court of Appeals No. 254617.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v BRADSHAW, No. 129196. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 263674.

PEOPLE v CHARLES MYLES, No. 129204. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259128.

PEOPLE v ROBERT JACKSON, No. 129210; Court of Appeals No. 254994.

PEOPLE v DRAPER, No. 129212. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257631.

PEOPLE v JAMES BOOTH, No. 129222; Court of Appeals No. 262026.

PEOPLE v KEITH NELSON, No. 129224; Court of Appeals No. 254585.

PEOPLE v ROBERT WALKER, No. 129226. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260689.

PEOPLE v WILKES, No. 129242. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259612.

PEOPLE v KEITH TAYLOR, No. 129255. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259009.

PEOPLE v BERNARD YOUNG, No. 129267. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260079.

PEOPLE v LUSTER, No. 129268. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259475.

PEOPLE v RUELAS, No. 129271. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to abey is denied. Court of Appeals No. 260055.

PEOPLE v HODGSON, No. 129273. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259913.

PEOPLE v TONY DAVIS, No. 129274; Court of Appeals No. 260059.

PEOPLE v BAKER, No. 129276; Court of Appeals No. 252032.

PEOPLE v LASLO, No. 129277. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260573.

PEOPLE v MICHAEL TAYLOR, No. 129280. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 263116.

PEOPLE v MELVIN WILLIAMS, No. 129281. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259494.

PEOPLE v MARTIN HALL, No. 129285. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259423.

PEOPLE v PAGE, No. 129287; Court of Appeals No. 251629.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v BOWLING, No. 129293. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259623.

PEOPLE v GERVENAK, No. 129297; Court of Appeals No. 261878.

PEOPLE v LORD, No. 129298; Court of Appeals No. 252847.

PEOPLE v ELIJAH TILLMAN, JR, No. 129299; Court of Appeals No. 254625.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v UNDERHILL, No. 129305; Court of Appeals No. 259312.

PEOPLE v FLOYD LOVE, No. 129306. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259672.

PEOPLE v SCHWESING, No. 129307. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259787.

PEOPLE v TALBOT, No. 129308; Court of Appeals No. 261960.

PEOPLE v BOYKIN, No. 129309; Court of Appeals No. 253224.

PEOPLE v KANE, No. 129310; Court of Appeals No. 261939.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v PETTWAY, No. 129321; Court of Appeals No. 261669.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v PAQUETTE, No. 129322; Court of Appeals No. 261991.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v CHEATUM, No. 129326; Court of Appeals No. 255261.

HYLAND v DEPARTMENT OF CORRECTIONS, No. 129328. The defendant's motion for miscellaneous relief is also denied. Court of Appeals No. 262991.

PEOPLE v OLIVO, No. 129329; Court of Appeals No. 260994.

PEOPLE v HINES, No. 129343; Court of Appeals No. 262429.

PEOPLE v STEIN, No. 129350; Court of Appeals No. 262061.

PEOPLE v LENDRUM, No. 129355; Court of Appeals No. 261675.

PEOPLE v PARKINSON, No. 129446; Court of Appeals No. 261285.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v FISHELL, No. 129447. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260889.

PEOPLE v TIMOTHY TERRY, No. 129451; Court of Appeals No. 263191.

PEOPLE v HAILEY, No. 129454; Court of Appeals No. 254407.

PEOPLE v LOZANO, No. 129456; Court of Appeals No. 261440.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v TJ SUTTON, No. 129457; Court of Appeals No. 253177.

PEOPLE v NUZUM, No. 129462; Court of Appeals No. 252800.

PEOPLE v MAYFIELD, No. 129464; Court of Appeals No. 263517.

PEOPLE v COLEMAN EDWARDS, No. 129476; Court of Appeals No. 253296.

PEOPLE v ROBERT WOODS, No. 129479; Court of Appeals No. 253225.

PEOPLE v LAMBERT, No. 129480; Court of Appeals No. 262334.

PEOPLE v WILLIAM ALEXANDER, No. 129492; Court of Appeals No. 262796.

TAYLOR v USA LAWYERS SERVICE, No. 129502; Court of Appeals No. 252808.

RITCHIE v DEPARTMENT OF CORRECTIONS, No. 129516. The motion for immediate consideration is granted. Court of Appeals No. 262193.

Interlocutory Appeals

Leave to Appeal Denied November 29, 2005:

BARANCIK v SCHINCO, No. 128708; Court of Appeals No. 259701.

PEOPLE v CHRISTOPHER PEREZ, No. 128957; Court of Appeals No. 260472.

Reconsideration Denied November 29, 2005:

CENSKE v DEPARTMENT OF COMMUNITY HEALTH, No. 127375. Leave to appeal denied at 472 Mich 917. Court of Appeals No. 256102.

PEOPLE v ROY TILLMAN, No. 127801. Leave to appeal denied at 473 Mich 883. Court of Appeals No. 249414.

Leave to Appeal Denied December 2, 2005:

PEOPLE v WESTCARR, No. 126477; Court of Appeals No. 243042.

CAVANAGH, J. (*dissenting*). Because defendant was denied a possible defense and was, thus, prejudiced by the trial court's denial of his motion for a continuance, I would reverse the decision of the Court of Appeals and remand this case to the trial court for a new trial.

KELLY, J. (*dissenting*). I would reverse and remand for a new trial. The trial judge abused his discretion when he denied defendant's request for a continuance in order to retain a medical expert.

Defendant was charged with three counts of first-degree criminal sexual conduct for engaging in sexual penetration of his six-year-old stepdaughter. Midway through jury selection, the prosecutor moved to endorse a second physician as a medical expert. The prosecutor announced that the complainant's mother had just produced a medical report that neither he nor defense counsel had seen. In it, the doctor found that the complainant's hymen was missing.

Another doctor who had examined the complainant and was an endorsed prosecution witness had noted an intact hymen. His report was inconclusive about whether there had been sexual abuse. Given that evidence, the defense had not planned to call a medical expert.

Defense counsel objected to the late endorsement of the second physician as a prosecution witness. When the judge granted the late endorsement, defense counsel asked for a continuance to retain an independent medical expert to examine the victim and rebut the second doctor's testimony. The judge denied the request, not wanting to discharge the already impaneled jurors. In due course, defendant was convicted on all charges and sentenced to three concurrent terms of 15 to 30 years.

I believe that the trial judge abused his discretion when he denied the defense an opportunity to fully contest the new information and the new witness. The existence of the second doctor's report became known on a Thursday after the lunch break. That allowed defense counsel only one working day and the intervening weekend to locate a medical expert and prepare for cross-examination of the second prosecution expert.

It is questionable whether without a continuance counsel could have found a doctor willing to become involved at the last minute. Moreover, there was insufficient time for any such expert to examine the complainant, report his findings to counsel, and for counsel to prepare his new defense strategy.

The due process clauses of the United States Constitution and the Michigan Constitution protect a defendant against unfair surprise by incriminating evidence. US Const, Am XIV, § 1; Const 1963, art 1, § 17. Even where the prosecutor is not at fault for failing to disclose surprise evidence, the defendant is entitled to a trial continuance if needed to prevent unfair prejudice. *People v Suchy*, 143 Mich App 136 (1985), lv den 424 Mich 855 (1985).

In *Suchy*, four days before trial, the defendant's codefendants pleaded guilty and agreed to testify against her. The judge granted the prosecution's request to endorse the witnesses and denied the defendant's motion for a continuance. The Court of Appeals held that the trial court had abused its discretion by denying the continuance. The rights that the defendant was asserting are constitutional; the request was timely made and not a delaying tactic. The defendant was prejudiced because the endorsement of the prosecution witnesses altered the defense posture, and the defendant had insignificant opportunity to prepare a response.

Here, the defense prepared for trial with the understanding that the prosecution's medical evidence would indicate an intact hymen, implying there had been no penetration, further implying no sexual abuse. The surprise evidence forced a change in the defense's strategy. Denial of the continuance prevented the preparation of a new strategy. I would reverse the convictions and remand the case for a new trial.

In re BEARDEN (DEPARTMENT OF HUMAN SERVICES v BEARDEN), No. 129885; Court of Appeals No. 261814.

Summary Disposition December 5, 2005:

PEOPLE v HENRY DAVIS, Nos. 128786-128789. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for entry of an amended judgment of sentence. Defendant's eight concurrent sentences of 13 years and 6 months to 20 years violate the two-thirds rule of MCL 769.34(2)(b). Because the statutory maximum for each of the involved offenses is 20 years, the longest minimum sentence defendant could receive is 13 years and 4 months. See MCL 750.213, MCL 750.455, MCL 750.457, and MCL 750.459. The judgment of sentence is to be amended accordingly. In all other respects, leave to appeal is denied. We do not retain jurisdiction. Court of Appeals Nos. 259345, 259400, 259401, 259402.

Leave to Appeal Denied December 5, 2005:

PEOPLE v BRADY, No. 127985. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand to the trial court for an evidentiary hearing is denied. Court of Appeals No. 256711.

CAVANAGH, J. I would remand this case to the trial court for correction of the sentence.

KELLY, J. I would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

PEOPLE v CAMFIELD, No. 128045; Court of Appeals No. 259254.

PEOPLE v DENNIS FOUST, JR, No. 128327. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259393.

GREEN v PROVIDENCE MEDICAL CENTER, No. 128338; Court of Appeals No. 250706.

PEOPLE v SHERJUAN HAMILTON, No. 128348; Court of Appeals No. 250297.

BOARD OF TRUSTEES OF THE CITY OF FLINT RETIREMENT SYSTEM v CITY OF FLINT, No. 128382; Court of Appeals No. 250273.

RATHBURN v CHILDREN'S HOSPITAL OF MICHIGAN, No. 128400; Court of Appeals No. 250126.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v HACK, No. 128455. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255854.

KELLY, J. I would grant leave to appeal.

PEOPLE v MAURICE ALLEN, No. 128473; Court of Appeals No. 252379.

KELLY, J. I would peremptorily vacate the second conviction of assault with intent to murder on the basis of *People v Hooper*, 152 Mich App 243 (1986).

PEOPLE v WILLIE WILSON, No. 128537; reported below: 265 Mich App 386.

PEOPLE v JOHN HOWARD, No. 128552; Court of Appeals No. 252161.

PEOPLE v MATHIS, No. 128554; Court of Appeals No. 251750.

KELLY, J. I would grant leave to appeal to affirm the applicability and viability of *People v Scruggs*, 256 Mich App 303 (2003).

PEOPLE v BRINKLEY, No. 128556; Court of Appeals No. 260554.

KELLY, J. I would grant leave to appeal.

COWAN v LAKEVIEW VILLAGE CONDOMINIUM ASSOCIATION, No. 128570; Court of Appeals No. 251645.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v LANGLEY, No. 128582; Court of Appeals No. 260295.

SWAID v HENRY FORD HEALTH SYSTEM, No. 128585; Court of Appeals No. 259356.

KELLY, J., did not participate.

LOLMAUGH v CURRY, No. 128590; Court of Appeals No. 260258.

PEOPLE v MCCLENDON, No. 128636; Court of Appeals No. 249197.

PEOPLE v WILLIAM MEYER, No. 128646; Court of Appeals No. 252801.

PEOPLE v MICHAEL JONES, No. 128664; Court of Appeals No. 252193.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

MURDOCK v KIRCHER, No. 128667; Court of Appeals No. 251153.

PEOPLE v TERRANCE JONES, No. 128730. The motion to add issue is denied. Court of Appeals No. 261522.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v FENNER, No. 128795; Court of Appeals No. 257999.

KELLY, J. I would remand this case for resentencing and correction of the presentence investigation report.

PEOPLE v ELIJAH COOK, No. 128982; reported below: 266 Mich App 290.

PEOPLE v ELLIOTT JAMES, No. 129020; Court of Appeals No. 253248.

PEOPLE v JOSHUA SIMS, No. 129037; Court of Appeals No. 259503.

PEOPLE v WARE, No. 129040; Court of Appeals No. 253441.

PEOPLE v ST JOHN, No. 129062; Court of Appeals No. 252181.

PEOPLE v DANIEL WASHINGTON, No. 129105; Court of Appeals No. 252540.

PEOPLE v RHONDA HARDIN, No. 129225; Court of Appeals No. 252552.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v LUCAS, No. 129258; Court of Appeals No. 254521.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v SUMMERVILLE, No. 129260; Court of Appeals No. 261623.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal December 7, 2005:

PEOPLE v FRANCISCO, No. 129035. The clerk is to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties are directed to file supplemental briefs by January 5, 2006, addressing: (1) whether *People v McDaniel*, 256 Mich App 165, 172-173 (2003), was correct in deciding that Offense Variable 13 may be scored based on three or more felonies committed in any five-year period even if that period does not include the date of the sentencing offense, and (2) assuming OV 13 should not have been scored, is defendant automatically entitled to resentencing because of the scoring error, or is resentencing unnecessary because the minimum sentence imposed was "within the appropriate guidelines sentence range" within the meaning of MCL 769.34(10). We further order the Oakland Circuit Court to appoint the State Appellate Defender Office to represent the defendant in this Court. Court of Appeals No. 252188.

Summary Dispositions December 8, 2005:

PEOPLE v OLSZEWSKI, No. 127607. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the September 14, 2005, order of the Wayne Circuit Court and remand this case for entry of an order for a new trial. The evidentiary hearing conducted by the Wayne Circuit Court, as ordered by the Court of Appeals, demonstrated that defendant was deprived of an impartial jury. *People v Hannum*, 362 Mich 660 (1961); *People v DeHaven*, 321 Mich 327 (1948). Court of Appeals No. 247776.

PEOPLE v WYRICK, No. 128610. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals decision with respect to correcting the judgment of sentence and remand this case to the Muskegon Circuit Court for correction of the judgment. The Court of Appeals misconstrued the Public Health Code in defining the term "felony" for purposes of MCL 333.7401(3). MCL 333.7401(3) authorizes sentencing courts to impose consecutive, rather than concurrent, sentences when a defendant is convicted of "another felony." Defendant was convicted of marijuana possession, second offense. The Public Health Code expressly designates marijuana possession as a misdemeanor. MCL 333.7403(2)(d). The trial court used the double-penalty provision of the Public Health Code, MCL 333.7413(2), to convert the misdemeanor into a felony. The sentence enhancement statutes do not create new offenses; they merely authorize trial courts to increase the length of time that a defendant must serve. *People v Eason*, 435 Mich 228, 246-247 (1990). The statute that authorizes trial courts to impose consecutive sentences for "another felony," MCL 333.7401(3), does not govern this case. Accordingly, we direct the court to amend defendant's judgment of conviction to reflect the imposition of concurrent, rather than consecutive, sentences for possession of cocaine and possession of marijuana, second offense. We also vacate the Court of Appeals decision to remand the case to the trial court to alter the reference in the judgment of conviction from enhancement under the habitual offender statute, MCL 769.12, to enhancement under the Public Health Code, MCL 333.7413(2). This change is unnecessary because the prosecutor may seek a greater sentence under the habitual offender statute even when a defendant is sentenced under the Public Health Code. *People v Primer*, 444 Mich 269, 271-272 (1993). Because defendant had three prior felony convictions when he was sentenced for cocaine possession, MCL 333.7403(2)(a)(iv), the trial court did not err when it sentenced defendant under the habitual offender statute. In all other respects, the application for leave to appeal and the application for leave to appeal as cross-appellant are denied. We do not retain jurisdiction. Reported below: 265 Mich App 483.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur with the amendment of the judgment of conviction to reflect the imposition of concurrent, rather than consecutive, sentences. I dissent from the remainder of the order for the reasons stated in my dissent in *People v Primer,* 444 Mich 269, 276 (1993).

MCKIM v FORWARD LODING, INC, No. 128777. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the judgment of the Ogemaw Circuit Court. The Court of Appeals erred in finding plaintiff to be an invitee, because defendant did not derive a business or commercial benefit from plaintiff's provision of medical services on its property. *Stitt v Holland Abundant Life Fellowship,* 462 Mich 591 (2000). Moreover, as the dissenting judge correctly recognized, the hazard giving rise to plaintiff's injuries was open and obvious, and there was no special aspect present. *Mann v Shusteric Enterprises, Inc,* 470 Mich 320 (2004). Reported below: 266 Mich App 373.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

GARRETT v SAM H GOODMAN BUILDING COMPANY, INC, No. 128951. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the Court of Appeals affirmance of the trial court's grant of summary disposition in favor of defendant Sam H. Goodman Building Company, Inc., and we remand this case to the Wayne Circuit Court for further proceedings. Summary disposition should not have been granted for defendant Goodman Building because it did not move for summary disposition. Further, summary disposition based on the "open and obvious" doctrine was improper because neither defendant was the premises possessor. *Ghaffari v Turner Constr Co*, 473 Mich 16, 23 (2005). The Court of Appeals erred in applying *Fultz v Union-Commerce Assoc*, 470 Mich 460 (2004), to defendant Goodman Building because it and plaintiff were in contractual privity. In all further respects, leave to appeal is denied. Court of Appeals No. 251793.

SCHULTZ v HENRY FORD HEALTH SYSTEMS, No. 128993. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the judgment of the Wayne Circuit Court. See *Kenny v Kaatz Funeral Home, Inc,* 472 Mich 929 (2005). Court of Appeals No. 252643.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE v WATTS, No. 129363. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We do not retain jurisdiction. Court of Appeals No. 263407.

Leave to Appeal Denied December 8, 2005:

KORRI v NORWAY VULCAN AREA SCHOOLS, No. 125691; Court of Appeals No. 238811.

SMITH ESTATE v DETROIT POLICE OFFICER LORI PIERCE, No. 128402. The motion to file a reply brief is granted. Court of Appeals No. 247154.

WEAVER, J. I would grant leave to appeal.

PEOPLE v BURR, No. 128518; Court of Appeals No. 251329.

KELLY, J. I would reverse the judgment of the Court of Appeals and remand this case to the Otsego Circuit Court for resentencing.

BRANS v EXTROM, No. 128876; reported below: 266 Mich App 216.

Summary Disposition December 9, 2005:

MICK v LAKE ORION COMMUNITY SCHOOLS and MICK v BASS, Nos. 126547, 126548. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that portion of the Court of Appeals judgment reinstating plaintiff's retaliation claim based on defendant principal's February 11, 1999, memorandum. The memorandum did not constitute a materially adverse employment action, as explained in the Court of Appeals opinion dissenting on this issue. We affirm the Court of Appeals reinstatement of

plaintiff's gender discrimination claim relative to the Orion Oaks Elementary School principal position as against defendant Lake Orion Community Schools, for the reasons stated in the Court of Appeals controlling opinion. We remand this case to the Oakland Circuit Court for further proceedings consistent with the Court of Appeals controlling opinion regarding the reinstated claim. Court of Appeals Nos. 241121, 241122.

CORRIGAN, J. (*concurring in part and dissenting in part*). I concur in the majority's decision to reverse that portion of the Court of Appeals judgment reinstating plaintiff's retaliation claim. I disagree, however, with the majority's decision to affirm the Court of Appeals reinstatement of plaintiff's gender discrimination claim involving the position of principal at Orion Oaks Elementary School. Viewing the evidence in a light most favorable to plaintiff, I cannot join the majority's conclusion that plaintiff created a triable issue that plaintiff's gender was a motivating factor in defendant's employment decision. I would reinstate the trial court's decision granting summary disposition to the school district on both claims.

The Elliott-Larsen Civil Rights Act (ELCRA) prohibits discrimination on the basis of gender. MCL 37.2202(1)(a) states:

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.

To avoid summary disposition in cases where the plaintiff has offered no direct evidence of discrimination, the plaintiff must proceed through the steps prescribed in *McDonnell Douglas Corp v Green,* 411 US 792, 802-803 (1973). Although originally created for use in race discrimination cases, we have adopted the *McDonnell Douglas* approach for use in age and gender discrimination cases brought under the ELCRA. *Hazle v Ford Motor Co*, 464 Mich 456, 462-463 (2001). Because plaintiff here has offered no direct evidence of gender discrimination, we rely on the *McDonnell Douglas* framework.

Under *McDonnell Douglas,* a plaintiff must first offer a "prima facie case" of discrimination by presenting evidence that (1) the plaintiff belonged to a protected class, (2) the plaintiff suffered an adverse employment action, (3) the plaintiff was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. *Hazle, supra* at 463, citing *Lytle v Malady (On Rehearing),* 458 Mich 153, 172-173 (1998). Once a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case. *Hazle, supra* at 464, citing *Lytle, supra* at 173. If the defendant provides a legitimate, nondiscriminatory reason for its employment decision, the plaintiff must then demonstrate that the

evidence in the case, when construed in the plaintiff's favor, is " 'sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.' " *Hazle, supra* at 465, quoting *Lytle, supra* at 176.

I concur with the Court of Appeals and my colleagues that plaintiff successfully advanced a prima facie case. It was undisputed that plaintiff satisfied the first three *McDonnell Douglas* elements. Plaintiff is a male, he did not receive the Orion Oaks principal's position for which he applied, and he was qualified for the position. Defendant disputes that plaintiff satisfied the fourth element, but plaintiff also satisfied that element, requiring him to offer proof that the position was given to another person under circumstances giving rise to an inference of discrimination. Plaintiff presented evidence suggesting that he was rejected in favor of a woman who was less qualified. Plaintiff had two advanced degrees while the successful applicant, at the time of hiring, had none. Plaintiff had twenty-four years of teaching experience while the woman chosen had only five years of teaching experience. Plaintiff had ten years of administrative experience while the successful applicant had only one year of assistant administrative duties.

I part company with my colleagues on the sufficiency of the remaining proofs. Once plaintiff successfully advanced a prima facie case, the burden then shifted to defendant to articulate a legitimate, nondiscriminatory reason for its decision to hire the woman applicant over plaintiff. Defendant offered several reasons for its hiring decision. Among them were plaintiff's lack of "people skills" and lack of ability to communicate effectively. More importantly, plaintiff had not participated in the development of Orion Oaks. He showed no interest in teaching at the school when it opened in 1996. The woman chosen as principal, on the other hand, had participated in the work leading to the formation of the school. She applied for and been hired to teach at the school when it opened and was promoted to serve as the school's assistant principal during the 1997-98 school year. By the time she started as principal in 1998, she had obtained a master's degree. Defendant thus furnished legitimate, nondiscriminatory reasons for its hiring decision.

The presumption of discrimination initially created by plaintiff's prima facie case disappeared. The burden of production shifted back to plaintiff to show the existence of evidence " 'sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.' " *Hazle, supra* at 473, quoting *Lytle, supra* at 176.

In an attempt to satisfy his burden with statistical proof, plaintiff claimed that the superintendent had placed less-qualified women in five of six positions for which he applied between 1991 and 1999. Yet the school district's statistical evidence showed it had placed nine men and eleven women in administrative positions for which plaintiff was qualified, a nearly equal ratio of men and women in administrative positions in the district.

On this record, I do not see how plaintiff's statistical evidence supports a jury finding that plaintiff's gender motivated defendant's employment decision in any respect, especially when considered in light

of all the relevant statistics on hiring of men and women in administrative positions in the district. Accordingly, I would reverse the Court of Appeals decision and reinstate the trial court's grant of summary disposition to defendants on both claims.

CAVANAGH, J. I believe that plaintiff presented sufficient evidence of his claims of gender discrimination and retaliation. His claims are strong enough to survive defendants' motions for summary disposition. I believe the Court of Appeals reached the right result and, thus, I would simply deny leave to appeal in this case.

Leave to Appeal Denied December 9, 2005:

PEOPLE v MIGUEL HARRIS, No. 127956; Court of Appeals No. 246882.

KELLY, J. (*dissenting*). I would remand this case to the trial court for an evidentiary hearing regarding whether there was probable cause for defendant's arrest. As it is, the record does not reflect facts sufficient to constitute probable cause.

PEOPLE v VANWAGONER, No. 128349; Court of Appeals No. 250926.

CORRIGAN, J. I would grant leave to appeal to reconsider *People v Bender*, 452 Mich 594 (1996).

KELLY, J. (*dissenting*). Defendant's confession was properly suppressed by the trial court under *People v Bender,* 452 Mich 594 (1996).

PEOPLE v PHILLIPS, No. 128407. The motion to add issue is denied. Court of Appeals No. 246922.

KELLY, J. (*dissenting*). The *corpus delicti* rule for felony murder applies here. It requires the prosecution to prove the underlying felony before a defendant's statement of intent to commit the underlying felony can be used against the defendant to establish the felony murder. Because that rule was violated, the Court should grant leave to appeal and should reconsider *People v Hughey,* 186 Mich App 585 (1990).

DONOHUE v INTERMODAL TRANSPORTATION SERVICES, INC, No. 128416; Court of Appeals No. 249700.

KELLY, J. (*dissenting*). I would grant leave to appeal in accordance with Judge WHITE's dissent. There was a factual question about age discrimination.

PEOPLE v JUDERJOHN, No. 128571; Court of Appeals No. 261174.

KELLY, J. (*dissenting*). I would grant leave to appeal to determine how best to score Offense Variable 10, exploitation of a vulnerable victim, when there is no victim. Here, a police officer was posing as a child victim.

PEOPLE v DUDDLES, No. 128627; Court of Appeals No. 251824.

KELLY J. (*dissenting*). I would remand this case for resentencing. The judge departed from a guidelines maximum of 15 months and sentenced defendant to 15 years in prison. I believe that this is unreasonable under *People v Babcock,* 469 Mich 247 (2003).

PEOPLE v BODRIE, No. 128649; Court of Appeals No. 252969.

KELLY, J. (*dissenting*). I would grant leave to appeal in order to examine the viability of the rule relied on by the trial court, *People v DerMartzex*, 390 Mich 410 (1973).

PEOPLE V MCCLELLAN, No. 128713; Court of Appeals No. 259130.

KELLY, J. (*dissenting*). I would remand this case to the trial judge to view the videotapes that she chose not to look at before and to reconsider defendant's motion to withdraw his plea.

Summary Dispositions December 15, 2005:

DEYO V DEYO, No. 126795. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and remand this case to the Livingston Circuit Court for reconsideration of the property division portion of the judgment of divorce. The Circuit Court properly recognized that invasion of plaintiff's separate inherited property is permitted only if the court specifically determines that defendant "contributed to the acquisition, improvement, or accumulation of the property," MCL 552.401, or that defendant's award is insufficient for her suitable support and maintenance, MCL 552.23(1), see *Dart v Dart*, 460 Mich 573 (1999), and *Reeves v Reeves*, 226 Mich App 490 (1997). However, the circuit court's finding was insufficient to support either statutory basis. If, upon reconsideration, the Livingston Circuit Court alters the property division, it may, if necessary, amend the spousal support award. The court may conduct additional proceedings or evidentiary hearings as it deems appropriate. We do not retain jurisdiction. Court of Appeals No. 245210.

CORRIGAN, J. (*dissenting*). I would deny leave to appeal.

The parties married in 1977 and remained married for 25 years before they divorced in 2001. During the marriage, plaintiff worked as a gravedigger and landscaper and made approximately $25,000 a year. Defendant was primarily a homemaker during the marriage.

In 1994, plaintiff's father, Orville Quinney, became ill, and the parties began caring for him. In 1996, plaintiff's father moved into a new house with the parties, and plaintiff quit his job to care for his father full time. Plaintiff was the conservator of his father's estate and apparently used those assets to substitute for his outside employment. Plaintiff's father died in 1997 and left a large inheritance[1] to plaintiff alone. The inheritance consisted primarily of securities, a bank account, and real estate in South Lyon, Howell, Warren, Roseville, and Milford.

The trial court agreed with plaintiff that some of the real estate and securities inherited by plaintiff had not been commingled with the marital estate and were part of plaintiff's separate estate. However, the court included this separate property in the marital estate for distribution purposes because the court believed that defendant's "assistance in

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[1] Plaintiff testified that the inheritance was worth $2,339,133.71 at the time of the divorce proceedings.

caring for [plaintiff's] father as well as her continuation in the strained marriage for so many years created a situation whereby she did contribute to the inherited estate." The court awarded defendant the entire marital estate of $714,634[2] and half of a piece of plaintiff's inherited South Lyon property (the Eleven Mile Road farm) worth $798,400.[3]

The Court of Appeals affirmed in a split unpublished opinion per curiam. The majority concluded that the trial court did not clearly err in finding that the entire inherited estate should be included in the marital estate because defendant contributed to the acquisition of the inherited estate by assisting with the care of plaintiff's father.

I favor denying leave to appeal, first, because this case presents absolutely no issues of jurisprudential significance. The outcome of this case turns on its particular facts. The law regarding the division of inherited property in divorce proceedings has been thoroughly addressed by this Court. The only reason to interfere in the lower courts' rulings is to engage in error correction. Because I do not believe that the Court of Appeals decision is "clearly erroneous and will cause material injustice," MCR 7.302(B)(5), this Court should deny leave to appeal.

Additionally, I believe that the trial court properly included the inherited assets in the marital estate for distribution purposes. First, plaintiff commingled the inherited property with the marital property. "[P]roperty received by a married party as an inheritance, *but kept separate from marital property*, is deemed to be separate property not subject to distribution." *Dart v Dart*, 460 Mich 573, 584-585 (1999) (emphasis added). "[T]he marital estate . . . include[s] the appreciation in value of the husband's separate assets that he actively managed during the marriage . . . ." *Id.* at 585 n 6.

Here, the parties used the inherited assets to make purchases to improve the marital estate. When plaintiff's father became ill, the parties used the father's money to purchase a new home, where the three of them lived together. After the father died, plaintiff recorded a deed transferring that house to defendant and him. The parties used inherited funds to buy another house next door, which they rented out. The parties also used inherited funds to remodel the marital home, to pay joint credit card debts, and to purchase fertilizer, a power washer, a truck, and lawn maintenance equipment for plaintiff's planned new business, as well as a car for their daughter. Plaintiff's use of the inherited assets in this manner shows that he treated certain of the inherited assets as marital property.

Second, the trial court correctly concluded that the inheritance should be included as part of the marital estate because defendant helped care for plaintiff's sick father. A spouse's separate assets may be included in the marital estate if the award is "insufficient for the suitable support and maintenance" of the other party, MCL 552.23(1), or the other party

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[2] The inherited property that was jointly owned or comanaged by the parties was included in the $714,634 marital estate. Plaintiff agreed that this portion of the inheritance should be included in the marital estate.

[3] Defendant's award totaled 36 percent of the total estate.

"contributed to the acquisition, improvement, or accumulation of the property," MCL 552.401. *Reeves v Reeves*, 226 Mich App 490, 494-495 (1997). The parties decided not to put plaintiff's father in a nursing home because it was more economical to care for him themselves. Plaintiff quit his regular job to care for his father, became the conservator of his father's estate, and the parties supported themselves with plaintiff's father's money while he was alive. Defendant was involved in caring for plaintiff's father, which included bringing him meals and making him comfortable. By helping with the care of plaintiff's father, defendant assisted in keeping him out of a nursing home. In *Reeves, supra* at 495, the Court of Appeals explained that a spouse's separate property can be invaded under these types of circumstances:

> [I]n *Hanaway v Hanaway*, 208 Mich App 278, 294; 527 NW2d 792 (1995), this Court held that the defendant's inherited stock in a family-owned company was available for invasion because the plaintiff's handling of child-rearing and domestic duties had freed the defendant to concentrate on building up that company. The *Hanaway* Court found that the defendant's stock had "appreciated because of defendant's efforts, facilitated by plaintiff's activities at home." *Id.* at 294.

Similarly here, defendant's efforts to care for plaintiff's father preserved the father's fortune by saving the costs associated with a nursing home. Additionally, the money saved by caring for plaintiff's father at home presumably accrued interest, allowing the estate to appreciate in value. Thus, when plaintiff's father died, the inheritance was larger because of defendant's efforts. Defendant thus "contributed to the acquisition, improvement, or accumulation" of the inherited property under MCL 552.401.

WEAVER and KELLY, JJ. We join the statement of Justice CORRIGAN.

PEOPLE v GRANT MONROE, No. 128356. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 259678.

PEOPLE v HOUGH, No. 128855. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Allegan Circuit Court for a determination whether defendant was on parole when incarcerated on the instant charge, or whether he was entitled to sentence credit under MCL 769.11b between June 17, 2004, and August 20, 2004, and for correction of the presentence report to accurately reflect the number of defendant's convictions and defendant's parole status, if necessary. In all other respects leave to appeal is denied. We do not retain jurisdiction. Court of Appeals No. 258230.

VERVERIS v HARTFIELD LANES, No. 128861. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to the Court of Appeals for

reconsideration. See *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929 (2005). Court of Appeals No. 251868.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

GALLIHER v TRINITY HEALTH-MICHIGAN, No. 129955. The motion for immediate consideration is granted. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The motion to stay trial court proceedings is also considered, and it is granted. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Court of Appeals No. 263612.

KELLY, J. I would deny leave to appeal.

Leave to Appeal Denied December 15, 2005:

DERDERIAN v GENESYS HEALTH CARE SYSTEMS, Nos. 127011, 127012. The motion for leave to file brief amicus curiae and motion for leave to be added to brief amicus curiae are granted. Reported below: 263 Mich App 364.

PEOPLE v ANTHONY JOHNSON, No. 127434. Pursuant to MCR 7.302(G)(1), the application for leave to appeal is denied. Court of Appeals No. 246937.

PEOPLE v COUCH, No. 128074; Court of Appeals No. 257789.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v DARRYL WOODS, No. 128101. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 249036.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v MARIO HENDERSON, No. 128102. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 249037.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v JAHNER, No. 128201. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255405.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v DOBY, No. 128392. The motion to add issues is granted. We take this opportunity to clarify that, although defendant is not entitled to application of the new sentencing provisions contained in MCL 333.7401(2)(a)(ii), he is entitled to early parole eligibility under MCL 791.234(11). Defendant committed his offense before March 1, 2003, and that statute grants early parole eligibility to persons convicted of "violating or conspiring to violate section 7401(2)(a)(ii) . . . before March 1, 2003 . . . ." Court of Appeals No. 251680.

HALEY v NUNDA TOWNSHIP, No. 128491; Court of Appeals No. 250082.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

PEOPLE v WANDELL KEY, No. 128553; Court of Appeals No. 252312.

KELLY, J. I would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

MANSKE v DEPARTMENT OF TREASURY, No. 128577; reported below: 265 Mich App 455.

PEOPLE v MARKOS, No. 128742; Court of Appeals No. 249780.

CAVANAGH and KELLY, JJ. We would reverse and remand this case for further proceedings for the reasons stated in the partially dissenting opinion in the Court of Appeals.

KMART OF MICHIGAN, INC v 250 MARTIN INVESTMENTS, LLC, No. 128770; Court of Appeals No. 251378.

PEOPLE v HESSELL, No. 128776. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand to the trial court is denied. Court of Appeals No. 258860.

KELLY, J. I would grant leave to appeal.

PEOPLE v JARVIS, No. 128816; Court of Appeals No. 251720.

KELLY, J. I would reverse and remand this case to the circuit court for a new trial.

PEOPLE v AYRE, No. 128849; Court of Appeals No. 259955.

KELLY, J. I would remand this case to the trial court to allow defendant to withdraw his plea.

HINES v VOLKSWAGEN OF AMERICA, INC, No. 128872; reported below: 265 Mich App 432.

KELLY, J. I would grant leave to appeal.

PEOPLE v RONALD MARTIN, No. 128881; Court of Appeals No. 253797.

KELLY, J. I would grant leave to appeal limited to the issue whether the trial court erred under *People v Allen*, 429 Mich 558 (1988), and MRE 609 by admitting the defendant's prior conviction for receiving and concealing stolen property to impeach the defendant in his trial on the charge of armed robbery.

BRAVERMAN v DON BOSCO HALL, No. 128947; Court of Appeals No. 253619.

KELLY, J. I would grant leave to appeal.

THOMAS v NEW MONROE BIG BOY, INC, No. 128994; Court of Appeals No. 252444.

In re BUCKNER (BUCKNER v PAROLE BOARD), No. 129033; Court of Appeals No. 258861.

CAVANAGH, J. Iwould grant leave to appeal.

PEOPLE v MATTHEWS, No. 129108; Court of Appeals No. 252034.

KELLY, J. I would grant leave to appeal limited to the issue whether the Oakland Circuit Court abused its discretion in denying defendant's motion to suppress his statements based on the claimed invocations of the right to counsel during the three interviews.

PEOPLE v BRAXTON, No. 129138; Court of Appeals No. 262027.

KELLY, J. I would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

PICKL v MICHAELS, No. 129151; Court of Appeals No. 251496.

CAVANAGH and KELLY, JJ. We would remand this case to the trial court for it to rule on plaintiffs' fraud and breach of contract claims.

PEOPLE v ANTHONY LEWIS, No. 129161; Court of Appeals No. 260732.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for consideration of defendant's Standard 4 brief.

PEOPLE v KENNETH DAVIS, No. 129275; Court of Appeals No. 255238.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v MAY, No. 129331; Court of Appeals No. 252606.

KELLY, J. I would grant leave to appeal.

PEOPLE v COCHRANE, No. 129340; Court of Appeals No. 251043.

KELLY, J. I would reverse and remand this case to the circuit court for a new trial.

PEOPLE v CARL JORDAN, No. 129423. The motion to strike is also denied. Court of Appeals No. 262341.

PEOPLE v WILLIE CHARLESTON, III, No. 129477; Court of Appeals No. 262332.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v NATHAN BOES, No. 129493; Court of Appeals No. 262507.

HUBER v DEAN, No. 129613; Court of Appeals No. 263551.

KELLY, J. I would remand this case to the trial court for further consideration.

Leave to Appeal Granted December 16, 2005:

FEYZ v MERCY MEMORIAL HOSPITAL, No. 128059. Michigan Health and Hospital Association's motion for leave to file brief amicus curiae is granted. The Michigan State Medical Society and the Michigan Osteopathic Association are invited to submit briefs amicus curiae. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 264 Mich App 699.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal December 16, 2005:

POLICE OFFICERS ASSOCIATION OF MICHIGAN v OTTAWA COUNTY SHERIFF, No. 127503. We direct the clerk to schedule oral argument on whether to grant the application for leave to appeal or take other peremptory action. MCR 7.302(G)(l). We direct the parties to file supplemental briefs within 28 days of the date of this order, addressing (1) whether the Act 312 arbitration panel identified the economic issues in dispute and properly rejected plaintiff's request to add new issues in accordance with the plain language of MCL 423.238, and (2) whether a reviewing court has authority to direct the arbitration panel to reconsider its determination of the "economic issues in dispute" in light of the conclusive authority granted to the arbitration panel in MCL 423.238. The motion for leave to file late reply is denied. The motions for leave to file brief amicus curiae are granted. Reported below: 264 Mich App 133.

Order Holding Case in Abeyance December 16, 2005:

PEOPLE v HOULIHAN, No. 128340. It appears to this Court that the case of *Simmons v Metrish* (Docket No. 03-2609), is pending in the United States Court of Appeals for the Sixth Circuit, on remand from the United States Supreme Court for reconsideration in light of *Halbert v Michigan*, 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005). This Court recognizes that the Sixth Circuit decision in *Simmons* will not be binding on this Court, see *Abela v Gen Motors Corp*, 469 Mich 603, 607 (2004). But if this Court were to rule that *Halbert* does not apply to motions brought under MCR 6.502, and the Sixth Circuit were to grant relief to the defendant in *Simmons*, Michigan defendants might then commonly receive relief in federal habeas proceedings inconsistent with the results they might receive from Michigan courts. Given these circumstances, we order that the application be held in abeyance pending the decision in that case. Court of Appeals No. 256534.

KELLY, J. (*concurring*). I concur in abeying this matter for the decision of the United States Court of Appeals for the Sixth Circuit in *Simmons v Metrish* (Docket No. 03-2609). I cast this vote notwithstanding my strong preference to remand this and all similar cases for the appointment of counsel. Unfortunately, insufficient votes exist on the Court to support a remand order, and without my vote to hold the case in abeyance, the decision below would stand, denying counsel to defendant.

The issue presented both in *Simmons* and in this case is whether the United States Supreme Court's decision in *Halbert v Michigan*,[1] applies retroactively to Michigan cases on collateral review. *Halbert* held that Michigan must appoint legal counsel for indigent defendants who seek in the Court of Appeals discretionary review of their plea-based convictions. I believe that we should apply *Halbert* retroactively to other cases that are on collateral review.

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[1] 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005).

The general rule in Michigan is that judicial decisions are given complete retroactive effect. Prospective application is given only to decisions that overrule clear and uncontradicted case law. *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240 (1986). This is because the latter cases are found to be "unexpected" and "indefensible" in light of the law existing at the time of the conduct in question. *People v Doyle*, 451 Mich 93, 104 (1996).

To determine whether a decision establishes a new rule of criminal procedure, federal courts apply the analysis of *Teague v Lane,* 489 US 288 (1989). Retroactivity is required unless the rule is new. *Id.* at 301. A rule is not considered new unless it " 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.' " *Graham v Collins*, 506 US 461, 467 (1993), *quoting Teague, supra* at 301 (emphasis omitted).

The *Halbert* decision relied on the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the federal constitution[2] and on the Court's earlier decision in *Douglas v California*, 372 US 353 (1963). *Douglas* held that the federal Due Process Clause and Equal Protection Clause require a state to provide counsel for indigent defendants seeking first-tier review as of right in state appellate courts. *Id.* at 356. It was decided in 1963. The United States Supreme Court made it clear at that time that "there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.' " *Id.* at 355, quoting *Griffin* v *Illinois,* 351 US 12, 19 (1956).

Accordingly, it would be inaccurate to say that the Supreme Court's decision in *Halbert* was "unexpected" and "indefensible" when made in 2005. Nor would it be accurate to assert that *Halbert* announced a new federal rule. Admittedly, Michigan law did not allow for the appointment of appellate counsel to indigent defendants seeking first-tier review of a plea of guilty or nolo contendere. However, Michigan law did not then and does not now exist in a vacuum. The unequivocal language of *Douglas* left no doubt that principles of equal protection are violated when indigent defendants are treated differently than rich defendants. For over 40 years, indigent defendants have been entitled to the appointment of counsel at least in first-tier appeals as of right.

Hence, it seems likely that the federal courts in *Simmons* will rule that *Halbert* should be applied retroactively. Meanwhile, if this Court persists in failing to require appointed appellate counsel in this and all similar cases, hundreds of these cases likely will have to be reviewed again. This will enormously burden the appellate judicial system and work an untold hardship on many individuals caught up in it.

CAVANAGH, J. (*dissenting*). I disagree with the majority's decision to hold this case in abeyance pending the decision of the United States Court of Appeals for the Sixth Circuit in *Simmons v Metrish* (Docket No. 03-2609). It has been over five years since a majority of this Court determined that it was constitutionally permissible to deny counsel to indigent defendants who are appealing from a guilty or nolo contendere

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[2] US Const, Am XIV, § 1.

plea. See *People v Bulger*, 462 Mich 495 (2000). In *Bulger*, I vehemently disagreed with the position taken by the majority. Now, the United States Supreme Court has spoken, and it has held that a majority of this Court improperly and unconstitutionally denied counsel to Michigan's indigent defendants. See *Halbert v Michigan*, 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005).

Since the majority's decision in *Bulger*, numerous indigent defendants who were constitutionally entitled to counsel have been improperly denied their rights. It is untenable to me that these indigent defendants must now continue to wait for their government to follow the United States Constitution. Indigent defendants were denied that which the Constitution requires, and I fail to see why the majority continues to prolong the deprivation of an indigent defendant's right to counsel. Accordingly, I believe counsel should be appointed without delay for those indigent defendants improperly denied their constitutional rights. In this case, as in the many other cases involving the deprivation of counsel to indigent defendants, justice delayed is truly justice denied.

MARKMAN, J. (*dissenting*). I respectfully dissent. Because I do not believe that the decision in *Halbert v Michigan*, 545 US ____; 125 S Ct 2582; 162 L Ed 2d 552 (2005), applies retroactively to permit a collateral attack upon a conviction that was already final at the time *Halbert* was released, I do not believe defendant is entitled to relief. Accordingly, I would simply deny leave to appeal.

I. FACTS AND PROCEDURAL HISTORY

In 2001, defendant pleaded guilty to charges of first-degree criminal sexual conduct and child sexually abusive activity. He was sentenced to prison terms of 20 to 40 years for the CSC I conviction and 13 years, 4 months to 20 years for the child sexually abusive activity conviction. Defendant requested the appointment of appellate counsel, but the trial court denied the request pursuant to MCL 770.3a. Defendant filed a pro se application for leave to appeal, arguing that he was entitled to the appointment of appellate counsel, but the Court of Appeals denied leave on January 2, 2003. Defendant then sought leave to appeal in this Court, which denied leave to appeal on September 19, 2003. Defendant did not file a petition for certiorari in the United States Supreme Court.

In December 2003, defendant filed a motion for relief from judgment. The trial court denied the motion on May 27, 2004. The Court of Appeals denied defendant's delayed application for leave to appeal from the denial of that motion on February 10, 2005. Defendant then filed an application for leave to appeal in this Court. We scheduled oral argument on the application and directed the parties to file supplemental briefs "addressing whether the holding in [*Halbert*] retroactively applies to defendant's motion for relief from judgment from his plea-based conviction where the trial court denied his request for the appointment of appellate counsel to assist him in pursuing a direct appeal." *People v Houlihan*, 474 Mich 866 (2005).

II. STANDARD OF REVIEW

This case requires us to determine whether the United States Supreme Court's decision in *Halbert* applies retroactively. Whether a decision applies retroactively is an issue of law, which this Court reviews de novo. *People v Sexton*, 458 Mich 43, 52 (1998).

III. ANALYSIS

A. *HALBERT*

In 1994, the voters of this state amended our Constitution to provide that "an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court" and not as of right. Const 1963, art 1, § 20. Thereafter, many trial court judges began to deny appointed appellate counsel to indigent defendants who had pleaded guilty. See *Kowalski v Tesmer*, 543 US 125 (2004). This Court upheld the constitutionality of this practice against challenges based on the "equal protection" and "due process" clauses of the Fourteenth Amendment to the United States Constitution. *People v Harris,* 470 Mich 882 (2004); *People v Bulger*, 462 Mich 495 (2000). The Legislature also codified this practice of limiting the appointment of appellate counsel in guilty plea cases. MCL 770.3a.[1]

However, in *Halbert,* the United States Supreme Court held, in a six to three decision, that the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution require that counsel be appointed for defendants who have pleaded guilty and who seek to appeal their convictions to the Michigan Court of Appeals.

B. RETROACTIVITY

While the Supreme Court in *Halbert* answered in the affirmative the question whether this state is obligated to provide appellate counsel for first-tier appeals from plea-based convictions, it did not specifically address the question whether such decision applies retroactively.

While this Court has had occasion to address the retroactivity issue a number of times in recent years, the wide variety of factual and jurisprudential considerations that have entered into our analyses in those cases suggests that it is difficult to articulate a bright-line rule. However, this case involves a retroactivity question regarding a decision of the United States Supreme Court concerning the meaning of the

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[1] Specifically, MCL 770.3a(1) provided that, except for certain situations not here relevant, "a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence." The analysis contained herein with respect to defendant's "guilty plea" is equally applicable to the other types of pleas referenced in this statute.

United States Constitution. For that reason, principles of retroactivity established by that Court govern the instant inquiry.[2]

The "general rule," *Teague v Lane*, 489 US 288, 310 (1989), is that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* That is, new rules are usually not applied retroactively. However, *Teague* adopted two exceptions to this general rule of nonretroactivity. First, a new rule should be applied retroactively if it places " 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' " *Id.* at 307 (citation omitted). Second, a new rule should be applied retroactively "if it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty." *Id.* (citation and internal quotation marks omitted).

Under *Teague*, the determination whether a constitutional rule of criminal procedure applies to a case on collateral review involves a three-step inquiry: (1) the court must determine when the defendant's conviction became final; (2) the court must ascertain the " 'legal landscape as it then existed,' " i.e., whether the rule is " 'new' " or, rather, was compelled by existing precedent; and (3) if the rule is new, the court must decide whether it falls within either of the two exceptions to nonretroactivity noted above. See, e.g., *Beard v Banks*, 542 US 406, 411 (2004) (citations omitted). I turn now to that inquiry.

1. DEFENDANT'S CONVICTION IS FINAL

A state court conviction is final " 'for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.' " *Beard, supra* at 411 (citation omitted). Here, defendant's direct appeal ended when this Court denied leave to appeal in 2003, and the time for filing a petition

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[2] Even if this case were not controlled by federal retroactivity jurisprudence, the reasons underlying the federal standard in this area counsel in favor of its use here. An important justification for the retroactivity doctrine of *Teague v Lane*, 489 US 288 (1989), concerns the state's interest in the finality of convictions. "[T]he *Teague* principle protects not only the reasonable judgments of state courts but also the States' interest in finality quite apart from their courts." *Beard v Banks*, 542 US 406, 413 (2004). *Teague* explained that the retroactive application of new rules on collateral review is potentially intrusive because "it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Teague, supra* at 310 (emphasis omitted). Plainly, this interest in the finality of convictions is vindicated by the application of the *Teague* standard in state collateral proceedings as well as federal collateral proceedings.

for certiorari elapsed without defendant's having filed such a petition. The decision in *Halbert*, meanwhile, was not released until June 23, 2005. Thus, defendant's conviction was clearly final for purposes of the *Teague* analysis.

Defendant and amicus Criminal Defense Attorneys of Michigan (CDAM) argue, however, that defendant's motion for relief from judgment should be viewed as essentially a continuation of his direct appeal. Defendant contends that some sort of tolling is required because he was denied the opportunity to have counsel assist him in the direct appeal. Likewise, CDAM argues that because defendant never had an appeal with the assistance of counsel, "he is in the position of someone whose case is still pending on direct review." CDAM brief at 8. CDAM suggests that defendant's direct appeal was "invalid" because defendant did not have the assistance of counsel in his direct appeal.

These arguments amount to classic bootstrapping. In asserting that this collateral proceeding should be viewed as a continuation of defendant's direct appeal because he was denied counsel, CDAM and defendant put the cart before the horse. They are essentially applying *Halbert* retroactively to conclude that the absence of counsel renders void the prior proceedings on direct review. But defendant cannot simply assume in this manner that *Halbert* applies retroactively, for that is the very issue that we must here decide. The Supreme Court has made clear that a court " '*must* apply *Teague* before considering the merits of [a] claim,' " *Beard, supra* at 412 (emphasis in original; citation omitted). Here, defendant and CDAM erroneously reach the merits of the claim *first* by assuming that defendant was entitled to counsel under *Halbert*, and *then* using that assumption to argue that defendant's conviction is not final. This circular logic is unavailing. Defendant's conviction was clearly final at the time *Halbert* was issued.

2. *HALBERT* IS A NEW RULE

The second step of the *Teague* inquiry requires us to ascertain whether the holding in *Halbert* constitutes a "new rule." In general, " 'a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.' " *Penry v Lynaugh*, 492 US 302, 314 (1989) (citation omitted). In determining whether the rule is "new," the Court must determine "whether 'a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.' " *O'Dell v Netherland*, 521 US 151, 156 (1997) (internal citations omitted). If not, then the rule is new.

In *Beard*, *supra* at 413, the Supreme Court made clear that the question is not merely whether the existing precedent might have *supported* the rule, but whether it *dictated* the rule. The rule must have been " 'apparent to all reasonable jurists.' " *Id.* (Citation omitted.) *Beard* also noted that the existence of dissenting opinions in the case adopting the rule may be relevant (although not dispositive) in considering whether the existing precedent compelled the rule. *Id.* at 415-416.

Here, it is clear that existing precedent did not *dictate* the holding in *Halbert*. As both the majority and dissenting opinions in *Halbert* recognized, the issue in *Halbert* and *Bulger* essentially fell into a gap between two existing precedents: *Douglas v California*, 372 US 353 (1963), and *Ross v Moffitt*, 417 US 600 (1974) (see *Halbert, supra,* 545 US ___ n 2; 125 S Ct 2590 n 2; 162 L Ed 2d 564 n 2). The Supreme Court recognized that the defendant's case was "framed by" the two decisions concerning state-funded appellate counsel: *Douglas*, which held that the Fourteenth Amendment guarantees a criminal appellant the right to counsel on a first appeal as of right, and *Ross*, which held that the Fourteenth Amendment does not require a state to provide free counsel for indigent defendants seeking to take discretionary appeals to the highest state court. *Halbert* described the question before it as "essentially one of classification: With which of those decisions should [petitioner Halbert's] case be aligned?" *Id.*, 545 US ___; 125 S Ct 2590; 162 L Ed 2d 564.

Two aspects of the appellate process following plea-based convictions in Michigan eventually persuaded a majority of the Supreme Court that *Douglas*, not *Ross*, was controlling. First, in ruling on an application for leave to appeal, the Court of Appeals examines the merits of an appellant's claims. *Id.* "Of critical importance" to the Court's decision was that the Court of Appeals, unlike this Court, sits as an error-correction court. *Id.* Second, the Supreme Court concluded that indigent defendants pursuing first-tier review in the Court of Appeals are "generally ill equipped to represent themselves." *Id.* The Court reasoned that a defendant who pleads guilty in a Michigan court, although he relinquishes access to an appeal as of right, is entitled to apply for leave to appeal, and that entitlement is formally communicated to him. *Id.*

In both *Bulger* and *Halbert*, reasonable jurists could, and did, disagree regarding whether *Douglas* or *Ross* was the more relevant precedent. The six-justice Supreme Court majority in *Halbert*, and two justices dissenting from this Court's opinion in *Bulger*, concluded that *Douglas* was the more relevant precedent, because it established a right to counsel in a first-tier review of a criminal conviction. But the four-justice majority in *Bulger* (a case in which I was recused) also articulated a reasonable argument that *Ross* was more applicable, because it involved an application for discretionary review. Moreover, the three dissenting justices in *Halbert* adopted a considerable part of the rationale of our majority opinion in *Bulger*.

In short, while *Douglas* may well have *supported* the holding in *Halbert*, it did not *compel* that holding. It simply was not apparent to four members of this Court or to three members of the United States Supreme Court that *Douglas required* the appointment of counsel to file an application for discretionary review of a guilty-plea conviction. Thus, reasonable jurists could, and did, disagree on this issue.

Further, it is apparent that the decision in *Halbert* " 'imposes a new obligation' " on this State. *Penry, supra* at 314 (citation omitted). Specifically, Michigan courts are now required to appoint counsel for defendants convicted on their pleas who seek access to first-tier appellate review in the Court of Appeals. This obligation did not exist before the decision in *Halbert*, and is therefore indisputably "new."

Accordingly, I have no difficulty concluding that the rule adopted in *Halbert* is a "new" rule for purposes of the *Teague* retroactivity analysis.

3. *TEAGUE* EXCEPTIONS ARE INAPPLICABLE

Having concluded that defendant's conviction was final by the time of *Halbert*, and that the *Halbert* rule is new, the final step in the *Teague* analysis requires a determination whether the rule nonetheless falls within one of the two exceptions outlined in *Teague*. *O'Dell, supra* at 156-157. The first exception pertains to new rules " 'forbidding criminal punishment of certain primary conduct [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.' " *Id.* at 158 (citation omitted). There has been no suggestion that this exception applies in the instant case. The second, "even more circumscribed," exception, *id.*, permits retroactive application of " ' "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.' " *Graham v Collins*, 506 US 461, 478 (1993) (citations omitted).

The Supreme Court has repeatedly emphasized the limited scope of the second *Teague* exception, explaining that " ' "it is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." ' " *Beard, supra* at 417, quoting *O'Dell, supra* at 157, quoting *Graham, supra* at 478. The Court has observed that because any such rule " 'would be so central to an accurate determination of innocence or guilt [that it is] unlikely that many such components of basic due process have yet to emerge,' it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception." *Beard, supra* at 417 (internal citations omitted). In other words, the requirements of this exception present an extremely high barrier—a barrier so high, in fact, that it has never yet been surmounted.

With this in mind, we must determine whether the right to appointed counsel to assist in an appeal from a plea-based conviction is a " ' "watershed rule[] of criminal procedure "implicating the fundamental fairness and accuracy of the criminal proceeding' " or " ' "implicit in the concept of ordered liberty".' " ' " *Graham, supra* at 478 (citations omitted). I believe that it is not.

Defendant correctly observes that the Supreme Court has referred to the *Gideon*[3] right to counsel as an example of a rule that would fall into the second *Teague* exception. However, it is significant that in referring to this example, the Supreme Court observed, "In providing guidance as to what might fall within this exception, we have repeatedly referred to the rule of [*Gideon*] (right to counsel), and *only to this rule*." *Beard, supra* at 417 (emphasis added). Yet, the Sixth Amendment right to counsel articulated in *Gideon* and its progeny has a constitutional basis distinct from that underlying the *Douglas* line of cases addressing the right to

[3] *Gideon v Wainwright*, 372 US 335 (1963).

counsel *on appeal*, which are rooted in the "equal protection" and "due process" clauses of the Fourteenth Amendment.

The Sixth Amendment right to counsel at trial is fundamental to the fair and accurate determination of guilt because the trial is the focus of the entire criminal proceeding—the "main event," so to speak.[4] *Halbert*, however, does not speak to the procedure by which guilt is fairly and accurately determined. It does not address itself to the plea proceeding that, like its counterpart, the trial, is the "main event" of the criminal process. Defendant enjoyed his Sixth Amendment right to counsel at such plea proceeding, including the benefit of elaborate procedures designed to secure his knowing and intelligent waiver of rights incidental to the trial process. See, e.g., MCR 6.302. Rather, *Halbert* was concerned with a distinct procedure, the criminal appeal, which the state has no obligation to provide at all. See *Halbert, supra*, 545 US ___; 125 S Ct 2586; 162 L Ed 2d 559-560, citing *McKane v Durston*, 153 US 684, 687 (1894). It cannot be said that *Halbert* announced a rule either " 'central to an accurate determination of innocence or guilt' " or " ' "implicit in the concept of ordered liberty." ' " *Beard, supra* at 417 (citations omitted).

Indeed, the Supreme Court itself has recognized that appeals are not central to the accurate determination of guilt. In *Goeke v Branch*, 514 US 115 (1995), the Supreme Court held that the second exception for nonretroactivity did not apply to a new rule barring the dismissal of an appeal of a recaptured fugitive. The Court held that the new rule was not among the "small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty. Because due process does not require a State to provide appellate process at all, a former fugitive's right to appeal cannot be said to be so central to an accurate determination of innocence or guilt, as to fall within this exception . . . ." *Id.* at 120 (citations and internal quotations omitted).

Here, defendant's guilt was established by his own plea, and the plea hearing, at which defendant was represented by counsel and accorded a broad array of procedural protections, was the "main event." Indeed, it is hard to imagine a more dispositive process by which guilt can be accurately determined, and in which the appellate process becomes less central to an accurate determination of guilt, than that in which a full admission to criminal conduct has come from the mouth of the defendant himself and in an environment in which the defendant has been accorded every protection against a coerced or mistaken confession.

Halbert does not call into question the validity of the procedures employed during the plea and sentencing aspects of defendant's experience with the criminal justice system; rather, *Halbert* dealt only with the right to appeal. The federal constitution imposes on the states no obligation to provide appellate review of criminal convictions. Because

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[4] The Supreme Court has noted that "the Sixth Amendment inquiry trains on the stage of the proceedings corresponding to [a defendant's] . . . trial, where his guilt was adjudicated, eligibility for imprisonment established, and prison sentence determined." *Alabama v Shelton*, 535 US 654, 665 (2002).

due process does not require a state to provide appellate process at all, the *Halbert* rule cannot be said to be among the " ' "small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." ' " *Beard, supra* at 417 (citations omitted).

The Supreme Court has noted that it has "yet to find a new rule that falls under the second *Teague* exception." *Id.* For the reasons noted, I do not believe that the rule in *Halbert* is so exceptional as to constitute the first of such rules.

IV. CONCLUSION

The rule of *Halbert*—that the "due process" and "equal protection" clauses require the appointment of counsel for defendants convicted on their pleas who seek access to first-tier review in the Court of Appeals—applies retroactively to all cases pending on direct review as of *Halbert's* issuance. However, it does not apply retroactively to collateral proceedings in cases already final as of that date. Because defendant's direct appeal ended in 2003, before the June 23, 2005, issuance of *Halbert*, the *Halbert* rule, in my judgment, is inapplicable to defendant.

Such a result comports not only with the analytical framework established by *Teague*, but also with the important considerations of judicial economy and finality that underlie that test. Here, defendant has received the full protection of the legal process when, through his own admission, his guilt was established. The state has a strong interest in the finality of that process and in not being required to constantly redefine that process, and in not being forced "to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Teague, supra* at 310. This is particularly so where the conviction is based on a guilty plea, entered after a defendant has received the full panoply of procedural protections accorded by the relevant provisions of the federal and state constitutions, statutes, and court rules. Because such a defendant has received all the protections that due process requires, we can take comfort in the finality of that conviction, in terms of compliance with *Teague* and compliance with the requirements of fundamental fairness and justice.

Accordingly, at least for the instant class of cases, the will of the people of Michigan, who initiated and approved the amendment to Const 1963, art 1, § 20, and whose elected representatives enacted MCL 770.3a, should be honored, and defendant's application for leave to appeal should be denied.

CORRIGAN, J. I join the dissenting statement of Justice MARKMAN.

YOUNG, J. I join in the abeyance order but agree with the analysis of the dissenting statement of Justice MARKMAN.

Leave to Appeal Denied December 16, 2005:

PEOPLE v CHRISTOPHER MCKAY, No. 126930. Pursuant to MCR 7.302(G)(1), the application for leave to appeal is again considered and it is denied, because, by accepting a valid *Cobbs* agreement, defendant

waived his objection to the scoring of Offense Variable 13. See *People v Wiley*, 472 Mich 153 (2005); *People v Cobbs*, 443 Mich 276 (1993). Court of Appeals No. 255596.

YOUNG, J. (*concurring*). I join with the order denying leave to appeal. I believe a close inspection of the record reveals that defendant entered into a valid *Cobbs* (see *People v Cobbs,* 443 Mich 276 [1993]) agreement and waived his objection to a scoring error because he "understandingly and voluntarily enter[ed] into a plea agreement . . . ." *People v Wiley*, 472 Mich 153, 154 (2005).

At his April 25, 2003, arraignment, defendant solicited a *Cobbs* evaluation from Judge Kym L. Worthy. The prosecutor supplied what he thought to be the appropriate guidelines range and the judge inquired about defendant's prior convictions and reviewed other factors. Finally, she offered a preliminary assessment that the sentence would be 9 to 15 years and emphasized that that sentence was "exceedingly generous coming from me." Defendant declined to plead to the charge in light of this evaluation at the arraignment.

Defendant's attorney attempted to lower the judge's *Cobbs* evaluation at a final conference five days later. He noted the defendant's supportive family, good work history, and other mitigating circumstances. Judge Worthy was unpersuaded. She refused to "revisit," i.e., lower, her evaluation and go "any lower than 9 years." The judge said she was "crazy for offering the 9 to 15" as it was "exceedingly lenient, way too lenient, especially for me."

Defendant pleaded no contest on May 5. Defense counsel continued to ask the court to lower the minimum sentence. Although her "mind [was] not closed," Judge Worthy replied that "the chances [of a lower sentence] are very very minimal, highly unlikely."

Judge Worthy imposed a sentence of 9 to 15 years on May 15. Again, she rejected defense counsel's arguments for a reduced sentence because the sentence was "exceedingly fair, it's more than fair." She explained to defendant why the "sentence that I told you I would give you was exceedingly lenient." Several times, Judge Worthy reiterated that "I'm not going any lower than I already have in this case" and "I'm not changing the sentence."

Justice MARKMAN's contention that defendant only agreed to plead guilty but "did not agree to the sentence imposed" finds no support in the record recounted above. From the beginning of these proceedings, Judge Worthy indicated that defendant would likely receive a 9- to 15-year sentence if he entered a plea. She never wavered from that evaluation despite defense counsel's repeated attempts to have her lower her evaluation. Defendant was under no illusions about the length of his sentence when he decided to plead no contest. Judge Worthy's statement that she had not closed her mind to a lower sentence does not obviate the *Cobbs* evaluation. In fact, it finds support in *Cobbs*, since a *Cobbs* agreement is always subject to future revision in light of newly introduced information.

A *Cobbs* plea is a voluntary, noncoercive agreement between the defendant and the sentencing judge. Indeed, the judge cannot offer preliminary impressions on the record until one of the parties requests an

evaluation. Judge Worthy may have relied, in part, on erroneous information when she calculated her evaluation. But defendant was not obliged to accept, i.e., plead no contest. That he did accept, after initially rejecting the offer, suggests he perceived some benefit from the offered sentence.

Further, a *Cobbs* plea necessarily contains a sentencing component. As occurred in this case, the defendant pleads guilty or no contest in reliance on a particular sentence offered by the sentencing judge. This trade-off is the essence of a *Cobbs* plea. If the defendant is not agreeing to a *specific* sentence in a *Cobbs* plea, then there could be no justification for giving the defendant the "absolute right" to withdraw the plea if the judge exceeds his or her preliminary evaluation. *Cobbs*, 443 Mich at 283. Thus, Justice MARKMAN has made a distinction that cannot be squared with the very theory of a *Cobbs* plea.

For this reason, I agree with the majority's order to deny leave to appeal.

CORRIGAN, J. I join the statement of Justice YOUNG.

MARKMAN, J. (*dissenting*). The majority concludes that defendant waived any error in the scoring of Offense Variable 13. I respectfully disagree. In *People v Wiley*, 472 Mich 153, 154 (2005), this Court held that a defendant who "understandingly and voluntarily enter[s] into a plea agreement to accept [a] specific sentence," "waives appellate review of a sentence that exceeds the guidelines . . . ." In other words, if a defendant agrees to a sentence that exceeds the statutory sentencing guidelines range, that defendant cannot appeal the sentence because he or she has waived any error.

The majority relies on *Wiley* to conclude that the defendant here waived his right to appeal the scoring of OV 13. The majority, however, fails to recognize that *Wiley* is a considerably different case. The defendant in this case did not agree to the sentence imposed; he simply agreed to plead guilty after a *Cobbs* evaluation. See *People v Cobbs,* 443 Mich 276 (1993). The defendant in *Wiley* did not simply agree to plead guilty after a *Cobbs* evaluation; he specifically agreed to the sentence imposed. The majority, as well as Justice YOUNG, errs in equating a sentencing agreement with a *Cobbs* evaluation.

A sentencing agreement is an agreement between the parties concerning a specific sentence. A *Cobbs* evaluation is a judge's on-the-record statement regarding "the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense." *Id.* at 283. When a defendant pleads guilty pursuant to a sentencing agreement, the defendant is agreeing to a specific sentence; when a defendant pleads guilty after a *Cobbs* evaluation, absent a sentencing agreement, the defendant is not agreeing to any specific sentence. There is a significant distinction between agreeing to a specific sentence and pleading guilty knowing that the trial court may or will likely impose a certain sentence. Unlike a sentencing agreement, a *Cobbs* evaluation is not binding on either party. The judge does not have to sentence the defendant to the sentence indicated at the *Cobbs* evaluation and the defendant is not precluded from challenging the sentence.

The purpose of a *Cobbs* evaluation is to give a defendant some idea of the length of sentence that the trial court may impose. This procedure was

developed before the enactment of the statutory sentencing guidelines. Thus, it was developed at a time when the statutory maximum (and occasionally the minimum) was the only source a defendant had to determine the length of sentence with which he or she was faced. For instance, a defendant charged with an offense that had a statutory maximum of 20 years would have no idea whether the trial court would impose a sentence of six months or ten years. In light of this predicament, this Court held in *Cobbs* that it would be appropriate for a trial court, at the defendant's request, to accord the defendant some rough, "ballpark" idea of the length of sentence that the trial court was inclined to impose. I do not believe that a *Cobbs* evaluation was ever intended to deprive a defendant of the right to be sentenced on the basis of correctly calculated guidelines.

A defendant who pleads guilty without agreeing to a specific sentence, does not waive the right to appeal a scoring error. MCR 6.302 requires a trial court to inform a defendant who is pleading guilty that he or she is waiving various rights, including the right to be tried by a jury, but it does not require the trial court to inform the defendant that he or she is waiving the right to challenge the sentence. A waiver is an " 'intentional relinquishment or abandonment of a known right.' " *People v Carter*, 462 Mich 206, 215 (2000) (citation omitted). A defendant who pleads guilty without agreeing to a specific sentence intentionally relinquishes the right to be tried by a jury, but does not intentionally relinquish the right to be correctly sentenced.

In the instant case, defendant argues that the trial court erroneously scored OV 13, and, thus, that he is entitled to be resentenced. On December 7, 2005, we directed the Clerk to schedule oral argument on whether to grant leave to appeal in *People v Francisco,* Docket No. 129035, and we have directed the parties in that case to address the same issue that is at issue in this case—"whether *People v McDaniel,* 256 Mich App 165, 172-173 (2003), was correct in deciding that OV 13 may be scored based on three or more felonies committed in any five-year period even if that period does not include the date of the sentencing offense." Therefore, I would hold this case in abeyance for *Francisco.*

CAVANAGH and KELLY, JJ. We join the statement of Justice MARKMAN.

PEOPLE v SEAN TAYLOR, No. 128255; Court of Appeals No. 251148.

KELLY, J. (*dissenting*). I would grant leave to appeal. The Court of Appeals decision in this case grafts onto the felony-murder statute offenses that the Legislature did not list there. MCL 750.316. We should review this decision to ensure that it is not a judicial expansion into an area that the Legislature has clearly occupied. Hence, I would grant leave to appeal.

In re DONNELLON (DEPARTMENT OF HUMAN SERVICES v VANOVER), No. 129959; Court of Appeals No. 264744.

Summary Dispositions December 27, 2005:

NEAL v DEPARTMENT OF CORRECTIONS and ANDERSON v DEPARTMENT OF CORRECTIONS, Nos. 128540, 128541. Pursuant to MCR 7.302(G)(1), in lieu

of granting leave to appeal, we remand this case to the Court of Appeals to consider defendants' argument regarding the applicability of the prison litigation reform act, MCL 600.5501 *et seq.*, to prisoners whose claims accrued after the effective date of the act. The application for leave to appeal as cross-appellant is also considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The motions to lift stay and to dismiss application are denied. We do not retain jurisdiction. Court of Appeals Nos. 253543, 256506.

TAYLOR, C.J., did not participate.

PEOPLE v GETMAN, No. 129784. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the Calhoun Circuit Court's order of February 10, 2005, and remand this case to the Calhoun Circuit Court for consideration of the merits of defendant's motion for relief from judgment filed on December 13, 2004. Because the court did not rule on defendant's motion to withdraw guilty plea filed on August 24, 2004, or defendant's motion for relief from judgment filed on September 14, 2004, the Calhoun Circuit Court erred in dismissing defendant's motion for relief from judgment filed on December 13, 2004. We do not retain jurisdiction. Court of Appeals No. 261626.

PEOPLE v MORI, No. 129794. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Bay Circuit Court to resentence defendant within the sentencing guidelines range for defendant's absconding conviction or for articulation of substantial and compelling reasons for departing from the guidelines range. MCL 769.34(11). In all other respects the application is denied. Court of Appeals No. 264430.

Leave to Appeal Denied December 27, 2005:

FLEETWOOD v GOVERNOR, No. 127470; Court of Appeals No. 258059.

PEOPLE v THEIS, No. 127842; Court of Appeals No. 258330.

PERCIVAL v DEPARTMENT OF CORRECTIONS, No. 128211. The motion for joinder of parties is denied. Court of Appeals No. 261019.

WOODARD v SEBRO PLASTICS, INC, No. 128365; Court of Appeals No. 258522.

PEOPLE v WAGLE, No. 128397. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255947.

PEOPLE v WIECEK, No. 128440; Court of Appeals No. 247596.

PEOPLE v BURGER, No. 128614; Court of Appeals No. 251788.

PEOPLE v WILLIE JONES, No. 128638; Court of Appeals No. 250326.

PEOPLE v KAFANDEN, No. 128643. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257605.

PEOPLE v JEROME LEWIS, No. 128662. The motion to remand is denied. Court of Appeals No. 252508.

PEOPLE v STANLEY GIBBS, No. 128691. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258165.

PEOPLE v WINBURN, No. 128696. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). The motion to remand and the motion to compel the circuit court to docket and adjudicate a motion for reconsideration are also denied. Court of Appeals No. 258661.

PEOPLE v KENDRICKS, No. 128704; Court of Appeals No. 251882.

PEOPLE v MARSHALL FORREST III, No. 128732. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258736.

SHOAFF v BALDWIN, No. 128733, 128734, 128736; Court of Appeals Nos. 248606, 248609, 255460.

PEOPLE v NYE, No. 128754; Court of Appeals No. 252557.

SMITH v SMITH, No. 128780; Court of Appeals No. 251773.
CAVANAGH, J., did not participate.

HALL v SMALL, No. 128784; reported below: 267 Mich App 330.

PEOPLE v ALFONSO MARTINEZ, No. 128803; Court of Appeals No. 249416.

PEOPLE v NICHOLS, No. 128852; Court of Appeals No. 251428.
KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

FITTS v HOFBAUER, No. 128857; Court of Appeals No. 259740.

PEOPLE v WINNIE, No. 128869; Court of Appeals No. 253717.
KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

SARAFOPOULOS v ROMP, No. 128879; Court of Appeals No. 253214.

TUCKER v MEIJER, INC, No. 128910; Court of Appeals No. 251771.

PEOPLE v CHAUNCEY JACKSON, No. 128915; Court of Appeals No. 253391.

PEOPLE v FALCONER, No. 128919; Court of Appeals No. 260025.
KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

GEHRKE v GEHRKE, No. 128922; reported below: 266 Mich App 391.

PEOPLE v SUFAJ, No. 128926; Court of Appeals No. 253551.

PEOPLE v JAMES DAVIS, No. 128933; Court of Appeals No. 252145.

FORCELLI v PRINCETON ENTERPRISES, LLC, No. 128941; Court of Appeals No. 251305.

VALENCIC v TPM, INC, No. 128954; Court of Appeals No. 259469.

CZYZYK v IRONS, No. 128955; Court of Appeals No. 253126.

EVANS v DICKSTEIN, No. 128959; Court of Appeals No. 252791.

TAYLOR v CROWN VANTAGE CORPORATION, No. 128964; Court of Appeals No. 259681.

WEGIENKA v MONSANTO CHEMICAL COMPANY, INC, No. 128971; Court of Appeals No. 259508.

In re MESSER TRUST (FIFTH THIRD BANK v REMAINDER BENEFICIARIES), No. 128973; Court of Appeals No. 249456.

UNITED STATES STEEL CORPORATION v CITY OF ECORSE, Nos. 128978, 128980; Court of Appeals Nos. 260704, 260705.

CARPENTER v SNACKTIME SERVICES, INC, No. 128996; Court of Appeals No. 252434.

In re PATROSKE ESTATE (SCHLACHT v PATROSKE), No. 129007; Court of Appeals No. 253067.

PEOPLE v CONN, No. 129012; Court of Appeals No. 252591.

DYER v MARQUETTE GENERAL HOSPITAL, INC, No. 129018; Court of Appeals No. 252413.

PEOPLE v $1,101.67, No. 129021; Court of Appeals No. 260290.

MAKSIMUK v ED RINKE CHEVROLET COMPANY, No. 129023; Court of Appeals No. 251895.

MOSCHKE v UTILITY CONTRACTING COMPANY, No. 129030; Court of Appeals No. 260279.

JENKINS v SMITH, No. 129047; Court of Appeals No. 252796.

COUNTRYSIDE TOWNHOUSES v MONTERUSSO, No. 129057; Court of Appeals No. 259966.

PEOPLE v KISSANE, No. 129069. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). To the extent that the defendant challenges the denial of relief under MCL 770.16, the application is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 259734.

DAVIS v GENERAL MOTORS CORPORATION, No. 129086; Court of Appeals No. 260319.

PEOPLE v KITTLE, No. 129109. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259476.

AMOS v KELLER TRANSFER LINE, INC, No. 129125; Court of Appeals No. 254232.

PEOPLE v SINADINOS, No. 129164; Court of Appeals No. 261466.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v N KALONJI OWUSU I, No. 129165. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256603.

BELIGANO v WAL-MART, INC, No. 129168; Court of Appeals No. 261789.

PEOPLE v CARLETON, No. 129170; Court of Appeals No. 252555.

LONG v DEPARTMENT OF TRANSPORTATION, No. 129172; Court of Appeals No. 252751.

CAVANAGH, J., did not participate.

PEOPLE v BURKS, No. 129173; Court of Appeals No. 250169.

LAUER v WAYNE COUNTY, No. 129175; Court of Appeals No. 254318.

PEOPLE v HAMBY, No. 129180; Court of Appeals No. 252735.

PEOPLE v JAMES STEVENSON, No. 129183. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is denied. Court of Appeals No. 259034.

PEOPLE v RONALD ANDERSON, No. 129185. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259844.

PEOPLE v LANTON, No. 129186; Court of Appeals No. 255638.

PEOPLE v SEAN TERRY, No. 129188; Court of Appeals No. 252373.

PEOPLE v THREATT, No. 129197. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259037.

PEOPLE v WERNER, No. 129199. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259282.

SIMCOX v ABC APPLIANCE INC, No. 129213; Court of Appeals No. 261679.

PEOPLE v RICKY J NELSON, No. 129215. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259541.

PEOPLE v DEATRICK, No. 129219; Court of Appeals No. 261452.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v STERLING, No. 129233; Court of Appeals No. 254339.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v PRISCILLA PRICE, No. 129243; Court of Appeals No. 261739.

ALEXANDER v PERFECTION BAKERIES, INC, No. 129252; reported below: 267 Mich App 161.

WRIGHT v MICRO ELECTRONICS, INC, No. 129261; Court of Appeals No. 252790.

HALL v WAYNE COUNTY DEPARTMENT OF PUBLIC SERVICES, No. 129266; Court of Appeals No. 252162.

PEOPLE v JERMAINE BROWN, No. 129286. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for peremptory reversal, the motion for a writ of habeas corpus and protective order, and the motion for miscellaneous relief are denied. Court of Appeals No. 258878.

PEOPLE v ANTHONY DIXON, No. 129288. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259249.

PEOPLE v DAVID BROWN, No. 129290. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is denied. Court of Appeals No. 259418.

PEOPLE v STRAUB, No. 129291; Court of Appeals No. 263099.

STURGEON BEACH PROPERTY OWNERS ASSOCIATION v GULL, No. 129292; Court of Appeals No. 253878.

WISNIEWSKI v TENNECO, INC, No. 129294. The motion to strike the appellant's supplemental brief is denied as moot. Court of Appeals No. 261351.

PEOPLE v SCAMIHORN, No. 129311. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259961.

BELLERS v DEPARTMENT OF CORRECTIONS, No. 129316; Court of Appeals No. 260964.

VALLEJO v DOWNING, No. 129319; Court of Appeals No. 260433.

PEOPLE v MONEHEN, No. 129320. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259864.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v HERNDON, No. 129323. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258742.

PEOPLE v WAYNE DELL, No. 129327. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262768.

PEOPLE v HUMPHREY, No. 129330. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259807.

DRAKE v DEPARTMENT OF TREASURY, No. 129332; Court of Appeals No. 260851.

PEOPLE v BEAN, No. 129338; Court of Appeals No. 262146.

PEOPLE v MARRERO, No. 129342. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to add issue is granted. The motion to remand is denied. Court of Appeals No. 260448.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v TIDIK, No. 129349; Court of Appeals No. 252504.

ORION HOMES, INC v CITY OF ROYAL OAK, No. 129351; Court of Appeals No. 262386.

RUSSELL v RICHFIELD IRON WORKS, No. 129354; Court of Appeals No. 260291.

PEOPLE v LEONARD HUNTER, No. 129356; Court of Appeals No. 252595.

PEOPLE v THEODORE REYNOLDS III, No. 129366. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 262282.

KELLY, J. I would grant leave to appeal.

YAHIA v OMEGA INDUSTRIES, INC, No. 129369; Court of Appeals No. 262101.

MENDOLA v ABBOTT, NICHOLSON, QUILTER, ESSHAKI & YOUNGBLOOD, PC, No. 129370; Court of Appeals No. 261613.

MATUSCAK v WALGREEN COMPANY, No. 129374; Court of Appeals No. 261319.

HUTCHINSON v LAKEVIEW LUTHERAN MANOR, No. 129375; Court of Appeals No. 261618.

PEOPLE v MAGUIRE, No. 129378; Court of Appeals No. 262245.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

ANDERSON v FORD MOTOR COMPANY, No. 129379; Court of Appeals No. 253090.

PEOPLE v CHESTER COLE, No. 129387; Court of Appeals No. 254186.

GRANT v DEPARTMENT OF CORRECTIONS, No. 129389; Court of Appeals No. 263353.

PEOPLE v HERRERA, No. 129394; Court of Appeals No. 249569.

PEOPLE v HAROLD COLE, No. 129395; Court of Appeals No. 261907.

PERKINS v HARDWICK, No. 129401; Court of Appeals No. 264525.

PEOPLE v WARDELL WILLIS, No. 129407; Court of Appeals No. 263241.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v KEITH, No. 129410. The motion for immediate consideration and the motion for miscellaneous relief are granted. Court of Appeals No. 252187.

PEOPLE v BORETTI, No. 129411. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260557.

PEOPLE v HERNANDEZ, No. 129413; Court of Appeals No. 250008.

RADULOVICH v TENAGLIA, Nos. 129415, 129416; Court of Appeals Nos. 253267, 256658.

PEOPLE v ESTEP, No. 129421; Court of Appeals No. 253125.

PEOPLE v JESSIE HARRISON, JR, No. 129433. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motions to remand for an evidentiary hearing and to seal the record are denied. Court of Appeals No. 260384.

PEOPLE v ANTHONY, No. 129440. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The miscellaneous motions are denied. Court of Appeals No. 263005.

PEOPLE v POYNTZ, No. 129441; Court of Appeals No. 253402.

PEOPLE v MARIA MARTINEZ, No. 129444; Court of Appeals No. 249573.

PEOPLE v JEFFERY WOODARD, No. 129450. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260559.

PEOPLE v STANTON, No. 129455. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259572.

PEOPLE v MORIAH YOUNG, No. 129465; Court of Appeals No. 260925.

PEOPLE v JOSEPH EVANS, No. 129470; Court of Appeals No. 261992.

PEOPLE v ERIC THOMAS, No. 129474; Court of Appeals No. 262454.

PEOPLE v WILLIE MURRAY, No. 129475. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259509.

RICHARDS v ADAPT BRANCH, INC, No. 129478; Court of Appeals No. 261189.

PEOPLE v SAMUEL, No. 129490. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260324.

PEOPLE v RIMSON, No. 129495. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260296.

PEOPLE v VONGPRACHANH, No. 129496; Court of Appeals No. 262025.

PEOPLE v HARDIMAN, No. 129498. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260265.

MOAK v MURFIN, No. 129503; Court of Appeals No. 260389.

RICHARD v FLAGSTAR BANK FSB, No. 129505; Court of Appeals No. 260987.

PEOPLE v JEROME HOLLOWAY, No. 129509. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260343.

PEOPLE v MACK, No. 129510; Court of Appeals No. 253121.

PEOPLE v CONWAY, No. 129511. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 264257.

PEOPLE v FELTON WOODS, No. 129517. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). The motion to remand is denied. Court of Appeals No. 263604.

PEOPLE v EAVES, No. 129519; Court of Appeals No. 263599.

PEOPLE v WHITCHSETT, No. 129520; Court of Appeals No. 263601.

PEOPLE v KEENAN, No. 129526. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260268.

PEOPLE v PACHECO, No. 129528. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 262318.

PEOPLE v ALDER, No. 129535. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). The motion to remand is denied. Court of Appeals No. 260731.

PEOPLE v MICHAEL BATES, No. 129538; Court of Appeals No. 263113.

PEOPLE v RONALD FIELDS, No. 129539; Court of Appeals No. 253405.

PEOPLE v BRADFIELD, No. 129540. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260929.

PEOPLE v COURSER, No. 129541; Court of Appeals No. 262882.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v GERALD MCDONALD, No. 129542; Court of Appeals No. 262902.

PEOPLE v NIGHTHAWK, No. 129544. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260505.

PEOPLE v LAYHER, No. 129547. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260887.

PEOPLE v DOWNING, No. 129548; Court of Appeals No. 261996.

PEOPLE v POLO, No. 129549. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260198.

PEOPLE v SHAWN MARTIN, No. 129550; Court of Appeals No. 263521.

PEOPLE v JOSEPH CURTIS, No. 129551; Court of Appeals No. 262572.

PEOPLE v HAMPTON, No. 129552; Court of Appeals No. 262765.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

AAA INVESTMENTS v BARNES, No. 129553; Court of Appeals No. 261932.

PEOPLE v ARCHIE MOORE, No. 129554; Court of Appeals No. 261180.

PEOPLE v ANDRE POLK, No. 129556; Court of Appeals No. 262553.

PEOPLE v ALPHONZO WRIGHT, No. 129561; Court of Appeals No. 263387.

PEOPLE v WALTON, No. 129562; Court of Appeals No. 254820.

PEOPLE v REGAN, No. 129575. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260420.

PEOPLE v BRENDA PRICE, No. 129576; Court of Appeals No. 264114.

PEOPLE v SEVREY, No. 129577; Court of Appeals No. 262931.

PEOPLE v TANNER, No. 129578; Court of Appeals No. 262878.

PEOPLE v GRANDBERRY, No. 129579; Court of Appeals No. 254212.

PEOPLE v WECKLE, No. 129580; Court of Appeals No. 263773.

PEOPLE v RYAN ROBERTSON, No. 129581; Court of Appeals No. 251879.

PEOPLE v CURTIS JONES, No. 129582. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260702.

KUNTZ v USF HOLLAND, INC, No. 129584; Court of Appeals No. 262383.

PEOPLE v RUSSELL DUNHAM, No. 129585. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261077.

PEOPLE v JEHMLICH, No. 129586. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260462.

PEOPLE v VIRGIL GREEN, No. 129587; Court of Appeals No. 252045.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v MICHAEL MONROE, No. 129588; Court of Appeals No. 253620.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v EMEIGH, No. 129589; Court of Appeals No. 262393.

PEOPLE v CLARENCE GREEN, No. 129590; Court of Appeals No. 263491.

PEOPLE v AVERELL WILLIAMS, No. 129592. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260409.

PEOPLE v EDWARD PITTMAN, No. 129593; Court of Appeals No. 262574.

PEOPLE v HANN, No. 129594; Court of Appeals No. 263051.

PEOPLE v KOPSOLIAS, No. 129596; Court of Appeals No. 262850.

PEOPLE v NICHOLS, No. 129598. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260145.

PEOPLE v LINDBLOOM, No. 129600; Court of Appeals No. 263224.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

WILLIAMS v DEPARTMENT OF CORRECTIONS, No. 129604; Court of Appeals No. 261020.

PEOPLE v TYRONE TAYLOR, JR, No. 129616; Court of Appeals No. 262877.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v LAWRENCE DELL, No. 129618. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 261013.

PEOPLE v CERDAVALENCIA, No. 129621; Court of Appeals No. 263489.

PEOPLE v ROBERT COLLINS, No. 129628; Court of Appeals No. 264028.

PEOPLE v DERRICK RAY, No. 129630. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260901.

PEOPLE v MARK WILSON, No. 129634. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260614.

PEOPLE v SPIKES, No. 129635; Court of Appeals No. 264340.

PEOPLE v CALIFF, No. 129637; Court of Appeals No. 254134.

PEOPLE v HAROLD JOHNSON, No. 129638. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260129.

KING v BRIGGS, Nos. 129639, 129640; Court of Appeals Nos. 259136, 259229.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal to reconsider *Waltz v Wyse*, 469 Mich 642 (2004).

PEOPLE v DUANE GIBSON, No. 129641; Court of Appeals No. 262147.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v GNIDA, No. 129645; Court of Appeals No. 253707.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v KEITH SMITH, No. 129646. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260620.

PEOPLE v GORA, No. 129647; Court of Appeals No. 262876.

PEOPLE v DUPLESSIS, No. 129649. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261183.

PEOPLE v AMOS BOWERS, JR, No. 129651. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260669.

PEOPLE v MCBRIDE, No. 129654; Court of Appeals No. 252505.

PEOPLE v JEFFREY GRAY, No. 129655; Court of Appeals No. 262512.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v LESLIE GORDON, No. 129657; Court of Appeals No. 263778.

PEOPLE v DERRICK JAMES, No. 129658; Court of Appeals No. 255291.

PEOPLE v MATTISON, No. 129659. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260563.

PEOPLE v TODOROV, No. 129660; Court of Appeals No. 253945.

PEOPLE v PAUL REED, No. 129661; Court of Appeals No. 263420.

PEOPLE v DICK, No. 129662; Court of Appeals No. 262319.

PEOPLE v HURST, No. 129663; Court of Appeals No. 264162.

PEOPLE v SCOTT MASON, No. 129669; Court of Appeals No. 262453.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v HUDE, No. 129670; Court of Appeals No. 264455.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v GREGORY HAMILTON, No. 129671; Court of Appeals No. 262337.

PEOPLE v WORKMAN, No. 129676; Court of Appeals No. 263119.

PEOPLE v MICHAEL VILLICANA, JR, No. 129677; Court of Appeals No. 254046.

PEOPLE v RICHARD JOHNSON, No. 129678. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for appointment of counsel is denied. Court of Appeals No. 261477.

PEOPLE v SANTOS, No. 129679; Court of Appeals No. 264145.

PEOPLE v WILLIAM ERNEST, JR, No. 129681; Court of Appeals No. 262321.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v OEHLER, No. 129682; Court of Appeals No. 264717.

PEOPLE v EMMITT GLOVER, No. 129683. The defendant's motion to remand is also denied. Court of Appeals No. 254928.

PEOPLE v JAMISON, No. 129685; Court of Appeals No. 262883.

PEOPLE v MARK MURRAY, No. 129694; Court of Appeals No. 263609.

PEOPLE v WALLACE, No. 129697; Court of Appeals No. 263611.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v RICKY L NELSON, No. 129698. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260238.

PEOPLE v EUGENE REID, No. 129702; Court of Appeals No. 256237.

PEOPLE v DAVID STEWART, No. 129703. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260618.

PEOPLE v JAMES THORP, No. 129704; Court of Appeals No. 263548.

PEOPLE v MINNER, No. 129715. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 264842.

PEOPLE v ACKELS, No. 129718; Court of Appeals No. 254133.

PEOPLE v SHAWN YOUNG, No. 129720; Court of Appeals No. 253626.

PEOPLE v STEMEN, No. 129721. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261472.

PEOPLE v FORTSON, No. 129722; Court of Appeals No. 262239.

PEOPLE v SCHELLENBERGER, No. 129723. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261241.

PEOPLE v DENSLOW, No. 129725; Court of Appeals No. 263516.

PEOPLE v KAJUAN HALE, No. 129726; Court of Appeals No. 254412.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v BARNETT, No. 129727; Court of Appeals No. 263806.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v BILLIE CLARK, No. 129730; Court of Appeals No. 264420.

PEOPLE v GILLAM, No. 129731; Court of Appeals No. 264388.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v MIKLUSICAK, No. 129735; Court of Appeals No. 263706.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v STEPHENSON, No. 129738. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 264767.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v SAMMIE CLARK, No. 129744; Court of Appeals No. 252545.

PEOPLE v HUTSON, No. 129748; Court of Appeals No. 254188.

PEOPLE v TYRONE ALLEN, No. 129752. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261428.

PEOPLE v LOUKAS, No. 129753. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for an evidentiary hearing is denied. Court of Appeals No. 260753.

PEOPLE v DWON MAYS, No. 129755; Court of Appeals No. 264239.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v MUSLEH, No. 129759. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 265075.

PEOPLE v RUIZ, No. 129764. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261741.

PEOPLE v MCMILLAN, No. 129772. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261759.

PEOPLE v ANDRE HAWKINS, No. 129773; Court of Appeals No. 264291.

PEOPLE v DELGADO, No. 129782. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261081.

PEOPLE v THOMAS POLK, No. 129785. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262059.

PEOPLE v GAGNE, No. 129790; Court of Appeals No. 264347.

PEOPLE v ARTZ, No. 129793. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261323.

PEOPLE v COBAS, No. 129796. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 264659.

PEOPLE v CLIFFORD WALKER, No. 129799; Court of Appeals No. 264381.

PEOPLE v TOLAND, No. 129803; Court of Appeals No. 254027.

PEOPLE v ROSE, No. 129805; Court of Appeals No. 252935.

PEOPLE v FOSSETT, No. 129806; Court of Appeals No. 264838.

PEOPLE v GUZMAN, No. 129809. The motion to raise new issues is denied. Court of Appeals No. 254616.

PEOPLE v JIMMY MORGAN, No. 129819. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261831.

PEOPLE v MARION, No. 129829; Court of Appeals No. 254011.

PEOPLE v OESCHGER, No. 129832. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261526.

PEOPLE v RANIS HILL, Nos. 129852, 129854; Court of Appeals Nos. 256184, 256984.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v WYMAN COBB, III, No. 129855. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262145.

PEOPLE v GOUINE, No. 129863; Court of Appeals No. 264526.

PEOPLE v ERIC WILLIAMS, No. 129867. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 265677.

KELLY, J. I would grant leave to appeal.

PEOPLE v JAMES MCCRAE, JR, No. 129869; Court of Appeals No. 253396.

PEOPLE v HEATHER ROBINSON, No. 129870. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261432.

PEOPLE v LEE BUSH, No. 129888. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261819.

PEOPLE v KEVIN TAYLOR, No. 129891; Court of Appeals No. 263156.

PEOPLE v DAVID MCINTEE, No. 129898; Court of Appeals No. 254895.

KELLY, J. I would hold this case in abeyance for *People v Drohan,* lv gtd 472 Mich 881 (2005).

PEOPLE v DERRICK MASON, No. 129899; Court of Appeals No. 255423.

PEOPLE v SALOME GONZALES, No. 129900. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262127.

PEOPLE v SCOTT DUNHAM, No. 129904; Court of Appeals No. 257548.

PEOPLE v KERBYSON, No. 129906; Court of Appeals No. 254349.

PEOPLE v SEALS, No. 129911; Court of Appeals No. 255873.

PEOPLE v SARA JOHNSON, No. 129912; Court of Appeals No. 254329.

PEOPLE v SCHRAUBEN, No. 129921; Court of Appeals No. 264996.

PEOPLE v CORPUS, No. 129924. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261818.

PEOPLE v QUICK, No. 129925; Court of Appeals No. 256843.

Interlocutory Appeals

Leave to Appeal Denied December 27, 2005:

HOLDEN v MARYWOOD GOLF CLUB, No. 129156; Court of Appeals No. 260253.

PEOPLE v GAMBLE, No. 129599; Court of Appeals No. 252608.

Leave to Appeal Granted December 28, 2005:

MIDDLETON v MARQUETTE COUNTY, No. 128677; Court of Appeals No. 251855.

CARSON FISCHER, PLC v MICHIGAN NATIONAL BANK, No. 128689. The parties are directed to include among the issues to be briefed: (1) whether the insertion of personal loan numbers on the face of embezzled checks made payable to the order of Michigan National Bank was an "alteration" of the checks as that term is utilized in MCL 440.4406 and MCL 440.3407 and (2) if the checks did not contain an "alteration," whether they were therefore properly payable under MCL 440.4401(1). Court of Appeals No. 248167.

46TH CIRCUIT TRIAL COURT v CRAWFORD COUNTY, No. 128878. On order of the Court, the motion for immediate consideration and the motions to exceed page limit are granted. The application for leave to appeal the May 3, 2005, judgment of the Court of Appeals is considered, and it is granted, limited to the issues: (1) what evidence supported the conclusion that the level of funding offered by the counties was insufficient to allow the court to fulfill essential court functions; (2) with respect to the dispute over pension and health care benefits, what evidence supports the conclusion that these benefits were reasonable and necessary to achieve the court's constitutional and statutory responsibilities, and that the court's failure to obtain such benefits so affected employee morale, or the court's ability to retain or hire competent employees, that they were reasonable and necessary to achieve the court's constitutional and statutory responsibilities; and (3) whether Crawford County and/or Kalkaska County entered into a contract with the 46th Circuit Trial Court to fund pension and health care benefits at a specific level. In all other respects, leave to appeal is denied. The motion for peremptory reversal is denied. Because of the unique characteristics of this

case, we order that Kalkaska and Crawford counties shall file a joint appellants' brief, not to exceed 70 pages. The 46th Circuit Trial Court and Otsego County shall file a joint appellees' brief, not to exceed 70 pages. Kalkaska and Crawford counties may file a joint reply brief as provided by MCR 7.306(C). The parties shall not file additional briefs without first obtaining the approval of the Court. The parties' briefs may not advance arguments regarding any issues on which this Court has denied leave. Briefs that do not conform to this direction may be stricken. We also order the parties to designate lead counsel and inform the clerk of such designation. Lead counsel shall manage and coordinate the preparation of briefs to avoid any duplication of issues. Only lead counsel will be permitted to present oral argument. The Michigan Association of Counties' motion to file a brief amicus curiae is granted. The Michigan Association of Counties is invited to file a brief amicus curiae within the time for filing the joint appellants' brief. MCR 7.306(D). Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 266 Mich App 150.

Summary Dispositions December 28, 2005:

CROUCHMAN v MOTOR CITY ELECTRIC COMPANY, No. 127871. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and the summary disposition orders of the Wayne Circuit Court, and remand this case to the Wayne Circuit Court for entry of an order granting third-party defendant's motion for summary disposition. The unambiguous language of § IV.1.a(1) of the insurance policy does not extend liability coverage to the vehicle the third-party plaintiff was operating. See *Farm Bureau Mutual Ins Co of Michigan v Nikkel,* 460 Mich 558 (1999). Coverage cannot be based on the language in § IV.1.c(2) of the policy, because the language of that provision excludes coverage and does not create coverage. See *Auto-Owners Ins Co v Harrington,* 455 Mich 377, 381-382 (1997). Court of Appeals No. 248419.

CAVANAGH and KELLY, JJ. We concur in the result only.

DPG YORK, LLC v STATE OF MICHIGAN, No. 128656. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals order and remand this case to the Court of Appeals for plenary consideration. We direct the Court of Appeals to issue an abbreviated briefing schedule to the parties and to issue its decision within 45 days of the date of this order. Among the issues to be addressed, the Court of Appeals shall consider whether 2004 PA 326 affords due process protection against unnecessary and uncontrolled discretionary power in conformance with *State Highway Comm v Vanderkloot*, 392 Mich 159, 169 (1974), and *Westervelt v Natural Resources Comm*, 402 Mich 412 (1978). That is, the court shall consider whether, pursuant to 2004 PA 326, the "totality of protections against arbitrariness, including both safeguards and standards," is adequate to protect against arbitrary administrative action, "irrespective of what [2004 PA 326] say[s] or fail[s] to say." *Westervelt*, *supra* p 443 n 20, quoting Davis, *Administrative Law Treatise*, 1970 Supplement, pp 40-41 (emphasis deleted). We do not retain jurisdiction. Court of Appeals No. 260337.

WOODLAND OIL COMPANY v OTWELL MAWBY, PC, No. 128709. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and reinstate the Grand Traverse Circuit Court's directed verdict in favor of defendant, dismissing plaintiff's innocent misrepresentation claim. Contrary to the reasoning of the Court of Appeals, plaintiff did not incur any damages in reliance on defendant's alleged misrepresentations. Further, plaintiff's costs to perform additional remediation did not inure to defendant's benefit. See *United States Fidelity & Guaranty Company v Black*, 412 Mich 99 (1981). In all other respects, the application for leave to appeal is denied. Court of Appeals No. 249246.

GONZALEZ INTEGRATED MARKETING v OLTERSDORF, No. 128735. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the Court of Appeals judgment and reinstate the September 10, 2003, order of the Wayne Circuit Court granting plaintiff's motion for summary disposition and denying defendant's motion for summary disposition for the reasons stated by that court. Court of Appeals No. 251151.

PEOPLE v CADARETTE, No. 128755. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether defendant must be given the opportunity to withdraw his plea for failure of the Genesee Circuit Court to honor a sentence agreement under *People v Cobbs*, 443 Mich 276 (1993). In all other respects leave to appeal is denied. We do not retain jurisdiction. Court of Appeals No. 260890.

GRANT v AAA MICHIGAN, WISCONSIN, INC, No. 128936. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to the Court of Appeals for reconsideration in light of our decision in *Smith v Globe Life Ins Co*, 460 Mich 446, 467 (1999), holding that MCL 445.904(1) and (2) permit private actions against an insurer pursuant to MCL 445.911, because, before its amendment by 2000 PA 432, MCL 445.904(2) provided an exception to the exemption of MCL 445.904(1)(a) permitting private actions pursuant to MCL 445.911 arising out of misconduct made unlawful by chapter 20 of the Insurance Code. We do not retain jurisdiction. Reported below: 266 Mich App 597.

KILLINGBECK v FLOTATION DOCKING, INC, No. 129008. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the judgment of the Mackinac Circuit Court. Summary disposition was properly granted to defendant where plaintiff failed to provide any direct evidence of retaliation in violation of MCL 418.301(11). Plaintiff's ambiguous question asked of defendant's supervisory employee could at most be deemed a reference to defendant's letter of September 1, 1999, advising plaintiff that there was no position available for him at that time, should his doctor release him to return to work. Nothing in that letter revealed an improper discriminatory motive, and the letter was in fact neither a termination letter nor an adverse employment action. Court of Appeals No. 251928.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE v COLMINES, No. 129090. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for a determination of whether defendant is entitled to jail credit for time served on this offense because of his inability to post bond. MCL 769.11b. If the court determines that defendant is entitled to jail credit, it shall determine the appropriate amount and issue an amended judgment of sentence accordingly. In all other respects, leave to appeal is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). We do not retain jurisdiction. Court of Appeals No. 259203.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal December 28, 2005:

BIERLEIN v SCHNEIDER, No. 128913. Pursuant to MCR 7.302(G)(1), we direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. The parties shall file supplemental briefs within 28 days of the date of this order, addressing whether, when no conservator had been appointed, and no bond had been approved by or filed with the probate court, (1) the circuit court had subject matter jurisdiction to approve the settlement and enter an order of dismissal; or (2) any other reason justifying relief from the operation of the judgment in this case exists; or (3) as a prophylactic measure, in the exercise of this Court's inherent power to enforce its own rules pursuant to MCR 7.316(A)(7), the dismissal in this case ought to be set aside and the settlement reopened. Court of Appeals No. 259519.

Leave to Appeal Denied December 28, 2005:

BELL v MICHIGAN COUNCIL 25 OF THE AMERICAN FEDERATION OF STATE, COUNTY, & MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 1023, No. 128663; Court of Appeals No. 246684.

CAVANAGH and CORRIGAN, JJ. We would grant leave to appeal.

MARKEL v DEGRAW, No. 128948; Court of Appeals No. 252054.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

CARON v WALMART STORES, INC, No. 129075; Court of Appeals No. 254915.

KELLY, J. I would grant leave to appeal.

PEOPLE v PALMER, No. 129129; Court of Appeals No. 253408.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v TOMMY BROWN, No. 129198. Court of Appeals No. 254494.

PEOPLE v GROVE, No. 129357; Court of Appeals No. 255397.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v EVERETT, No. 129486; Court of Appeals No. 253303.

KELLY, J. I would grant leave to appeal.

In re CONGDON (FAMILY INDEPENDENCE AGENCY v CONGDON), Nos. 129936, 129974; Court of Appeals Nos. 260374, 260373.

PERIC v PERIC, No. 129938. The motion for dismissal is denied as moot. Court of Appeals No. 259222.

MURDOCK v WAYNE CIRCUIT JUDGE, No. 130107. The motion for stay is denied. Court of Appeals No. 264482.

Miscellaneous Order December 28, 2005:

CENTRAL CEILING & PARTITION, INC v DEPARTMENT OF COMMERCE, No. 121009. After granting leave to appeal, 468 Mich 870 (2003), this Court carefully considered the written and oral arguments of the parties and affirmed the judgment of the Court of Appeals, albeit for different reasons. The Court concluded, based on the limited facts of this case, that the liens presented to the Wayne County Register of Deeds were timely recorded. 470 Mich 877 (2004). In the order dated June 17, 2004, this Court ordered the Wayne County Register of Deeds to show cause why the Register of Deeds should not be required to pay the costs incurred by the other parties in the prosecution and defense of this action. We further ordered the Wayne County Register of Deeds to send the Clerk of the Court quarterly written reports on its progress toward bringing its recording system into compliance with the requirements of MCL 565.24 and 565.25. The responses of the Register of Deeds, the Michigan Homeowner Construction Lien Recovery Fund, and the Michigan Land Title Association to this Court's order have been considered. On February 23, 2005, Plaintiff Central Ceiling only agreed to waive its claim for case evaluation sanctions against the Department of Commerce. On order of the Court, the Register of Deeds will not be required to pay costs, a public question being involved. The Register of Deeds shall no longer be required to file quarterly reports of its progress toward bringing its recording system into compliance with the statutory requirements. We do not retain jurisdiction. Reported below: 249 Mich App 438.

YOUNG, J. (*concurring*). I concur with the order ending this Court's jurisdiction over this matter without imposing costs on the Wayne County Register of Deeds (Register). However, I wish to emphasize the Register's current and ongoing noncompliance with this state's recording statute, which compromises and jeopardizes the interests of tens of thousands of Wayne County property owners. It is my hope that the elected officials of Wayne County will recognize this grave concern and act immediately to protect their constituents.

This troubling issue came to this Court's attention in the instant case, a dispute over whether construction liens were timely filed. Pursuant to the recording act, MCL 570.1111(1), in order to protect his interests, a lien claimant must record with the register of deeds a construction lien within 90 days of the last furnishing of labor or material. MCL 565.25 requires the register of deeds to maintain an entry book that records the day, hour, and minute of receipt. Plaintiff, Central Ceiling & Partition, Inc., timely presented its construction liens to the Register within the

90-day period. The Register did not actually record the liens and assign a liber and page number until after the 90-day period had lapsed. On the basis of the unique facts of this case, however, we affirmed the Court of Appeals decision that plaintiff's liens were timely recorded. 470 Mich 877 (2004).

Following oral arguments, when it became clear that the recording act was not being followed in Wayne County, this Court ordered the Register to file briefs indicating whether its *current* recording practices complied with the recording statute. We concluded on the basis of the Register's responses that they did not. The Register did not maintain an entry book recording the day, hour, and minute of receipt (e.g., January 1, 2005, at 10:00 a.m.) as required by statute. It only noted the year, month, and day (e.g., January 1, 2005). Second, the Register typically did not record the liens until days or weeks after their receipt. In the instant case, for example, three contractors' liens were not recorded until 35, 48, and 50 days after the lien claimants presented them to the Register. As a result, a lien claimant may have presented its lien within the 90-day window, but, because of the delay in recording, the entry book would not reflect that the lien was "recorded" within 90 days. Consequently, the construction lien would be extinguished under MCL 570.1111(1). Moreover, because the Register's office failed to record the hour and minute when the liens were received, it could not determine priority among conflicting filings as contemplated by the recording act.

We added the Register as a defendant because costs were sought against it for its noncompliance with the statute that had occasioned the dispute in this case. This Court ordered the Register to file quarterly reports and inform this Court of its progress in updating its recording procedures to comply with the recording act. 470 Mich 877 (2004).

I attach herewith our most recent communication from the Register, a November 1, 2005, letter responding to this Court's request for further information regarding its compliance with the statute. This Court asked the Register:

> Has implementation progressed to the point that currently received lien documents are recorded in the new system and the relevant information including day, hour, and minute of receipt, [is] retrievable in compliance with MCL 565.24?

The Register answered in the negative, indicating that it was maintaining the existing, noncompliant system until its new system could be installed.

While the Register may have signed a contract to install and implement a new computerized system sometime in 2006 that will remedy its noncompliance, the Register is still not *currently* complying with the statute. According to the Register, it receives approximately 2,500 to 3,000 documents a day. The new system will not be implemented for six to nine months. On a daily basis, thousands of documents are currently being improperly recorded and added to the huge backlog of filings that also do not comply with the law. In Wayne County, lien claimants and property owners receive little protection that the recording act is de-

signed to provide, and it is these individuals who will suffer the consequences of the Register's noncompliance. Liens, mortgages, and other property interests are jeopardized by the failure of the Register's office to perform its duty in accordance with the law.

It is not this Court's responsibility to direct the operations and funding of an arm of the executive branch. Hence, we will defer to the other political branches to accomplish that which we could not during the pendency of this action. However, it is a grievous thing when a governmental agency fails to protect the very thing it is established to safeguard —the property rights of its citizens. I urge the appropriate elected officials to take account of and remedy this problem as soon as possible.

WEAVER, J. I join the statement of Justice YOUNG.

Robert A. Ficano
County Executive

Edward M. Thomas
Corporation Counsel

Mary Rose MacMillan
Deputy Corporation Counsel

Samuel A. Nouhan
Chief of Litigation
(313) 224-5030

November 1, 2005

RECEIVED
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CORBIN R. DAVIS
CLERK SUPREME COURT

Michigan Supreme Court Clerk's Office
Attn: Mr. Corbin R. Davis, Clerk
Michigan Hall of Justice, 4th Floor
925 W. Ottawa St.
Lansing, Michigan 48915

RE: Central Ceiling & Partition, Inc. v Department of Commerce, et al
Supreme Court No: 121009
Court of Appeals No: 225378
Wayne Circuit Court No: 98-810597 CH

Dear Mr. Davis:

This responds to the Court's September 13, 2005 correspondence requesting additional information regarding the Register of Deeds' implementation of a new records management system. The Court's numbered questions are considered sequentially.

1. **Now that the contract for the new system has been approved, is implementation of the project under way?**

RESPONSE: Yes. The new system is being implemented on schedule and in accordance with the most recent work plan submitted to the Court.

2. **What is the current estimate of the date of completion of the project?**

RESPONSE: The current estimate regarding the completion of the system implementation is late Spring or early Summer of 2006, i.e., around June of 2006.

3. **Has implementation progressed to the point that currently received lien documents are recorded in the new system and the relevant information including day, hour, and minute of receipt, retrievable in compliance with MCL 565.24?**

DEPARTMENT OF CORPORATION COUNSEL
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RESPONSE: No. The transition to the new system is a resource intensive and time consuming operation. The Wayne County Register of Deeds receives approximately 2,500 to 3,000 documents per day for recording. While handling this volume, the Register is simultaneously maintain the existing system and transitioning to the new system.

An early phase of the implementation involves the conversion of 50 million documents into the new format/system (likely approximating some 100 million pages of information), making all documents recorded after 1960 retrievable electronically under the new system. The enormity of this aspect of the implementation has necessitated the re-training and some re-classification of personnel in the Register of Deed's office. Additionally, the implementation has caused a massive revamping of office procedures, and requires the equipping of an off-site (i.e., in another state) disaster recovery site capable of being staffed by the Register's staff in the event of a unexpected system interruption (natural disaster, terrorist event, etc). This phase of the system implementation is a strain on the Register's resources. During this transitional period, normal operations under the TRIMIN system must remain intact, further straining manpower in the Register's office.

4. **If not, what steps are being taken to assure compliance with respect to current filings?**

RESPONSE: The Register is making all reasonable efforts to implement the new system and maintain the old system during the transition. With respect to current filings, the existing system does identify the date of receipt. And once the filing is indexed, such information is electronically retrievable. The current system allows litigants (such as those involved in the above-mentioned lawsuit) to determine the date a construction or similar lien was received in the Register's office, and by inference, the fact that it was received during regular hours of operation.

Also, the Register is considering a proposal for a short term method of compiling date, hour, and minute of receipt of current lien document filings. If adopted, this method will be used during the transition to the new system. It may involve setting up a database of relevant information searchable by the public in the Register's office. The Register is exploring with relevant county departments ways to acquire additional resources and personnel to accomplish this objective.

5. **Does the information currently contained at the Register of Deeds' website, www.waynecountylandrecords.com, represent a partial implementation of the Hart Anthem Records Management System or will implementation of that system not commence until Spring/early Summer, 2006?**

RESPONSE: No. The new system will not be implemented and available to the public on a partial basis. The existing system will cease operations on one day, and the new system will be utilized the next business day. The new system will be fully operational--used by the Register's office and available to the public--in the Spring or early Summer of 2006. The Wayne County Department of Information Technology created the referenced website.

CONCLUDING REMARKS: The Register of Deeds is making every effort to manage the transition to the new system in a timely, efficient, and effective manner. If requested, the Register will provide periodic reports to the Court regarding the status of the new system implementation, and is exploring with the system vendor an accelerated implementation plan that will make the system fully operational and available to the public before the projected date.

Mr. Youngblood has been forthcoming regarding his attempts to reform operations in the Register's office. He has provided periodic reports to the Court in compliance with the Court's prior orders. He has shared detailed information regarding his consideration of, and plans to utilize, the new Hart Anthem Records Management System. He is committed to bringing 21st century technology to the Wayne County Register of Deeds office, in an effort to comply with this Court's mandate, and in service of the public.

Please contact me if you require any additional information.

Very truly yours,

EDWARD THOMAS
Corporation Counsel

Samuel A. Nouhan/bjs

SAMUEL A. NOUHAN
Principal Attorney
Chief of Litigation

#165228

Summary Disposition January 3, 2006:

PEOPLE v JAMES D JACKSON, No. 128629. Pursuant to MCR 7. 302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and remand this case to the Oakland Circuit Court for resentencing within the appropriate sentencing guidelines range or, if the sentencing judge believes that a departure is justified, for a statement of substantial and compelling reasons supporting the departure. We do not quarrel with the Court of Appeals finding that this crime was extremely brutal. However, the sentencing judge stated that she did not believe that defendant was entitled to the same sentence as his accomplices, "who were able to step up to the plate and say what they did and to admit their guilt," while defendant subjected the victims to "having to testify." A sentencing court, cannot, in whole or in part, base its sentence on a defendant's refusal to admit guilt. *People v Wesley,* 428 Mich 708, 711 (1987); *People v Yennior,* 399 Mich 892 (1977). Nor can a defendant be punished for exercising his right to trial. *United States v Jackson,* 390 US 570 (1968); *People v Courts,* 401 Mich 57 (1977). The sentencing court also commented on the "excessive brutality, violence, and terrorism" to which the victims were subjected. But the 50-point score defendant received on Offense Variable 7 already accounted for these circumstances. A sentencing court may base a departure on a characteristic already taken into account by the sentencing guidelines only if the court finds that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b); *People v Babcock,* 469 Mich 247, 268 (2003). No such finding was made here. In all other respects, the application for leave to appeal is denied. Court of Appeals No. 253115.

CORRIGAN, J. (*concurring*). I concur in the majority's conclusion that the sentencing court improperly sentenced defendant on the basis of defendant's refusal to admit guilt. I also reluctantly concur in the majority's decision to remand this case for resentencing because the trial court failed to articulate the factors in this case that were " 'given inadequate or disproportionate weight,' " the precise magic language necessary to sustain a departure under *People v Babcock*, 469 Mich 247, 268, 272 (2003). I write separately to reiterate that sentencing judges need to comply precisely with the *Babcock* requirements so that unnecessary remands may be avoided.

Defendant and his accomplices committed an unimaginably brutal crime. He and his three accomplices broke into a home in search of marijuana. The home, however, was at the time occupied by the victims, a married couple who were housesitting for the owners, and their two-year-old son. Over a period of two to three hours, defendant and his accomplices terrorized the victims through beatings and sexual assaults. The Court of Appeals thoroughly illustrated the objective and verifiable acts of defendant and his accomplices. It stated:

> The guidelines as scored simply do not contemplate the following objective and verifiable acts illustrating that each of the multiple victims in this case experienced sadism, torture or excessive brutality: (1) in the presence of the wife and the two-year old son, the husband endured a severe beating for a prolonged period, at least one-half hour with occasional beating thereafter, that split open the skin on his skull and caused multiple bruises and lacerations all over his body; the husband felt countless strikes by a shotgun, fists, feet and a whipping by an extension cord, and the wife saw the husband struck fifty or sixty times; (2) the assailants forced the husband to strip off his clothing by "point-[ing] the gun to [the wife's] head and then to [the] son's head and ask[ing] if [they] wanted to die"; (3) while Anderson held the shotgun to the wife's face, he and defendant forced her to remove her clothing; defendant and the other assailants issued repeated threats, including that Anderson should shoot the victim because she had seen his face, and that they "should shoot [the wife] for bleeding, bitch"; they also advised the husband, "[B]itch, give us the shit or we're going to rape your girl"; (4) on one occasion, defendant committed three acts of vaginal and rectal penetration of the wife while she was forced to perform fellatio on Anderson, before the two other assailants also forced the wife to fellate them; during one of the last two acts of fellatio, someone penetrated the wife's vagina from behind; the husband repeatedly was beaten and forced to watch many of the penetrations of the wife; (5) defendant and the other assailants forced the wife to fellate the husband briefly before punching and hitting the wife, and making her get on top of her husband and make sexual contact for a short time, all of which occurred while the two-year old son cried and screamed in the wife's arms; (6) the assailants repeatedly separated the victims, especially the wife, who was taken from place to place to facilitate multiple acts of sexual penetration with the various assailants; and (7) after the crimes, which occurred over the course of between two to three hours, (a) police officers indicated that the wife appeared hysterical and devastated; the wife subsequently lost her job and developed an ongoing anxiety disorder that requires daily medication, (b) a police officer reported that the husband exhibited "extremely upset, hysterical" behaviors, and (c) the mother observed that the son repeatedly exhibited aggressive behaviors. [Unpublished opinion per curiam of the Court of Appeals, issued March 15, 2005 (Docket No. 253115).]

At sentencing, the trial judge stated that "an upward departure is justifiable considering the excessive brutality, violence, the terrorism that had occurred to both these victims but most significantly, to [the female victim]." These factors, however, were already considered in the scoring of

the offense variables. A sentencing court may base a departure on a characteristic already taken into account by the sentencing guidelines only if the court finds that the characteristic was " 'given inadequate or disproportionate weight.' " *Babcock, supra* at 268; MCL 769.34(3)(b). The trial court did not so state. It appears to me that such magic language is now indisputably required before this Court will sustain an upward departure.

It is beyond peradventure that objective and verifiable reasons that keenly and irresistibly grab one's attention are present on this tragic record. In my nearly 14 years as an appellate judge, I cannot recall such abject depravity, cruelty, and sadism toward victims—a married couple and their child—as the Court of Appeals has described. Defendant's crimes are "off the charts" in terms of extreme brutality, terrorism, and violence. Because the trial court failed to state that the factor of excessive brutality, violence, and terrorism was given inadequate weight under the guidelines, I join in remanding for resentencing.

WEAVER, J. (*concurring in part and dissenting in part*). I concur in the majority's holding that the sentencing court improperly sentenced on the basis of defendant's refusal to admit guilt. *United States v Jackson,* 390 US 570 (1968).

I dissent from the portion of the order remanding this case to the trial court on the basis of *People v Babcock,* 469 Mich 247 (2003). Applying the analysis of my partial dissent and partial concurrence in *People v Babcock, supra* at 280-284, I would find that the trial court satisfied the requirement for "a substantial and compelling reason" for its departure from the sentencing guidelines, and its decision did not venture beyond the range of principled outcomes under the circumstances.

YOUNG, J. I would deny leave to appeal.

Leave to Appeal Denied January 5, 2006:

In re SPRENKLE-HILL ESTATE (HILL V FLINT), No. 128364. The order of October 7, 2005, that directed the hearing of oral argument on the application for leave to appeal is vacated and leave to appeal is denied because we are no longer persuaded the questions presented should be reviewed by this Court. Reported below: 265 Mich App 254.

Interlocutory Appeal

Leave to Appeal Denied January 5, 2006:

CAUDILL V HOWELL, No. 129788. The motion for immediate consideration is granted. Court of Appeals No. 264544.

Summary Disposition January 12, 2006:

PEOPLE V POSTLEY, No. 130272. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted, and direct that Court to decide the case on an expedited basis. We further order that the stay issued by this Court

on January 9, 2006, remains in effect until completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Court of Appeals No. 266826.

Leave to Appeal Denied January 12, 2006:

PEOPLE v HUFFMAN, No. 129042. On order of the Court, the motions to admit James N. Horwood, Peter J. Hopkins, Tillman L. Lay and Eugene Volokh pro hac vice are granted. The motion for leave to file a brief amicus curiae is granted. The application for leave to appeal the May 10, 2005 judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Reported below: 266 Mich App 354.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

Leave to Appeal Granted January 13, 2006:

In re VANCONNETT ESTATE (RAU v LEIDLEIN), No. 126758. The parties shall include among the issues to be briefed: (1) whether MCL 700.2514 has displaced the case law that predated the adoption of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., under MCL 700.1203(1), (2) whether the mere fact that Herbert and Ila VanConett entered into a mutual will imposes restrictions on the surviving spouse's power of disposal despite the absence of express contractual or testamentary limitations on the power of alienation, (3) the source and nature of such a restraint if it is contended that Herbert VanConett was so restrained from disposing of his estate, and (4) whether any secondary authority in wills and estates law (e.g., hornbooks and treatises), or practice in the field, supports the proposition that a mutual will imposes restrictions on the surviving spouse's power of disposal in the absence of express contractual language or testamentary limitations on the power of alienation. The Real Property Law Section and Probate and Estate Planning Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the questions presented may move the Court for permission to file briefs amicus curiae. Reported below: 262 Mich App 660.

MCDOWELL v CITY OF DETROIT, No. 127660. The motion to disqualify is denied. The application for leave to appeal is granted. MCR 7.302(G)(1). The general issue presented is whether a fire occurring within the wall of leased premises constitutes an "intrusion" into plaintiff's leased premises sufficient to bring it within the trespass-nuisance exception to governmental immunity as discussed in *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139 (1988). The parties are directed to include among the issues briefed: (1) whether, in general, a lease includes both the inner and outer walls of the leased premises, see, e.g., *Forbes v Gorman*, 159 Mich 291, 294 (1909), and (2) whether the general rule was modified by the portion of the subject lease that limited the tenant's right to make

"alterations or repairs or redecoration to the interior of the Premises or to install additional equipment or major appliances without the written consent of Management." The Real Property Law Section of the State Bar of Michigan, the Michigan Association of Realtors, and the Insurance Institute of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 264 Mich App 337.

KELLY, J. (*concurring in part and dissenting in part*). While I agree to grant leave to appeal, I do not participate in the decision to deny the motion to disqualify. I agree with Justice WEAVER in urging the Court to establish a particularized procedure to handle motions to disqualify a Supreme Court justice from participation in a case.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. (*dissenting*). I am opposed to the entry of the order denying the motion to disqualify and granting leave to appeal in this case at this time.

I would hold this case in abeyance until this Court publishes proposals for public comment, places the issue on a public hearing for administrative matters, 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. 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. See *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n,* 472 Mich 91 (2005) (WEAVER, J., concurring).

PEOPLE v HERNANDEZ-GARCIA, No. 129038. The parties are directed to include among the issues briefed the possible relevance of the *mens rea* principle recognized in *People v Tombs*, 472 Mich 446, 454-459 (2005), to the claim that MCL 750.227(2) should be interpreted to include a momentary innocent possession defense. Reported below: 266 Mich App 416.

HAYNES v NESHEWAT, No. 129206. The Michigan Department of Civil Rights and the Michigan Civil Rights Commission are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the question presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 249848.

TATE v CITY OF DEARBORN, No. 129241. The parties are directed to include among the issues to be briefed: (1) whether application of the rule of *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372 (1999), to this case tends to encourage gamesmanship by giving plaintiffs an incentive to fail to plead a theory in federal court, with the hope of later litigating that theory in state court, because it was arguably possible, or even probable, that the federal court would have declined to exercise its

jurisdiction; (2) whether there are distinguishing factors between this case and *Pierson, supra*; (3) whether, if a plaintiff wants to preserve state law claims based on the same facts as an action it has brought in federal court, it should be obligated to plead them, or at least attempt to plead them, in the federal court; and (4) whether the interests of federalism or state sovereignty are implicated by this case. Court of Appeals No. 261950.

CITY OF MT PLEASANT v STATE TAX COMMISSION, No. 129453. The application for leave to appeal the June 21, 2005, judgment of the Court of Appeals is granted, limited to whether MCL 211.7m exempts property from taxation on the basis that it is "used for public purposes" within the meaning of that statutory provision when the property is owned by a city after having been acquired to allow the area to be annexed to that city and is being assembled and prepared with infrastructure for eventual sale for economic development purposes that have been determined by the city to be in the public interest. The parties are directed to include in their briefs a discussion of (1) the time period(s) that petitioner owned the property at issue or parts thereof, (2) the nature of any improvements to or other use of the property by petitioner during those periods, and (3) whether, by virtue of such improvements or uses, the property was "used for public purposes" within the meaning of MCL 211.7m. The Charter County of Wayne's motion for leave to file brief amicus curiae is granted. Other persons or groups interested in the determination of the question presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 267 Mich App 1.

Summary Dispositions January 13, 2006:

HARRIS v RAHMAN, No. 126922. In lieu of granting leave to appeal, we reverse the Court of Appeals determination that there is a genuine issue of material fact as to whether defendant county health department employee Henry Maciejewski was grossly negligent, and we remand this case to the Wayne Circuit Court for entry of an order granting defendant Maciejewski's motion for summary disposition. Plaintiff did not present documentary evidence that defendant Maciejewski knew the quantity of mercury involved when he first spoke with plaintiff on the telephone, or that defendant Maciejewski's statements directly contradicted the advice of the Poison Control Center. No reasonable juror could honestly conclude that defendant Maciejewski's conduct amounted to reckless conduct showing a substantial lack of concern whether injury would result. See *Stanton v City of Battle Creek*, 466 Mich 611, 620-621 (2002); *Jackson v Saginaw Co*, 458 Mich 141, 146 (1998). Thus, plaintiff has failed to demonstrate that defendant Maciejewski's conduct constituted gross negligence under MCL 691.1407(2)(c). Court of Appeals No. 247253.

CAVANAGH, J. I would deny leave to appeal.

KELLY, J. (*dissenting*). I would deny leave to appeal and remand this case to the circuit court for trial. The trial court properly denied the motion for summary disposition by defendant Henry Maciejewski and the Court of Appeals correctly affirmed the decision.

Plaintiff's children found a one-pound can of dental mercury in a house they had recently rented. They played with it for about two days before plaintiff called the Poison Control Center. She was told to evacuate the house until she was contacted again. The family stayed in the yard the rest of the day. But no one contacted plaintiff, and she could not reach the county health department, so the family went back into the house.

The next day, July 2, 1998, plaintiff called the Wayne County Health Department. She spoke with defendant Maciejewski, the hazardous materials manager. As a trained expert, he knew that mercury is dangerous. He told plaintiff that he needed to get a mercury vapor detection meter before he could do anything to assist her and advised her to contact a private environmental consulting firm. About two weeks later, plaintiff again spoke with Maciejewski. By that time, he knew that the children had been tested and that their blood mercury levels were, in his words, "scary." He told plaintiff he was still working on getting the testing equipment.

Defendant Maciejewski tested plaintiff's home 2½ weeks after she first contacted him. Although the meter readings were in the "unsafe" range, he did not advise plaintiff to evacuate her home. He contacted the Environmental Protection Agency (EPA), the state health department, and local city government. Finally, on July 23, 1998, 21 days after plaintiff had first contacted defendant, plaintiff's family was evacuated from the house and the house padlocked. The EPA oversaw the cleanup.

Plaintiff sued several defendants. This appeal concerns only the summary disposition issued in favor of defendant Maciejewski.

Plaintiff alleges that Maciejewski was grossly negligent for failing to require immediate evacuation of the house and for not providing testing until over two weeks after plaintiff's first call. Plaintiff claims this gross negligence was the proximate cause of her children's injuries.

At the hearing on defendant's motion for summary disposition, the trial judge found that there was a factual dispute with regard to the issue of causation. It was unknown at that stage of the proceeding whether prolonged exposure causes more damage than the first contact with mercury. He anticipated that there would be expert testimony regarding the issue.

He also found a question of fact regarding the issue of gross negligence. He viewed the evidence in the light most favorable to plaintiff. He then concluded that reasonable minds could differ on whether defendant's conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury resulted.[1] He noted defendant's knowledge that mercury was very dangerous and disperses into the air at room temperature.

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[1] Section 7 of the governmental tort liability act (GTLA), MCL 691.1407(7)(a), provides that "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

In reviewing a grant of summary disposition, an appellate court views the evidence in the light most favorable to the nonmoving party. In this case, the Court of Appeals properly reviewed the parties' documentary evidence de novo. It wrote:

> Defendant, meeting the initial burden of showing that no genuine issue of material fact exists as to the element of gross negligence, presented evidence that: (1) he did not initially know how much mercury was involved; (2) he immediately informed [plaintiff] that she should call an environmental consulting firm, since he did not have the equipment necessary to conduct the testing, and provided [her] with the name of such a firm; (3) at the time he tested [plaintiff's] home he was informed by plaintiff that some professional cleanup had already been completed; and (4) he had advised [plaintiff] that additional cleanup should be done to get rid of certain furniture saturated with mercury, as well as to keep the household pets out of the most highly contaminated areas. Defendant further presented evidence that even at the time he contacted the Environmental Protection Agency to get it involved in the case he still did not believe that it was necessary for [plaintiff's] family to evacuate their home, because he did not believe that the readings he obtained during his testing were accurate.
>
> Plaintiff presented evidence that: (1) defendant knew at the time of the spill at [plaintiff's] home that the amount of mercury involved in a spill was an important factor because the greater the spill the greater the danger of vaporization and, therefore, poisoning; (2) before the time of the spill at [plaintiff's] home, defendant believed that when one pound of elemental mercury was involved in a spill immediate evacuation of the contaminated area was necessary; (3) defendant was informed during his first conversation with [plaintiff] that one pound of mercury was involved and that the Poison Control Center had advised the family to evacuate the home; (4) although defendant's testing had revealed levels of mercury contamination within the legal limits for industrial sites, this legal limit was higher than was safe in a residential area because it was based on time of exposure; (5) and that defendant had recommended that [plaintiff and her children] keep their family pets away from the most heavily contaminated areas for the safety of the pets. Plaintiff further presented evidence that, despite all of the above, not only did defendant not advise [plaintiff's] family to evacuate the home, but he directly contradicted the advice given the family by the Poison Control Center in telling them that it was mere speculation that the levels of

mercury in the home were dangerous. [Unpublished opinion per curiam of the Court of Appeals, issued July 22, 2004 (Docket No. 247253, slip op at 3-4.]

I believe the Court of Appeals summary of facts to be accurate, and I agree with the panel's conclusions. The trial court correctly determined that a genuine issue of material fact exists regarding whether defendant was grossly negligent in connection with the injuries suffered by plaintiff's children. Thus, plaintiff's claim is not statutorily barred by governmental immunity.

Leave to appeal should be denied, and the case should be remanded to the circuit court for trial.

BEHNKE v AUTO OWNERS INSURANCE COMPANY, No. 127459. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the judgment of the Chippewa Circuit Court for the reasons stated by Court of Appeals Judge GRIFFIN in part III of his dissent issued on September 16, 2004 (Docket No. 248107):

III. GENERAL ABILITY TO LEAD HIS NORMAL LIFE

Regarding the third prong, the *Kreiner* [*v Fischer*, 471 Mich 109 (2004)] Court offered the following guidance:

"Determining whether the impairment affects a plaintiff's 'general ability' to lead his normal life requires considering whether the plaintiff is 'generally able' to lead his normal life. *If he is generally able to do so, then his general ability to lead his normal life has not been affected by the impairment*. [*Kreiner, supra*, slip op, p 24; emphasis added.]"

In the present case, the trial judge found that plaintiff was "generally able" to lead his normal life, despite occasional headaches and neck pain. In particular, the court made the following findings of fact:

"As a result of the accident plaintiff was never hospitalized nor underwent surgery. He was off work for eight weeks, but has since worked full time both as a welder and a sawyer. He went to physical therapy on one occasion and did not return. No doctor has placed plaintiff on medical or work restrictions. Further, the headaches and neck pain do not limit range of motion other than such motion normally associated with headaches and occasional neck pain. Currently, plaintiff takes non-prescription medication for his headaches.

* * *

"The evidence established that plaintiff has continuing intermittent neck pain and headaches. However, his ability to work has not been medically restricted, even though the pain sometimes causes him to take additional breaks. Plaintiff has no physician-imposed restrictions on his daily activities and plaintiff is still able to work, drive, socialize, travel, take care of himself and otherwise engage in the normal activities of life. Plaintiff testified that when the headaches and neck pain occur, he is less active and limits his usual activities. At that point, he self-medicates with over the counter pain medications. Plaintiff also testified that while engaging in sexual relations with his wife, he occasionally experiences severe spasms. But, plaintiff also testified he has a very good intimate relationship with his wife despite these recurring spasms. *Although these minor lifestyle changes are undoubtedly frustrating, they do not affect plaintiff's ability to lead his normal life*. [Emphasis added.]"

Based on the evidence presented, these findings of fact are not clearly erroneous. MCR 2.613(C). Further, after applying *Kreiner* to these facts, I would hold that the lower court did not err in concluding that plaintiff is generally able to lead his normal life.[2]

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[2] "Absent an outcome-determinative genuine factual dispute, the issue of threshold injury is now a question of law for the court. MCL 500.3135." *Kern* [*v Blethen-Coluni,* 240 Mich App 333, 341 (2000)]. Here, the trial court's finding of fact is reviewed for clear error, MCR 2.613(C), while its ultimate legal conclusion is reviewed de novo. [*Kern,* supra] at 344 n 3.

WEAVER, J. (*concurring*). Although I dissented from the decision in *Kreiner v Fischer*, 471 Mich 109 (2004), under the facts of this case I concur in the decision to reverse the judgment of the Court of Appeals and reinstate the judgment of the circuit court.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

BENTFIELD V BRANDON'S LANDING BOAT BAR, No. 127515. In lieu of granting leave to appeal, we reverse part III of the Court of Appeals opinion and reinstate the Oakland Circuit Court's order denying plaintiff's motion for reconsideration. For the reasons stated in the partially dissenting opinion in the Court of Appeals, the trial judge did not abuse her discretion when she denied plaintiff's motion for reconsideration. Court of Appeals No. 248795.

CAVANAGH, J. I would deny leave to appeal.

MARKMAN, J. (*dissenting*). I would deny leave to appeal. In denying plaintiff's motion for reconsideration, the trial court held that plaintiff "merely present[ed] the same issues ruled upon previously by this Court . . . ." This statement was an error because plaintiff argued for the first time in his motion for reconsideration that defendant was liable

under MCL 554.139. The dissent in the Court of Appeals, upon which the majority relies, asserted that " '[w]e find no abuse of discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order.' " *Bentfield v Brandon's Landing Boat Bar,* unpublished opinion per curiam of the Court of Appeals, issued August 31, 2004 (Docket No. 248795) (METER, J., concurring in part and dissenting in part), quoting *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733 (1987). However, it also would not necessarily have been an abuse of discretion to have *considered* a motion for reconsideration resting upon a new legal theory. See MCR 2.119(F)(3). The trial court simply failed to recognize that plaintiff was raising a new legal theory and, as a result, failed to exercise its discretion to consider (or not consider) plaintiff's argument. The trial court's failure to exercise its discretion was itself an abuse of discretion.

KELLY, J. I join the statement of Justice MARKMAN.

THIRD JUDICIAL CIRCUIT COURT v THE JUDICIAL ATTORNEYS ASSOCIATION, Nos. 129500, 129501. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We further order that the stay entered by this Court on September 29, 2005, remains in effect until completion of this appeal. The motion to vacate or reconsider is denied as moot. We retain jurisdiction. Court of Appeals Nos. 262586, 263413.

CAVANAGH, WEAVER, and KELLY, JJ. We would deny leave to appeal.

Leave to Appeal Denied January 13, 2005:

PEOPLE v HENDRIX, No. 127795; Court of Appeals No. 257591.

WEAVER, J. (concurring). I concur with the denial order and agree with the majority's decision to deny leave to appeal.

The trial court in this case satisfied the requirement to articulate "a substantial and compelling reason"[1] for its departure from the guidelines, and, given that this case involves repeated criminal sexual misconduct with minor children by a "serial child sex abuser,"[2] the trial court's decision did not venture beyond the range of principled outcomes under the circumstances. Therefore, denial of leave to appeal is appropriate.

The Michigan Legislature has enacted guidelines regarding minimum sentences to be imposed by state courts. MCL 769.34. The guidelines permit upward and downward departures:

> A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. [MCL 769.34(3).]

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[1] MCL 769.34(3).

[2] Trial court sentencing transcript, p 16.

Had the trial court not departed from the guidelines in this case, defendant's minimum sentence would have fallen between 135 and 225 months. But the trial court, noting that defendant had been convicted of five counts of repeated sexual misconduct with minor children, determined that an upward departure was necessary and imposed a minimum sentence of 50 years' imprisonment. The trial court articulated the following reasons for its approximately 31-year departure:

> The Court finds that substantial and compelling reasons justify the departure from the sentencing guidelines in connection with this count if not all the counts. The reasons include the following. The Defendant has been convicted of five counts of Criminal Sexual Conduct involving minors. Those convictions involve more than one victim. Those convictions also involve same gender sexual abuse.
>
> Moreover any attempts of remorse or understanding of the grave nature of these crimes is simply incredible. In the Defendant's description of the offense in the Presentence Investigative Report he is stated to have the attitude that, that [sic] the offenses are nothing more than harmless games and were not meant for any kind of gratification. Now that's a paraphrase of what he said, I understand that's not a direct quote.
>
> The Court has carefully observed the Defendant's prior appearances before the Court and today. The record shall reflect the Court finds the Defendant's mannerisms, facial expressions, and other indicators of truthfulness or remorse to be without merit.
>
> I understand the Court of Appeals does not have the ability when examining the cold transcript to observe what I observed, the transcript does not reflect the climate or atmosphere of this and prior proceedings or his character. I have witnessed a disingenuous man whose statements . . . should be disregarded.
>
> Furthermore, the Defendant undertook a pattern of repeated sexual conduct—misconduct with minors. These were not isolated, discreet incidents. These incidents do not have spontaneity. To the contrary, Defendant clearly engaged in continuous repeated and deliberate patterns of Criminal Sexual Conduct involving more than one victim.
>
> Indeed the Defendant engaged in a series of premeditated acts purposefully creating circumstances or taking advantages of circumstances by which he could be alone with and victimize young children. Although I will not repeat the Defendant's, the agent's description of the offenses here, they involve creating opportunities to prey upon the children of his friends. By doing so he corrupted, scarred and stained the lives of the victims and the families of the victims with his wilful, wanton, and despicable behavior and he breached positions of trust as well.

> This Court has also reviewed correspondence from a number of interested parties, half of which paint him as an innocent angel and the other half painting him as an evil, wicked man who must be placed in prison to protect society.
>
> The Court finds unequivocally that the latter description is appropriate. One of the victims' father[s] has written the Defendant went on a relentless pursuant [sic] to befriend him and his young son and he believes that the Defendant did so to position himself to sexually molest his son.
>
> The Defendant's older sister has written that the Defendant sexually assaulted two of his [sic] sons. In other words, his own nephews when they were young children. The Defendant's oldest brother has written and has asked for a life sentence for his brother and characterized him as a serial rapist. He states that the Defendant raped his daughter when she was eight years old.
>
> The Defendant's niece states that she was molested when she was five or six years old, that she personally knows many other victims.
>
> I want to make clear right here and right now that I'm not sentencing the Defendant for crimes for which he has not been tried or convicted.
>
> Nevertheless justice dictates in a case such as this the Court must not have a blind eye to the unrelenting serial nature of the crimes for which he has been convicted, the nature of which are illuminated in form by the allegations of parallel conduct surrounding the Defendant. There is every indication from the record the Defendant is a serial child sex abuser who will simply take up where he leaves off.
>
> A light sentence would be putting our children at risk and a grave miscarriage of justice. In pronouncing the sentence the Court must punish the crimes that have been committed and protect society at large. The crimes committed demand a substantial upward departure. Protecting society in this case demands a substantial upward departure. In fact if an upward departure from the guidelines is not warranted in the instant case, the guidelines should be burned now because there would rarely be more forthright justification for an upward departure.[3]

The trial court's statement indicates and the record confirms that defendant engaged in continuous, repeated, and deliberate criminal sexual conduct with several young victims. The presentence investigation

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[3] Transcript, pp 13-17.

report provided to the trial court indicated that defendant befriended two preteen boys who were the sons of defendant's friends. Over an approximately two-year period, defendant repeatedly sexually molested both boys. The molestation included frequent oral and anal sex: one victim stated that defendant performed anal sex and "things of this nature happened so many times . . . that it [was] hard to remember all of them."[4] Another victim reported that after one such incident, "it hurt so much that he could barely walk and there was blood on the floor and lotion on the nightstand."[5]

Defendant purposely created opportunities to prey upon these young children, took advantage of them, breached their trust, and evidently still does not view his actions as criminal, calling them "harmless games."[6] Defendant is characterized by the trial court as "a serial child sex abuser who will simply take up where he leaves off"[7] as long as young children are within reach. It simply cannot be said that these are not well-articulated, substantial, and compelling reasons for the departure.

Moreover, it is equally apparent that given defendant's repeated criminal sexual conduct, his refusal to acknowledge the criminal nature of his actions, and the likelihood that he will reoffend and put more youth at risk, it cannot be said that a 50-year minimum sentence is not proportionate because it is beyond the range of principled outcomes. Under these circumstances, such a sentence is within the range of principled outcomes.

When the Legislature passed these sentencing guidelines, it certainly did not have in mind that this Court would engage in overzealous review of a trial court's sentencing authority, where the trial court took pains to clearly indicate that its basis for exceeding the guidelines was the court's firm belief that the defendant would commit additional sex crimes against young children.

For these reasons, I concur with the order denying leave to appeal.

KELLY, J. (*dissenting*). I would remand this case to the Court of Appeals for consideration as on leave granted. I would direct that Court to consider whether the trial court articulated substantial and compelling reasons for this particular departure from the guidelines recommendation and whether the sentence imposed is proportionate. See *People v Hegwood*, 465 Mich 432, 437 n 10 (2001), and *People v Babcock*, 469 Mich 247 (2003).

In re GRANGER (DEPARTMENT OF HUMAN SERVICES V JODIS), No. 130211; Court of Appeals No. 260111.

Leave to Appeal Granted January 20, 2006:

NATIONAL WINE AND SPIRITS, INC V STATE OF MICHIGAN, No. 126121. Persons or groups interested in the determination of the questions presented

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[4] Presentence investigation report, p 2.

[5] *Id*.

[6] *Id*., p 3.

[7] Transcript, p 16.

in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 243524.

Summary Dispositions January 20, 2006:

KROCHMAL v PAUL REVERE LIFE INSURANCE COMPANY, No. 126997. Pursuant to MCR 7.302(G)(1), we vacate the judgment of the Court of Appeals because we do not agree that *Perez v Aetna Life Ins Co*, 150 F3d 550 (CA 6, 1998), to the extent that the Court of Appeals relied on that decision, states the relevant Michigan common-law legal standard, and we affirm the Wayne Circuit Court's judgment of an award of disability benefits. Reported below: 262 Mich App 115.

CAVANAGH, J. (*concurring*). I concur with the order vacating the judgment of the Court of Appeals because it will also disavow the proposition that the phrase "satisfactory written proof of loss" is all that is needed to vest an insurer with complete discretionary authority.

KELLY, J. (*concurring*). I concur with Justice CAVANAGH's statement. I agree with the vacation of the judgment of the Court of Appeals for the additional reason that, in vacating, we make clear that the determination of an insurance company is reviewed by a court using a de novo standard.

MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND v FARMINGTON INSURANCE AGENCY, LLC, No. 127834. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Oakland Circuit Court for entry of judgment in favor of Farmington Insurance Agency, LLC. MCR 7.302(G)(1). Farmington Insurance Agency did not owe a duty to Distel Tool & Machine Company because it could not have reasonably foreseen that Distel would rely on a certificate of insurance that was issued to another company. In all other respects, the application is denied, because this disposition renders moot the remaining question presented. Court of Appeals No. 249013.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

COOK v HARDY, No. 128333. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the judgment of the Ingham Circuit Court for the reasons stated in the Court of Appeals dissent. MCR 7.302(G)(1). Court of Appeals No. 250727.

WEAVER and KELLY, JJ. We would deny leave to appeal.

Leave to Appeal Denied January 20, 2006:

LUGAN v LUGAN, No. 128621; Court of Appeals No. 250717.

KELLY, J. (*dissenting*). I would grant leave to appeal. This case raises an issue that cries out for our consideration: Does dismissal of the parties' first divorce action render their property settlement agreement without force during a subsequent divorce action occurring on the heels of the first?

Here, in the course of their first divorce proceeding, the parties reached a property settlement that was placed on the record in open court. The trial court advised them that the settlement was final and binding and could not be revoked. But the parties failed to submit a

judgment for the court's signature.[1] The court dismissed the case without prejudice. Neither party appealed from or moved to reinstate the divorce action.

Eight days later, plaintiff filed a second divorce action that was assigned to the same judge. The court denied defendant's motion for adoption of the earlier settlement. Consequently, a second property settlement was agreed upon. It was not as favorable to defendant as the first.

The Court of Appeals reversed, finding error in the trial court's refusal to adopt the parties' earlier settlement. *Lugan v Lugan*, unpublished opinion per curiam of the Court of Appeals, issued March 24, 2005 (Docket No. 250717), slip op at 2. It reasoned that the first settlement was a contract.[2] Contracts are subject to a six-year statutory period of limitations.[3] The Court of Appeals decided that defendant was entitled to have the contract enforced.

This Court was presented with a similar situation in *Tiedman v Tiedman*, 400 Mich 571 (1977). However, we did not directly address whether a property settlement agreement is an enforceable contract that survives dismissal of the underlying divorce litigation. In *Tiedman*, the parties put their property settlement on the record. The court approved it, saying that it would sign a judgment upon presentation.

Six days later, before the trial court could enter the judgment, the plaintiff's husband died in a fire. The plaintiff moved to dismiss the action. The trial court held that its oral pronouncement was a rendition of a judgment and granted the divorce in a judgment *nunc pro tunc*. The Court of Appeals affirmed the decision. This Court reversed it. Because it was contemplated that the judgment would be signed by the court *in futuro*, the divorce and property settlement could not be made effective *nunc pro tunc* after one party died.

Fourteen years later, in *Kresnak v Kresnak*, 190 Mich App 643 (1991), the Court of Appeals addressed the status and enforceability of a settlement agreement when one of the parties dies. In that action, which was for separate maintenance, the agreed-upon distribution of property was read into the record and orally approved by the court, as it was here. Mr. Kresnak died before entry of the written judgment. The personal

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[1] At a hearing on August 13, 2002, the trial court asked why no proposed judgment had been submitted in the first proceeding. Plaintiff's attorney claimed that defendant had refused to sign the judgment. Defendant and her attorney both claimed that they had never received it.

[2] *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347 (1999). A settlement agreement is binding when the parties articulate its terms on the record in open court, even if it is not reduced to writing. *Id.* at 349. In addition, a settlement agreement is binding when it is made in open court. MCR 2.507(H).

[3] *Michigan Mut Ins Co v Indiana Ins Co*, 247 Mich App 480 (2001), lv den 466 Mich 858 (2002). A settlement made in open court is enforceable as a contract and is governed by the legal principles applicable to the construction and interpretation of contracts. *Id.* at 484.

representative of his estate moved to enforce the separate maintenance agreement. Mrs. Kresnak opposed the motion, arguing that the court no longer had jurisdiction because of Mr. Kresnak's death. The circuit court disagreed and entered a written judgment consistent with the terms of the property settlement agreement. Mrs. Kresnak appealed from the denial of her motion for reconsideration, relying almost exclusively on *Tiedman*.

The Court of Appeals acknowledged that *Tiedman* appeared to control, but deemed it appropriate to limit *Tiedman* to its facts. *Id.* at 648. The Court adopted as its own the observations in anno: *Separation agreements: Enforceability of provision affecting property rights upon death of one party prior to final judgment of divorce,* 67 ALR4th 237, pp 240-241. The article indicates that separation agreements are governed by rules of contract. As a general rule, the death of a party does not divest a court of jurisdiction to enter a judgment incorporating a property settlement agreement that the parties intended to be effective.

The Court of Appeals in this case[4] relied on *Kresnak* and determined that

> [o]nce the second divorce action began, the trial court should have afforded the same level of respect for the parties' settlement agreement that the law affords antenuptial agreements, *Rinvelt* [*v Rinvelt,* 190 Mich App 372 (1991)], or agreements entered into after separation in anticipation of divorce, *Kull* [*v Losch*, 328 Mich 519 (1950)].

In both *Tiedman* and *Kresnak,* a party to the divorce action died. Here, there was no death, but rather a different intervening event, dismissal of the first action. Dismissal without prejudice ordinarily terminates proceedings. *Northrup v Jay*, 262 Mich 463 (1933). The defendant here asserts that a settlement placed on the record is a contract. She argues that dismissal of a divorce proceeding does not terminate an existing, enforceable contract such as the first settlement agreement in this case. Hence, she reasons, the express intent of the parties to the contract should control. *Mikonczyk*, *supra* at 349-350.

Clearly, there is no clear precedent from this Court or the Court of Appeals, and confusion exists in the state of the law on this question. The *Kresnak* decision involved separate maintenance and the death of one party. By denying leave to appeal here, the Court allows *Kresnak* to be expanded to an action for divorce where the same action had recently been dismissed. It would be helpful to the bench and bar if this Court were to itself consider the applicability of *Kresnak* and expand on or limit its 1977 ruling in *Tiedman*.

PEOPLE V RODNEY SCOTT, No. 129325. The motion to direct the prosecutor to serve an answer on defendant is denied as moot, the prosecutor having filed a proof of service stating that a copy of the answer was mailed to defendant on November 1, 2005. Court of Appeals No. 251113.

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[4] *Lugan, supra*, slip op at 4.

YOUNG, J. (*concurring*). I concur in the order to deny leave to appeal. I write separately to address Justice KELLY's argument that the defendant has the right to file multiple "Standard 4" pro se briefs.

A jury convicted defendant of possession of more than 650 grams of cocaine. Defendant's first appointed appellate attorney filed a brief for defendant. Defendant filed a supplemental brief *in propria persona*. He then asked his appellate attorney to withdraw. A second appointed appellate attorney also eventually withdrew. The Court of Appeals allowed his third appointed appellate attorney 28 days to file a *supplemental* brief. That attorney advised defendant that he was unsure whether defendant could file a *second* pro se brief, but that at the latest, such a brief must be filed within 84 days. The Court of Appeals issued its opinion before the 84 days elapsed.

Administrative Order No. 2004-6, Standard 4, allows a defendant to file a brief *in propria persona*, raising issues that the defendant's attorney does not believe are meritorious. Standard 4 states: "Defendant's filing shall consist of *one* brief filed with or without an appropriate accompanying motion." (Emphasis added.) In this case, defendant did in fact file a brief and the Court of Appeals considered it. Because the rule does not provide for multiple pro se briefs, there is no basis in the text of the rule to conclude, as Justice KELLY does, that the defendant is entitled to file more than one pro se brief.

KELLY, J. (*dissenting*). I would grant leave to appeal in this case. The Court should clearly interpret a defendant's right to file a brief *in propria persona* under Administrative Order No. 2004—6, Standard 4.

Standard 4 allows a defendant to file one pro se brief after his or her counsel's brief has been filed. In this case, defendant had three appellate attorneys. After the first filed a brief that defendant believed to be inadequate, defendant submitted a pro se brief. His third attorney filed a new brief on March 16 that replaced the first attorney's brief. Arguably, according to Standard 4, defendant had 84 days, or until June 8, to file his pro se brief. However, on May 12, 27 days before the 84-day period expired, the Court of Appeals issued its decision affirming defendant's conviction. Defendant had not yet filed his brief.

Defendant moved for reconsideration. He argued that, by deciding his case before the 84-day period had expired, the Court of Appeals deprived him of his right to file a pro se brief. Without explanation, the Court denied the motion by order.

Reasonable minds could differ on whether, under Standard 4, defendant was entitled to file a second brief *in propria persona*. Some might argue that a defendant is entitled to only one pro se brief, even if, as here, (1) that brief became obsolete after the final attorney's brief was filed, and (2) it was not filed after appellant's final brief. Standard 4 reads: "The defendant's filing *in propria persona* must be received by the Court of Appeals within 84 days *after* the appellant's brief is filed by the attorney . . . ."

The sequence of brief filings in this case could not have been anticipated by defendant, and Standard 4 is equivocal. Because of that, I believe that the Court of Appeals should have given defendant the benefit of the more generous reading of the rule.

This Court should grant leave to appeal and interpret Standard 4 so that the question that has arisen here is answered. If a defendant is entitled to only one brief *in propria persona*, even if it is filed before his attorney's final brief, we should make that clear. Then, presumably, the situation would not occur, as it did here, that counsel tells his client that he may have 84 days to file a brief when, in fact, he does not.

JACKSON v LAKER GROUP, LLC, Nos. 130109, 130110. The stay previously entered by this Court on December 28, 2005, is dissolved. Court of Appeals Nos. 261588, 261594.

CAVANAGH, J. I would reverse the judgment of the Court of Appeals and remand this case to the circuit court for trial.

KELLY, J. (*dissenting*). The Court should reverse the judgment of the Court of Appeals majority and remand this case for trial consistent with Judge WHITE's dissent. Otherwise, plaintiff Gloria Jackson will lose the home in which she has lived and on which she has made mortgage payments for the past ten years. This will occur on the basis of a record that raises more questions than it answers.

The facts of the case are that plaintiff paid defendant Kroll Construction $5,000 and obtained financing from Kroll for an additional $3,300 so that Kroll would remodel her bathroom. She executed a mortgage as security for the note. The record contains a copy of the mortgage but no one can find the note. There is evidence that the note required a "signed completion certificate" before payments were due.

Plaintiff claims that some of the remodeling was not done correctly, that she complained to Kroll, but that Kroll sent no one to follow up as promised. Plaintiff never signed a certificate of completion, nor was she asked to sign one. She did not pay off the note. Kroll foreclosed on the property by advertisement, purchased the entire property at the sheriff's foreclosure sale for $4,200, and conveyed its interest to defendant Laker for $7,000. Plaintiff asserts that the fair market value of the property is $125,000.

Laker sought summary eviction of plaintiff in the district court. Plaintiff opposed the action and filed a quiet title action in the circuit court. The circuit court granted summary disposition to Laker, finding no genuine issue of material fact regarding whether the statutory procedures were properly followed in the foreclosure sale. Plaintiff appealed from the dismissal of her action to quiet title and from the adverse summary disposition order. The Court of Appeals majority affirmed both orders.

I find Judge WHITE's Court of Appeals dissent persuasive. There are genuine issues of fact regarding whether plaintiff defaulted on the promissory note and mortgage. Arguably a signed certificate of completion would initiate her obligation to pay off the note. But no signed certificate of completion exists. It is possible that plaintiff is not in default.

Without a default, the power to sell property does not become operable. MCL 600.3204(1)(a). If there has been no default, the sheriff's sale was improper and passed no title. A sheriff's deed on foreclosure of a mortgage that is not in default at the time of the foreclosure passes no title to the purchaser. *Bowen v Brogan*, 119 Mich 218 (1899).

I would reverse the court orders below and remand the case for trial consistent with Judge WHITE's dissent.

WEAVER, J. I join the statement of Justice KELLY.

In re MCCLAIN (MCDONALD v THURSTON), No. 130212; Court of Appeals No. 262760.

Interlocutory Appeal

Leave to Appeal Denied January 20, 2006:

QARANA v NORTH POINTE INSURANCE COMPANY, No. 127488; Court of Appeals No. 244797.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the decision to deny leave to appeal. I would grant leave in this jurisprudentially significant case that implicates concerns such as those we recently addressed in *Rory v Continental Ins Co*, 473 Mich 457 (2005).

This garnishment case arises out of plaintiff's suit alleging assault and battery and premises liability involving an incident that occurred at the Royal Oak Music Theater, which was owned by Paragon Investment Company. North Pointe Insurance Company had issued a general liability insurance policy to Paragon. Upon receipt of Paragon's claim involving plaintiff, North Pointe assigned counsel to represent Paragon in the suit. Paragon's policy with North Pointe contained a clause stating that if Paragon was sued, then Paragon "must," among other things, "[c]ooperate with us in the investigation or settlement of the claim or defense against the 'suit.' " Section IV(2)(c)(3). To "cooperate" means "to work or act together or jointly for a common purpose or benefit," and "to work or act with others willingly and agreeably." *Random House Webster's College Dictionary* (2001). Despite Paragon's express duty to cooperate, however, Paragon failed to assist North Pointe in defending the suit. Specifically, Paragon failed to provide a list of the names of all employees and other witnesses that had knowledge of the incident, despite counsel's repeated requests.

In August 2000, Paragon filed for Chapter 7 bankruptcy and, as a result of the automatic stay provision of the United States Bankruptcy Code, the proceedings in this suit were temporarily stayed. In October 2000, the stay was lifted and the case proceeded. Even after the case proceeded, however, Paragon showed no interest in defending the suit. It continued to ignore counsel's requests to answer interrogatories, even after the trial court granted plaintiff's motion to compel answers to the interrogatories.

When Paragon failed to answer the interrogatories by the date ordered by the court, plaintiff moved for a default. Counsel notified Paragon that he was going to seek to withdraw as its counsel, and then obtained permission from the court to do so. The court gave Paragon 30 days to obtain new counsel, and stated that Paragon would be defaulted if it did not answer the interrogatories by a set date. Paragon failed to answer the interrogatories and, in fact, never appeared at a subsequent evidentiary hearing. The trial court entered a default judgment of $85,846 in plaintiff's favor.

Plaintiff then filed a request for a writ of garnishment against North Pointe, alleging that the policy obligated it to pay on Paragon's behalf the judgment he had received. North Pointe moved for summary disposition under MCR 2.116(C)(1), asserting that it was not liable because Paragon had breached the cooperation clause by failing to assist North Pointe in defending the underlying suit. Plaintiff also moved for summary disposition under MCR 2.116(C)(9) and (10).

The trial court granted North Pointe's motion, and denied plaintiff's motion. It held that: (1) Paragon's breach of the cooperation clause constituted a valid defense to payment under a nonmandatory indemnity policy; (2) Paragon "completely failed to cooperate with its defense," even though North Pointe tried to obtain Paragon's cooperation; and (3) North Pointe was materially prejudiced by Paragon's noncooperation that resulted in a default judgment being entered against Paragon.

Plaintiff appealed to the Court of Appeals, which reversed and remanded for further proceedings. The panel applied this Court's governing principle that an insurer must prove the insured's lack of cooperation and that the insured's noncooperation actually prejudiced the defense. *Allen v Cheatum*, 351 Mich 585, 595 (1958). It concluded, however, that reasonable minds could differ regarding whether North Pointe's efforts to secure Paragon's cooperation in defending the underlying action had been diligent and whether the defense was prejudiced by Paragon's noncooperation.

I question the propriety of rewriting the insurance contract to impose a duty of diligence on the insurer when no such requirement existed under the plain language of the contract. The contract language affirmatively required Paragon to cooperate in the defense of the suit. Despite Paragon's duty, however, the record reflects it took no action to assist North Pointe in defending the suit. While counsel attempted contacts with Paragon's agents on numerous occasions from May 2000 to January 2001, they did not respond, much less "cooperate." Paragon failed to provide a list of the names of all employees and other witnesses to the incident, despite counsel's requests. Paragon also failed to answer interrogatories, again despite counsel's repeated requests. Moreover, the trial court granted plaintiff's motion to compel answers to the interrogatories. Again, Paragon never answered. North Pointe should not be held responsible for Paragon's failure to cooperate and complete disregard of counsel's attempts to seek cooperation.

Moreover, I question the continuing validity of *Allen, supra*, especially following this Court's decision in *Rory, supra*. Although the Court in *Allen* held that an insurer must show prejudice, the Court did not apply contract principles to reach its conclusion and, instead, formulated a rule that was applicable only to insurance contracts. This is entirely inconsistent with our recent holding in *Rory* that insurance policies are to be enforced the same as any other contract, according to their language, unless they violate the law or unless one of the traditional contract defenses such as fraud, duress, waiver, or unconscionability is proven. *Rory, supra*, at 461, 491. It is also inconsistent with our holding in *Rory* that courts do not have the authority to modify unambiguous contracts or rebalance the contractual equities struck by the parties. *Id.* at 461. I would thus grant leave.

Leave to Appeal Denied January 24, 2006:

DPG YORK, LLC v MICHIGAN, No. 128656. The motion for immediate consideration is granted. The motion for reconsideration of this Court's order of December 28, 2005 is considered, and it is granted. On reconsideration, including consideration of the briefs filed in connection with the application for leave to appeal (with respect to which neither party sought immediate consideration) and the motion for reconsideration, as well as plaintiffs' brief filed on remand with the Court of Appeals on January 12, 2006, we vacate our order dated December 28, 2005. The application for leave to appeal the February 15, 2005 order of the Court of Appeals is again considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court. This denial order constitutes the final decision in this case, and no motion for reconsideration will be accepted for filing. Court of Appeals No. 260337.

[In response to an executive message from the Governor concerning *DPG York v Michigan*, the Court entered the following order—REPORTER]

In re EXECUTIVE MESSAGE FROM THE GOVERNOR (CERTIFIED QUESTION IN DPG YORK v MICHIGAN), No. 130309. The executive message of the Governor pursuant to MCR 7.305(A) was received on January 12, 2006, requesting that this Court expedite final resolution of the appeal in *DPG York v Michigan*, Docket No. 128656. On the same date, appellants in *DPG York v Michigan* filed motions for reconsideration and for immediate consideration. In response to the executive message, we note the relief provided by our order granting reconsideration and denying the application for leave to appeal in Docket No. 128656.

Leave to Appeal Granted January 27, 2006:

STAMPLIS v ST JOHN HEALTH SYSTEM, Nos. 126980, 127032. The motion to disqualify is denied. The parties are directed to include among the issues briefed the effect, if any, of the 1995 amendment of MCL 600.2925d on the current viability of *Theophelis v Lansing Gen Hosp*, 430 Mich 473 (1988). The Michigan Trial Lawyers Association and Michigan Defense Trial Counsel are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 241801.

KELLY, J. (*concurring in part and dissenting in part*). While I agree to grant leave to appeal, I do not participate in the decision to deny the motion to disqualify. I agree with Justice WEAVER in urging the Court to establish a particularized procedure to handle motions to disqualify a Supreme Court justice from participation in a case.

WEAVER, J. (*dissenting*). I do not participate in the decision regarding the motion to disqualify Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN. I am opposed to the entry of any order in this case at this time and would hold this case in abeyance until this Court publishes proposals for public comment, places the issue on a public hearing for administrative matters, 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. 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. See *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n,* 472 Mich 91 (2005) (WEAVER, J., concurring).

Summary Dispositions January 27, 2006:

VILLAGE OF LINCOLN v VIKING ENERGY OF LINCOLN, INC, No. 127144. In lieu of granting leave to appeal, we vacate that portion of the judgment of the Court of Appeals that addressed the claim that the trial court erred in holding that public policy did not bar a challenge to plaintiff's enactment of the zoning ordinance. MCR 7.302(G)(1). Because the Court of Appeals affirmed the trial court's ruling that § 6 of zoning ordinance 96—2 was unconstitutional as applied to defendant under the circumstances, the ostensible public policy bar to the challenge was rendered moot, and the discussion of it by the Court of Appeals was dicta. Court of Appeals No. 246319.

CORRIGAN, J. (*concurring*). I concur in the Court's order to vacate the specified portion of the Court of Appeals judgment. I write separately to note that I question the Court of Appeals conclusion in *Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493 (2000). In an appropriate case, this Court should squarely review the continuing validity of the so-called "public policy" doctrine. Even after the passage of many years, a challenge that alleges that a zoning ordinance was improperly enacted may yet proceed. See, e.g., *Castle Investment Co v Detroit*, 471 Mich 904 (2004) (barring the enforcement of provisions of an improperly enacted 1976 ordinance that the plaintiff did not specifically challenge until 1998). For this reason, I concur in vacating the Court of Appeals reliance on a "public policy" ground described in *Jackson*.

CAVANAGH, WEAVER, and KELLY, JJ. We would deny leave to appeal.

PEOPLE v ROMMELL SANDERS, No. 129420. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We do not retain jurisdiction. Court of Appeals No. 261913.

CORRIGAN, J. I would deny leave to appeal.

Leave to Appeal Denied January 27, 2006:

PEOPLE v NORMAN, No. 127906; Court of Appeals No. 249493.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v SARAMPOTE, No. 128137; Court of Appeals No. 237031.

PEOPLE v TERRY JACKSON, No. 128670; Court of Appeals No. 253392.

KELLY, J. I would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

PEOPLE v EARL JOHNSON, No. 128710; Court of Appeals No. 252510.
KELLY, J. I would remand this case for resentencing.

MEIJER, INC v CITY OF MIDLAND, No. 128899; Court of Appeals No. 252660.

KIM v KIA MOTORS AMERICA, No. 128916; Court of Appeals No. 260071.
KELLY, J., would grant leave to appeal to consider the meaning of "deceptive" and "misleading" as those words appear in MCL 445.356(1).

AMERISURE INSURANCE COMPANIES v MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION, No. 128937; Court of Appeals No. 251304.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

HESS v CITY OF SALINE, No. 128953; Court of Appeals No. 260394.
KELLY, J. I would grant leave to appeal.

LONG v TITAN INSURANCE COMPANY, No. 129118; Court of Appeals No. 260113.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

BACHUS v FOLEY, No. 129135; Court' 252686.
CAVANAGH, J. I would grant leave to appeal.

COLE v YUSAF, No. 129167; Court of Appeals No. 251349.
KELLY, J. I would grant leave to appeal.

NALBANDIAN v PROGRESSIVE MICHIGAN INSURANCE COMPANY and GEORGE v AUTO CLUB INSURANCE COMPANY, Nos. 129200, 129201; reported below: 267 Mich App 7.

PEOPLE v SANTOS PEREZ, No. 129221; Court of Appeals No. 255430.

MCCLENDON v APOSTOLOU, No. 129228; Court of Appeals No. 260583.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v BELLAMY, No. 129272; Court of Appeals No. 254586.
KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v AVILES, No. 129284. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259640.
KELLY, J. I would hold this case in abeyance for *Davis v Washington*, cert gtd ___ US ___; 126 S Ct 547; 163 L Ed 2d 458 (2005).

PEOPLE v MONCRIEF, No. 129347; Court of Appeals No. 252524.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v DEONDRE COLLINS, No. 129348; Court of Appeals No. 249568.
KELLY, J. I would remand this case for resentencing.

PEOPLE v LEATHERMAN, No. 129352; Court of Appeals No. 252679.

KELLY, J. I would grant leave to appeal.

PEOPLE v ROY HAMILTON, No. 129358. The application for leave to appeal the July 5, 2005, order of the Court of Appeals is denied, because we are not persuaded that the questions presented should be reviewed by this Court. On the Court's own motion, we remand this case to the St. Clair Circuit Court for correction of the judgment of sentence. Defendant was sentenced to a prison term of five years to 40 years for his conviction for felonious assault, MCL 750.82, as a fourth-offense habitual offender, MCL 769.12. The maximum possible term of imprisonment for a fourth-offense habitual offender convicted of felonious assault is 15 years. MCL 769.12(1)(b). On remand, the trial court shall correct the judgment of sentence so that the maximum term of imprisonment for defendant's felonious assault conviction is 15 years. Court of Appeals No. 261738.

FARLEY v ADVANCED CARDIOVASCULAR HEALTH SPECIALISTS, PC, Nos. 129391, 129392, 129393; reported below: 266 Mich App 566.

KELLY, J. I would grant leave to appeal.

GATCHALIAN v GATCHALIAN, No. 129399; Court of Appeals No. 262004.

PEOPLE v TERRY JONES, No. 129412; Court of Appeals No. 252934.

KELLY, J. I would grant leave to appeal.

SPILLER v UNITED AIRLINES, INC, No. 129489; Court of Appeals No. 253502.

MATUSZEWSKI v CENTRAL MICHIGAN INNS, INC, No. 129545; Court of Appeals No. 253252.

PEOPLE v THOMAS WHITE, No. 129555; Court of Appeals No. 263988.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v VIEAU, No. 129601. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260327.

CAVANAGH and KELLY, JJ. We would remand this case to the Cheboygan Circuit Court for a new trial.

PEOPLE v RICKY GORDON, No. 129617. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259151.

PEOPLE v BOYD, No. 129620; Court of Appeals No. 264144.

PEOPLE v DASHEA GREEN, No. 129642. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260023.

PEOPLE v ECKLES, No. 129643; Court of Appeals No. 263493.

PEOPLE v DORN, No. 129644. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260553.

KELLY, J. (*dissenting*). I would remand to allow defendant his appeal as of right. Defendant lost that right because of the late filing of his petition. He alleges prison officials caused the late filing by delaying the mailing of his petition. This is another case that cries out for the Supreme Court to take action to adopt a prison mailbox rule in Michigan.

PEOPLE v JASON BAILEY, No. 129674; Court of Appeals No. 254131.

PEOPLE v JERMIHA BROWN, No. 129684; Court of Appeals No. 261620.

PEOPLE v CHARLES GIBBS, No. 129770; Court of Appeals No. 264568.

PEOPLE v ERNEST GREEN, No. 129771. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261473.

KELLY, J. I would hold this case in abeyance for *Davis v Washington*, cert gtd ___ US ___; 126 S Ct 547; 163 L Ed 2d 458 (2005).

PEOPLE v LANDIE STRONG, No. 129783; Court of Appeals No. 263992.

PEOPLE v LIVOUS, No. 129893; Court of Appeals No. 256064.

Interlocutory Appeal

Leave to Appeal Denied January 27, 2006:

PEOPLE v GARY DANIELS, No. 129729; Court of Appeals No. 264216.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

Summary Disposition January 30, 2006:

DEPARTMENT OF ENVIRONMENTAL QUALITY v SOUTH HURON VALLEY UTILITY AUTHORITY, No. 129515. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 261258.

Reconsiderations Denied January 30, 2006:

PEOPLE v MANUEL, No. 127349. Leave to appeal denied at 474 Mich 868. Court of Appeals No. 248647.

PEOPLE v TOLBERT, No. 127368. Leave to appeal denied at 473 Mich 905. Court of Appeals No. 246009.

KELLY and CORRIGAN, JJ. WE would grant reconsideration and, on reconsideration, would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

MESHKIN v KOMINSKY, No. 127509. Leave to appeal denied at 474 Mich 860. Court of Appeals No. 249916.

OLYMPIA SHISH-KEBAB, INC v MICHIGAN GAMING CONTROL BOARD, No. 127789. Leave to appeal denied at 473 Mich 883. Court of Appeals No. 256516.

WRIGHT v DAIMLERCHRYSLER CORPORATION, No. 127798. Leave to appeal denied at 474 Mich 895. Court of Appeals No. 249408.

PEOPLE v MEARL JONES, No. 127838. Leave to appeal denied at 474 Mich 895. Court of Appeals No. 256770.

PEOPLE v KNIGHT, No. 127850. Leave to appeal denied at 474 Mich 896. Court of Appeals No. 256830.

MCNAMARA v HORNER, No. 127888. Leave to appeal denied at 474 Mich 888. Court of Appeals No. 256763.

KLEIN v KIK, No. 127911. Leave to appeal denied at 474 Mich 892. Reported below: 264 Mich App 682.

KELLY and MARKMAN, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v FLOOD, No. 128023. Leave to appeal denied at 474 Mich 881. Court of Appeals No. 248157.

KELLY, J. I would grant reconsideration and, on reconsideration, would vacate the Court of Appeals opinion and remand this case to the Court of Appeals for consideration and discussion of the issues in defendant's supplemental brief.

PEOPLE v SPENCER HOGAN, No. 128154. Leave to appeal denied at 474 Mich 855. Court of Appeals No. 250428.

PEOPLE v BUNKLEY, No. 128171. Leave to appeal denied at 474 Mich 898. Court of Appeals No. 255118.

PEOPLE v WILLIAM BROWN, No. 128176. Leave to appeal denied at 473 Mich 885. Court of Appeals No. 246794.

PEOPLE v TRACY HAMMOND, No. 128189. The motion to amend reasons or grounds for appeal is denied. Leave to appeal denied at 474 Mich 932. Court of Appeals No. 255613.

PEOPLE v MICHAEL R WILLIAMS, No. 128305. Leave to appeal denied at 474 Mich 899. Court of Appeals No. 256903.

KELLY, J. I would grant reconsideration and, on reconsideration, would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v PHILLIP JONES, No. 128319. Leave to appeal denied at 474 Mich 900. Court of Appeals No. 261181.

PEOPLE v CHARLES, No. 128330. Leave to appeal denied at 474 Mich 871. Court of Appeals No. 252031.

PEOPLE v DYER, No. 128383. Leave to appeal denied at 474 Mich 900. Court of Appeals No. 252305.

KELLY, J. I would grant reconsideration and, on reconsideration, would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

In re PETITION BY THE WAYNE COUNTY TREASURER FOR FORECLOSURE OF CERTAIN LANDS FOR UNPAID TAXES (WAYNE COUNTY TREASURER v WESTHAVEN

MANOR LIMITED DIVIDEND HOUSING ASSOCIATION), No. 128403. Leave to appeal denied at 474 Mich 862. Reported below: 265 Mich App 285.

CORRIGAN and MARKMAN, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v CORBETT, No. 128409. Leave to appeal denied at 474 Mich 900. Court of Appeals No. 260383.

In re MCCORMICK ESTATE (BRAVERMAN v MCCORMICK), No. 128443. Leave to appeal denied at 474 Mich 901. Court of Appeals No. 250361.

COUCH v CORRELL, No. 128445. Leave to appeal denied at 474 Mich 872. Court of Appeals No. 256899.

PEOPLE v ROBAR, No. 128501. Leave to appeal denied at 474 Mich 932. Court of Appeals No. 251780.

PEOPLE v T J ROBINSON, III, No. 128615. Leave to appeal denied at 474 Mich 904. Court of Appeals No. 251810.

PEOPLE v MEEK, No. 128628. Leave to appeal denied at 474 Mich 904. Court of Appeals No. 259425.

PEOPLE v BLACK, No. 128644. Leave to appeal denied at 474 Mich 904. Court of Appeals No. 259694.

PEOPLE v CONELY, No. 128714. Leave to appeal denied at 474 Mich 857. Court of Appeals No. 250576.

PEOPLE v SCHARR, No. 128720. Leave to appeal denied at 474 Mich 905. Court of Appeals No. 259036.

PEOPLE v COOLEY, No. 128723. Leave to appeal denied at 474 Mich 905. Court of Appeals No. 253688.

PEOPLE v HARDEN, No. 128796. Leave to appeal denied at 474 Mich 862. Court of Appeals No. 241671.

PEOPLE v CACCAMO, No. 128833. Leave to appeal denied at 474 Mich 907. Court of Appeals No. 255336.

PEOPLE v JOHNELL ALLEN, JR, No. 128932. Leave to appeal denied at 474 Mich 936. Court of Appeals No. 249788.

MOORE v EGAN, No. 128934. Leave to appeal denied at 474 Mich 937. Court of Appeals No. 259352.

In re FOX (FISHER v FISHER), No. 128992. Leave to appeal denied at 474 Mich 851. Court of Appeals No. 258993.

PEOPLE v CRUTCHER, No. 129013. Leave to appeal denied at 474 Mich 909. Court of Appeals No. 250609.

JOHNSON v JOHNSON, No. 129022. Leave to appeal denied 474 Mich 937. Court of Appeals No. 261611.

PEOPLE v JACK HALL, No. 129034. Leave to appeal denied at 474 Mich 937. Court of Appeals No. 258449.

Leave to Appeal Denied January 30, 2006:

COUNTY ROAD ASSOCIATION OF MICHIGAN v GOVERNOR, Nos. 125901, 125910; Court of Appeals No. 245931.

PEOPLE v TATE, No. 127907; Court of Appeals No. 256434.

PEOPLE v MARCUS KING, No. 127997; Court of Appeals No. 249426.

PEOPLE v SISTRUNK, No. 128123; Court of Appeals No. 250683.

ADELSON v OAKLAND CIRCUIT JUDGE, No. 128218. The motion for bond pending appeal is denied as moot. Court of Appeals No. 258539.

PEOPLE v MICHAEL MORGAN, No. 129002; Court of Appeals No. 250437.

CAVANAGH, J. I would grant leave to appeal.

TERRA ENERGY, LTD v WHITE PINE ENTERPRISES, LLC, No. 129053. The motion for miscellaneous relief is granted. Court of Appeals No. 254159.

PEOPLE v HOFE, No. 129072; Court of Appeals No. 250653.

PEOPLE v VANCE, Nos. 129104, 129106; Court of Appeals Nos. 260292, 261914.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v MARTRICE MITCHELL, No. 129119; Court of Appeals No. 252029.

BANK ONE, NA v CONDIT, No. 129123. The motions for immediate consideration and peremptory reversal are denied. Court of Appeals No. 257626.

HOUSEHOLD BANK (NEVADA), NA v SMITH, No. 129126; Court of Appeals No. 259650.

CHESTONIA TOWNSHIP v STAR TOWNSHIP and ORDWAY v STAR TOWNSHIP, Nos. 129202, 129203; reported below: 266 Mich App 423.

PEOPLE v DEAN ROBINSON, No. 129234; Court of Appeals No. 260961.

PEOPLE v ERIC MARTIN, No. 129237; Court of Appeals No. 255869.

PEOPLE v HADLEY, No. 129270; Court of Appeals No. 253514.

NATHAN v CRENSHAW, No. 129317; Court of Appeals No. 260219.

LANDON HOLDINGS, INC v THORNAPPLE TOWNSHIP, No. 129334; Court of Appeals No. 253434.

FOSTER v DOW CORNING CORPORATION, No. 129336; Court of Appeals No. 254539.

ARRAND v SNIDER, No. 129346; Court of Appeals No. 260386.

PEOPLE v STEVEN NELSON, No. 129365; Court of Appeals No. 262515.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v DUBOIS, No. 129371; Court of Appeals No. 255634.

PEOPLE v GALLO-CERVANTES, No. 129376; Court of Appeals No. 250004.

WILKS v SAPPI FINE PAPER NORTH AMERICA, No. 129385; Court of Appeals No. 261112.

PEOPLE v GLEN HARRISON, No. 129390; Court of Appeals No. 253245.

PEOPLE v VANCLEAVE, No. 129402; Court of Appeals No. 253946.

PEOPLE v WOODFORK, No. 129417; Court of Appeals No. 255633.

PEOPLE v DELAUREN GORDON, No. 129418; Court of Appeals No. 255080.

PEOPLE v REESE, No. 129422; Court of Appeals No. 253400.

VILLAGE OF HOLLY v HOLLY TOWNSHIP, No. 129430. The motion to file brief amicus curiae is granted. Reported below: 267 Mich App 461.

PEOPLE v EDWARD CRAWFORD, No. 129432. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is denied. Court of Appeals No. 263784.

PEOPLE v DIPPERT, No. 129442; Court of Appeals No. 261908.

ST NICHOLAS GREEK ORTHODOX CHURCH OF DETROIT v PERNAL and WHITE CHAPEL MEMORIAL ASSOCIATION PARK PERPETUAL CARE TRUST v PERNAL, Nos. 129452, 129910; Court of Appeals Nos. 252968, 254597.

MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC v FAYAD, No. 129472; Court of Appeals No. 261774.

PEOPLE v DARIUS WILLIAMS, No. 129491; Court of Appeals No. 245618.

PEOPLE v FREDERICK FREEMAN, No. 129522. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260864.

HACK v TUSCOLA COUNTY MENTAL HEALTH, No. 129527; Court of Appeals No. 261800.

WILLIAMS v FORD VISTEON MOTOR COMPANY, No. 129546; Court of Appeals No. 253979.

SAGE v BRIGHTON INTERIOR SYSTEMS, No. 129563; Court of Appeals No. 261634.

WILLIAMS v MACKIE AUTOMOTIVE SYSTEMS (DETROIT), No. 129568; Court of Appeals No. 252972.

MEDALIST GOLF CLUB, LLC v BANK ONE OF MICHIGAN, No. 129608; Court of Appeals No. 257625.

GONZALEZ v ST MARY'S MEDICAL CENTER OF SAGINAW, No. 129612; Court of Appeals No. 261325.

LUCAS v MICHIGAN BELL (AMERITECH SERVICES, INC), No. 129624. The motion to dismiss is denied. Court of Appeals No. 261799.

SSAB HARDTECH, INC v STATE TAX COMMISSION, No. 129625. The motion to file brief amicus curiae is granted. Court of Appeals No. 255072.

PEOPLE v CHARLES ALLEN, No. 129632; Court of Appeals No. 248743.

PEOPLE v WEST, No. 129636. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is denied. Court of Appeals No. 260411.

PEOPLE v BIXLER, No. 129648. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The miscellaneous motions are denied. Court of Appeals No. 260408.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v LAMAR HAYWOOD, No. 129650. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260749.

PEOPLE v SIMPSON, No. 129656. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for appointment of counsel is denied. Court of Appeals No. 261165.

PEOPLE v FREDDIE NASH, No. 129668; Court of Appeals No. 255874.

PEOPLE v JAMES MCQUEEN, No. 129686; Court of Appeals No. 252871.

PEOPLE v JEMISON, No. 129692; Court of Appeals No. 262644.

PEOPLE v ARTERBERRY, No. 129699; Court of Appeals No. 263098.

PEOPLE v ALVAREZ, No. 129700; Court of Appeals No. 264484.

PEOPLE v MCDORMAN, No. 129708; Court of Appeals No. 263864.

PEOPLE v APONTE, No. 129716. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261014.

PEOPLE v LEON WILSON, No. 129728; Court of Appeals No. 255632.

PEOPLE v DONALD KELLY, No. 129732. The application for leave to appeal the August 31, 2005, order of the Court of Appeals is denied, because we are not persuaded that the question presented should be reviewed by this Court. We take this opportunity to clarify that, although defendant is not entitled to the new sentencing provisions contained in MCL 333.7401(2)(a)(iii), he is entitled to early parole eligibility under MCL 791.234(12). Defendant committed his offense before March 1, 2003, and that statute grants early parole eligibility to persons convicted of "violating or conspiring to violate section 7401(2)(a)(iii) . . . before March 1, 2003." Court of Appeals No. 263990.

PEOPLE v TUMELE, No. 129739; Court of Appeals No. 262063.

PEOPLE v STROZIER, No. 129747; Court of Appeals No. 254122.

PEOPLE v DUKES, No. 129757; Court of Appeals No. 255820.

PEOPLE v SAMPSON, Nos. 129762, 129763; Court of Appeals Nos. 254524, 254525.

PEOPLE v DEAN JOHNSON, No. 129792; Court of Appeals No. 264292.

PEOPLE v MORTON, No. 129804. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261091.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v OTIS JONES, No. 129830; Court of Appeals No. 254495.

PEOPLE v GALVESTER JOHNSON, No. 129835; Court of Appeals No. 255450.

PEOPLE v RICKMAN, No. 129846; Court of Appeals No. 253390.

PEOPLE v STEVEN BOOTH, No. 129849. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261757.

PEOPLE v WILLIAM STEVENSON, No. 129887; Court of Appeals No. 265034.

PEOPLE v ROBERT HAWTHORNE, No. 129889; Court of Appeals No. 256473.

PEOPLE v HERMAN, No. 129907; Court of Appeals No. 264346.

PEOPLE v GIRARD, No. 129913; Court of Appeals No. 255452.

PEOPLE v CLAPPER, No. 129914; Court of Appeals No. 264848.

PEOPLE v PLEAU, No. 129919. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261758.

PEOPLE v KAFANDEN, No. 129984; Court of Appeals No. 261035.

PEOPLE v BECKER, No. 130007; Court of Appeals No. 265756.

Interlocutory Appeals

Leave to Appeal Denied January 30, 2006:

AVERY v ROBERTS, No. 128900; Court of Appeals No. 253068.

ALDRICH v MID-MICHIGAN MEDICAL CENTER MIDLAND, Nos. 128373, 129383; Court of Appeals No. 262761.

PEOPLE v MADDOX, No. 129964. The motion to remand and the motion for a transcript are also denied. Court of Appeals No. 257981.

Statements Regarding Motion for Recusal Entered January 31, 2006:

ADAIR v STATE OF MICHIGAN, No. 129467; reported below: 267 Mich App 583.

TAYLOR, C.J., and MARKMAN, J. state as follows:

Plaintiffs have moved for our recusal from participation in this case on the basis of our spouses' employment with the office of the Attorney General and the "appearance of impropriety" assertedly raised by such employment.[1]

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[1] Chief Justice TAYLOR's spouse, Lucille Taylor, has worked part-time as an independent contractor providing legal advice to the Attorney General's office since mid-2004. Justice MARKMAN's spouse, Mary Kathleen Markman, has worked in the Governmental Affairs Bureau of the Attorney General's office since September 2005, at which time she was hired through the regular hiring processes of that office. There are an estimated 550 persons working in the Attorney General's office, including more than 300 attorneys. Neither of our spouses has undertaken any legal work in these positions pertaining to matters that have been brought before this Court. Further, neither of our spouses is employed in a supervisory capacity, and thus we have heard no cases brought by attorneys under their authority or supervision. Moreover, efforts have been undertaken by the Attorney General's office to create a permanent "wall" or barrier between the work performed by our spouses and cases that may be brought to this Court. Each of us on past occasions has recused himself from participation in cases in which our respective spouses have been involved in their previous legal capacities, and we remain cognizant of the need to recuse ourselves in the future should a conflict arise. Further, in contrast to the policy of the United States Supreme Court, see n 6 *infra*, it has been our practice to recuse ourselves from participation in all cases in which our respective spouses have participated at *any* stage of the proceedings, whether or not they have served as "lead counsel."

We note further for the record that it is not unusual for a judge's spouse or other relative to be employed as a lawyer, or even as a lawyer in a public agency, and that such employment is becoming increasingly common. Justice CORRIGAN's late husband was a lawyer and law professor at Wayne State University; it was her policy not to participate in cases in which her husband had been involved, but she heard cases involving Wayne State University. Former Justice RILEY's husband was a lawyer; she heard cases in which her husband's firm represented a party unless her husband had personally participated in the case. Former Justice BOYLE was married to a trial judge and she typically declined to participate when an appeal involved a decision made by her husband as a trial judge, but heard other appeals from his court. Former Justice ARCHER's wife was a trial judge; he did not review her decisions, but he reviewed other cases originating from the bench on which she served. Former Justice COLEMAN was married to a trial court judge; she declined to review his decisions, but she did hear other cases from his court. Former Justice BRICKLEY had a son practicing law while Justice BRICKLEY sat on this Court; he heard cases in which his son's firm represented a party unless

Having carefully considered this motion, we deny the motion for the following reasons:[2]

(1) The asserted basis for recusal in this case, the employment of our spouses by the Attorney General's office, has never before been understood in Michigan to constitute a basis for recusal.

(2) Specific court rules in Michigan that permit us to participate in this case are fully consistent with the rules and practices of the United States Supreme Court, the federal judiciary, and virtually every other state of the Union.

(3) Where, as here, specific court rules address the asserted basis for recusal, and those rules make clear that recusal is not required, a vague allegation of an "appearance of impropriety" cannot prevail over those rules.

(4) It would be an ethical "snare" if judges who complied fully with court rules, as well as with other rules of law such as those pertaining to campaign contributions, were subsequently required to recuse themselves from cases despite their compliance with the rules and laws.

(5) The recusal policy asserted by plaintiffs—that no judge can hear any case in which a party is represented by a law firm or a prosecutor's office in which a relative of that judge is employed, even if that relative

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his son had personally participated in the case. Justice CAVANAGH has a daughter who practices law; he hears cases in which his daughter's firm represents a party unless she has personally participated in the case. Justice CAVANAGH also has a nephew who is a Court of Appeals judge; he reviews his nephew's opinions. Former Justice GRIFFIN had a son who was a Court of Appeals judge while he was a justice; he reviewed decisions of Court of Appeals panels on which his son sat. Former Justice LEVIN had a brother who practiced law; he participated when his brother's firm was involved in an appeal and disqualified himself only if his brother appeared as counsel. Moreover, to cite other examples, Court of Appeals Judge FITZGERALD and former Ingham Circuit Judge Peter Houk have had spouses or children (or both) who worked in the Attorney General's office while they sat on state courts, and Justice CAVANAGH had a niece who worked for the Attorney General's office, and they followed a similar approach to recusal. Numerous other judges throughout Michigan, state and federal, over the years have honorably accommodated their judicial responsibilities with the fact of family members who have been employed by private law firms and prosecutor's offices coming before their courts.

[2] With rare exceptions, see, e.g., *Cheney v United States Dist Court for the Dist of Columbia,* 541 US 913 (2004), and *Laird v Tatum*, 409 US 824 (1972), it has been the historic practice of the United States Supreme Court, and this Court, for a justice not to supply reasons for why he or she does or does not recuse himself or herself from participating in a case. We depart from this practice here because the present motion is expressly predicated on media accounts that may, unless they are the subject of a response, produce recurrent motions for recusal on the same grounds.

has no personal involvement in the case and stands to gain nothing materially by its outcome—constitutes an unfair and unwise policy that would seriously inhibit employment opportunities for any judge's spouse or relative who is an attorney.[3]

(6) Moreover, the "exception" that plaintiffs would allow to this rule—that a judge may hear a case only if *all attorneys* agreed to permit his or her participation—would politicize and introduce gamesmanship into the judicial process.

(7) While the rule proposed by plaintiffs is unwarranted even with regard to spouses and relatives who are employed by private law firms, it is even more draconian with regard to spouses and relatives who are employed by prosecutor's offices whose financial viability is unaffected by whether they prevail in a given lawsuit and in which employee compensation is similarly unaffected.

(8) Particularly on the supreme court of a state, a body in which judges who recuse themselves cannot be replaced, it is necessary that judges participate in cases in which recusal is not required.

(9) If the fact of a working spouse or relative is viewed by some as sufficient to cast an "appearance of impropriety" on a judge's work, despite court rules and historical practice to the contrary, and despite a history of honorable conduct on the part of such judges in recusing themselves from cases in which their spouses were genuinely involved or interested, such a judgment must come from the people in the course of the judicial selection process provided for by the Michigan Constitution.

1. MCR 2.003(B)(6)

MCR 2.003(B)(6) states that, with regard to a "judge's spouse, or a person within the third degree of relationship to either [the judge or the judge's spouse], or the spouse of such a person," a judge is disqualified where that relative:

> (a) is a party to the proceeding, or an officer, director or trustee of a party;

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[3] Indeed, there is nothing inherent in plaintiffs' proposed policy that would limit it to spouses and relatives who work as *attorneys*. For purposes of this rule, it does not matter, after all, that a spouse or relative is not involved in a case or that he or she stands to gain no material benefit. Instead, all that is significant is the fact of affiliation with an institution; it is mere affiliation that constitutes the "appearance of impropriety." It would not seem to matter that the affiliation is as an attorney, a secretary, a health care manager, or a carpenter, for each would give rise to a similar "appearance of impropriety." The world that plaintiffs would create is one in which the most important thing that a party or attorney would need to know about a judge whose disqualification is desired is, "Who is the judge's wife (husband), and where does she (he) work?"

(b) is acting as a lawyer in the proceeding;[4]

(c) is known by the judge to have more than a de minimis interest that could be substantially affected by the proceeding;[5] [or]

(d) is to the judge's knowledge likely to be a material witness in the proceeding.

None of these circumstances obtains in the instant case with regard to our spouses.

2. UNITED STATES SUPREME COURT POLICY

MCR 2.003(B)(6) is consistent with the policy of the United States Supreme Court, which requires recusal in cases in which, with regard to a justice's spouse, or a person within the third degree of relationship to either the justice or the justice's spouse, or the spouse of such a person, "the litigation is in effect 'his' or 'her' [i.e., the relative's] case"; in which "the amount of the relative's compensation could be substantially affected by the outcome"; or in which "appearances on behalf of parties are made by firms in which our relatives are partners, unless we have received from the firm written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives' partnership shares."[6] Again, none of these circumstances obtains in the instant case with regard to our spouses.

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[4] "It is well established that this provision requires personal participation in the representation, and not just membership in the representing firm, see, *e.g., Potashnick* v. *Port City Constr. Co.*, 609 F.2d 1101, 1113 (CA5), cert. denied, 449 U. S. 820 (1980)." Statement of Recusal Policy, United States Supreme Court, November 1, 1993. The staff comment to an amendment to GCR 1963, 912.2, the predecessor to MCR 2.003(B), which is predicated on 28 USC 455, see part 4 *infra*, states that "[a]ttorneys performing legal functions not connected with a particular proceeding are excluded from coverage; only those attorneys who work directly on a case are covered by the language." 402 Mich cliii (1978). See also Anno: *Disqualification of federal judge, under 28 USCS § 455(b)(5)(ii), on ground that judge's relative is acting as lawyer in proceeding,* 73 ALR Fed 879, 881 (summarizing cases as standing for the proposition that, "[where] a relative of the judge who was associated with the firm representing one of the parties did not actually participate in trying the case, . . . the judge's relative was not acting as an attorney for one of the parties so as to mandate the disqualification of the judge under 28 USCS § 455(b)(5)(ii)").

[5] "[A]ssociates in a law firm do not have a substantial interest in the outcome of cases in which they do not actively participate . . . ." Anno: *Disqualification of judge under 28 USCS § 455(b)(5)(iii), where judge or his or her spouse, or certain of their relatives, is known to have an interest that could be affected by the proceeding,* 54 ALR Fed 855, 856.

[6] Statement of Recusal Policy, United States Supreme Court, November 1, 1993.

3. ABA MODEL CODE OF JUDICIAL CONDUCT

MCR 2.003(B)(6) is consistent with the American Bar Association Model Code of Judicial Conduct, Canon 3, which requires recusal in any proceeding in which the judge's

> spouse, or a person within the third degree of relationship to either [the judge or the judge's spouse], or the spouse of such a person:
>
> (i) is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) is acting as a lawyer in the proceeding;
>
> (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; [or]
>
> (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Once more, none of these circumstances obtains in the instant case with regard to our spouses.

4. FEDERAL LAW

MCR 2.003(B)(6) is consistent with the federal recusal statute, 28 USC 455(b)(5), which provides that a federal judge shall recuse himself from any proceeding in which

> [h]e or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding;

> [Pursuant to 28 USC 455(5)(ii),] [i]t is also apparent, from use of the present tense, that *current* participation as a lawyer, and not merely *past* involvement in earlier stages of the litigation, is required [for a recusal].
>
> * * *
>
> Absent some special factor, therefore, we will not recuse ourselves by reason of a relative's participation as a lawyer in earlier stages of the case. One such special factor, perhaps the most common, would be the relative's functioning as lead counsel below, so that the litigation is in effect "his" or "her" case *and* its outcome even at a later stage might reasonably be thought capable of substantially enhancing or damaging his or her professional reputation. [*Id.* (emphasis added).]

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.[7]

Again, none of these circumstances obtains in the instant case with regard to our spouses.

5. STATE LAW

MCR 2.003(B)(6) is consistent with the judicial conduct rules of Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming,[8] all of which define the obligation to recuse

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[7] See *Microsoft Corp v United States*, 530 US 1301 (2000), in which Chief Justice Rehnquist refused under this statute to recuse himself from participation in a case in which his son was a partner in the law firm representing one of the parties. Justice Scalia has also participated in cases in which his sons worked for law firms representing parties in lawsuits before the United States Supreme Court, including *Bush v Gore*, 531 US 98 (2000). See CNN.com law center archives, <http://archives.cnn.com/2000/LAW/12/12/supreme.court.conflict/index.html> (accessed January 12, 2006) ("Legal ethics expert Stephen Gillers of New York University's law school says . . . [,] 'It's not a basis for disqualification, so long as neither child is involved in the case . . . .' ").

[8] Ala Canons of Judicial Ethics, Canon 3; Ariz Sup Ct R 81, Canon 3; Ark Code of Judicial Conduct, Canon 3; Colo Code of Judicial Conduct, Canon 3; Conn Code of Judicial Conduct, Canon 3; Del Judges' Code of Judicial Conduct, Canon 3; Fla Code of Judicial Conduct, Canon 3; Ga Code of Judicial Conduct, Canon 3; Hawaii Code of Judicial Conduct, Canon 3; Ill Sup Ct R 63; Ind Code of Judicial Conduct, Canon 3; Iowa Code of Judicial Conduct, Canon 3; Kan Sup Ct R 601A, Canon 3; Ky Sup Ct R 4.300, Canon 3; Me Code of Judicial Conduct, Canon 3; Md R 16-813, Canon 3; Mass Sup Jud Ct R 3:09, Canon 3; Minn Code of Judicial Conduct, Canon 3; Miss Code of Judicial Conduct, Canon 3; Mo Sup Ct R 2.03, Canon 3; Neb Code of Judicial Conduct, Canon 3; Nev Code of Judicial Conduct, Canon 3; NH Sup Ct R 38, Canon 3; NM Ct R 21-400; NY Ct R 100.3 (22 NYCRR 100.3); NC Code of Judicial Conduct, Canon 3; ND Code of Judicial Conduct, Canon 3; Ohio Code of Judicial Conduct, Canon 3; Okla Stat, Tit 5, Ch 1, App 4, Canon 3; Pa Code of Judicial

in terms of whether a relative: (i) is a party to the proceeding, or an officer, director, or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or (iv) is to the judge's knowledge likely to be a material witness in the proceeding.[9]

46 Am Jur 2d, Judges, § 140, pp 237-238, provides a helpful summary of state law in this area:

> The canons rules of virtually all states provide that a judge should disqualify himself if he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding. The question of whether a person within the required relationship to either the judge or his spouse, or the spouse of such person, is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding as in the case where the judge's relative is affiliated with a law firm representing one of the parties, depends on the particular facts of each case. The court may consider: (1) the nature of the attorney's interest in the law firm; (2) whether that interest could be affected by the outcome of the case, and if so, whether it could be substantially affected; and (3) the judge's knowledge regarding the attorney's interest in the firm. One primary concern is the financial remuneration which the judge's relative might receive. Closely related to direct finan-

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Conduct, Canon 3; RI Sup Ct R, Art 6, Canon 3; SC App Ct R 501, Canon 3; SD Code of Judicial Conduct, Canon 3; Tenn Sup Ct R 10, Canon 3; Tex R Civ P 18b; Utah Code of Judicial Conduct, Canon 3; Vt Code of Judicial Conduct, Canon 3; Va Canons of Judicial Conduct, Canon 3; Wash Code of Judicial Conduct, Canon 3; W Va Code of Judicial Conduct, Canon 3; Wy Code of Judicial Conduct, Canon 3.

[9] There are minor variations among these provisions, none of which would have consequences for our participation in this case. Although the rules in California, the District of Columbia, Idaho, Louisiana, and Wisconsin are stated differently, none would require our recusal. Cal Code of Judicial Ethics, Canon 3 (requires recusal where judge's relative is "associated in the private practice of law with a lawyer in the proceeding"); DC Superior Ct R Civ P 63-I (requires recusal where judge has a "personal bias or prejudice either against the party or in favor of any adverse party"); Idaho R Civ P 40(d)(2) (requires recusal where judge is "interested in the action or proceeding"); La Code of Judicial Conduct, Canon 3 (requires recusal where the "judge's impartiality might reasonably be questioned"); Wis Stat 757.19 (requires recusal where judge has a "personal interest in the outcome of the matter").

> cial remuneration are nonpecuniary benefits to the lawyer-relative's firm, such as enhanced reputation and increased good will that indirectly benefit the lawyer-relative. The fact that a lawyer in a proceeding is affiliated with the law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge, nor does the possibility of a large verdict returned in the case. However, courts hold that judges must disqualify themselves from presiding over a case if one or more of the lawyers on the case belongs to a law firm in which the judge's relative of the requisite degree of relationship is a partner.[10]

6. CASE LAW

MCR 2.003(B)(6) is consistent with relevant judicial decisions on the subject of the instant motion. See 73 ALR Fed 879; 54 ALR Fed 855; *State v Harrell*, 199 Wis 2d 654 (1996) (disqualification not required where judge's wife was an assistant district attorney in the county district attorney's office that was prosecuting the defendant); *Sensley v Albritton*, 385 F3d 591 (CA 5, 2004) (disqualification not required where judge's wife was employed as a state assistant district attorney in the office that was representing the defendants); *Liberty Mut Ins Co v Wheelwright Trucking Co*, *Inc,* 851 So 2d 466, 498 (Ala, 2002) (statement of Lyons, J.) (disqualification not required where judge's son was an associate with the law firm that represented one of the parties); *Archer Daniels Midland Co v Seven Up Bottling Co*, 746 So 2d 966, 990 (Ala, 1999) (statement of See, J.) (disqualification not required where judge's brother-in-law was a partner in the law firm that represented one of the parties); *Adams v Deaton, Inc*, 644 So 2d 189 (La, 1994) (disqualification not required where judge's son was an associate with the law firm that represented one of the parties); *Brown v Fed S & L Ins Corp*, 105 Nev 409 (1989) (disqualification not required where judge's daughter was a law clerk with the law firm that represented one of the parties); *Keene Corp v Rogers*, 863 SW2d 168 (Tex App, 1993) (disqualification not required where judge's son-in-law was an associate with the law firm that represented one of the parties); *State v Putnam*, 164 Vt 558 (1996) (disqualification not required where judge's husband was a police officer who worked in the same barracks as an officer who was a potential witness in the case); *IQ Products Co v Pennzoil Products Co*, 305 F3d 368 (CA 5, 2002) (disqualification not required where judge's father-in-law

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[10] However, the last sentence of this quotation does not represent the universal practice. Chief Justice Rehnquist, for example, participated in cases in which the law firm in which his son was a partner represented one of the parties. See n 7 *supra*. Likewise, Justice BRICKLEY participated in cases involving the firm in which his son was a partner (as long as his son did not participate in the case). See also *Potashnick v Port City Constr Co,* 609 F2d 1101 (CA 5, 1980) (recusal not required where judge's father was a partner in the firm representing one of the parties).

was a retired partner in the law firm that represented one of the parties); *Southwestern Bell Tel Co v FCC*, 153 F3d 520 (CA 8, 1998) (disqualification not required where judge's son had accepted a position as an entry-level computer programmer with one of the parties); *Jenkins v Arkansas Power & Light Co*, 140 F3d 1161 (CA 8, 1998) (disqualification not required where judge's son had become a new associate at defendant's law firm); *In re Kansas Pub Employees Retirement Sys,* 85 F3d 1353 (CA 8, 1996) (disqualification not required where judge's daughter had accepted an offer of employment as an associate attorney with the law firm representing one of the parties); *Datagate, Inc v Hewlett-Packard Co,* 941 F2d 864 (CA 9, 1991) (disqualification not required where judge's son was an employee of one of the parties); *Hewlett-Packard Co v Bausch & Lomb Inc*, 882 F2d 1556 (CA Fed, 1989) (disqualification not required where judge's son was an employee of one of the parties); *United States ex rel Weinberger v Equifax, Inc*, 557 F2d 456 (CA 5, 1977) (disqualification not required where judge's son was an associate of the law firm representing one of the parties); *Faith Temple Church v Town of Brighton*, 348 F Supp 2d 18 (WD NY, 2004) (disqualification not required where judge's son had been offered, and had accepted, an associate position with the law firm representing one of the parties); *In re Mercedes-Benz Antitrust Litigation,* 226 F Supp 2d 552 (D NJ, 2002) (disqualification not required where judge's son had become a partner in a law firm representing one of the parties); *United States v Edwards*, 39 F Supp 2d 692 (MD La, 1999) (disqualification not required where judge's son was an associate in the law firm that represented a codefendant); *Cloverdale Equip Co v Manitowoc Engineering Co*, 964 F Supp 1152 (ED Mich, 1997) (disqualification not required where judge's son was an associate with the law firm that represented one of the parties); *Nobelpharma Ab v Implant Innovations*, *Inc,* 930 F Supp 1241 (ND Ill, 1996) (disqualification not required where judge's daughter was a partner in the law firm that represented one of the parties); *Wilmington Towing Co, Inc v Cape Fear Towing Co*, *Inc,* 624 F Supp 1210 (ED NC, 1986) (disqualification not required where judge's son worked as a summer associate and had tentatively accepted employment with the law firm that represented one of the parties); *Miller Industries, Inc v Caterpillar Tractor Co*, 516 F Supp 84 (SD Ala, 1980) (disqualification not required where judge's father was "of counsel" to the law firm representing one of the parties).

7. GOVERNMENTAL ATTORNEYS

Although MCR 2.003(B)(6) makes no distinctions between judges' relatives who work in the private sector and judges' relatives who work in the public sector, the potential for conflict is considerably less in the case of a relative working for a public office, such as our spouses, than in the case of one working for a private office: (a) the compensation of our spouses is unaffected by whether the Attorney General's office prevails in a given lawsuit; (b) the financial viability of the Attorney General's office is unaffected by whether it prevails in a given lawsuit; (c) the Attorney General's office, unlike a private law firm, is statutorily *obligated* to

represent a range of interests with which the Attorney General may fundamentally disagree, such as the defense of the policies of a Governor of a different political party, and can exercise little volition in undertaking such representation; and (d) the traditional credo of the prosecutor's office is grounded in the proposition that the prosecutor effectively prevails whenever "justice is done," regardless of whether the prosecutor has actually "won" or "lost" a particular lawsuit.[11] Although MCR 2.003(B)(6) is applicable generally to potential conflicts between judges and their relatives, such potential seems, if anything, more remote in the public than the in private sector.

The Michigan Court of Appeals has held that state disqualification rules do not require the recusal of a judge who was within the fourth degree of consanguinity to the prosecuting attorney. *People v Dycus*, 70 Mich App 734 (1976). There, the prosecuting attorney did not appear or personally participate in the proceedings. *Id*. at 736. The Ohio Supreme Court employed this same rationale in *In re Disqualification of Carr*, 105 Ohio St 3d 1233 (2004). There, the court stated:

> Relationships among lawyers in government agencies, however, are different. Salaried government attorneys simply " 'do[] not have the financial interest in the success of departmental representation that is inherent in private practice.' " As long as the government attorney whose conflict of interest prevents him or her from handling a particular matter is effectively screened from any participation in the case, other attorneys in the office can, in most circumstances, continue to handle the case. [*Id.* at 1236 (citations omitted).]

The Ohio court denied a motion for the disqualification of a judge whose spouse worked as a prosecutor in the same office that was prosecuting the case where the judge's spouse "neither entered an appearance in the case nor participated in the preparation or presentation of the case." *Id*. at 1237.

Similarly, as already noted, the Wisconsin Supreme Court did not require disqualification where a trial judge's wife, who was an assistant district attorney, did not participate in the case. *State v Harrell*, 199 Wis 2d 654 (1996). The court stated that the disqualification statute would be "too broad" if it swept in "every government attorney who happens to be employed in the same county office or governmental department." *Id*. at 659-660. Further, it noted that "a member of a government prosecutor's

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[11] "[R]egardless of [the government lawyer's] powers and duties, because his compensation and clientele are set, and the prestige of the office as a whole is not greatly affected by the outcome of a particular case," a judge considering a disqualification motion involving a lawyer-relative in government service may consider "a government attorney [to be] only 'engaged in the case' when he has worked on the case directly." 46 Am Jur 2d, Judges, § 139, p 237.

office does not have the same type of interest in the outcome of a trial as does a member of a private law firm" because of the lack of financial and reputational interest. *Id*. at 662.

Other courts have reached similar conclusions regarding judges' lawyer-relatives who worked for the government. See, e.g., *State ex rel Brown v Dietrick*, 191 W Va 169, 176 (1994) ("[That] a magistrate's spouse is the chief of police of a small police force does not automatically disqualify the magistrate, who is otherwise neutral and detached, from issuing a warrant sought by another member of such police force," though prudence might dictate curtailing the magistrate's involvement in this small town context.); *Trimble v State*, 316 Ark 161, 170-172 (1994) (finding no abuse of discretion when a judge did not disqualify himself where his son worked as an errand boy for the prosecutor's office); *People v Moffat*, 202 Ill App 3d 43 (1990) (rejecting a claim of unfair trial based on the fact that the judge's son worked as an assistant state's attorney in a different division); *State v Logan*, 236 Kan 79 (1984) (affirming the trial court's denial of a disqualification motion where the judge's son worked as an assistant district attorney but not on the particular case); see also *United States v Caggiano*, 660 F2d 184 (CA 6, 1981) (refusing to impute a conflict of interest of one attorney to all the attorneys in a United States Attorney's office).

8. "APPEARANCE OF IMPROPRIETY"

Plaintiffs argue that, even if our spouses have not participated in a case, we should recuse ourselves because there is an "appearance of impropriety" for us to participate in cases in which the Attorney General's office is involved. In support of this argument, plaintiffs cite Canon 2 of the Michigan Code of Judicial Conduct, which indicates that judges should avoid all impropriety and appearance of impropriety.

Putting aside for the moment what constitutes the "appearance of impropriety" in the specific context of judicial disqualification, Justice MALLETT wrote for this Court that a judge "is disqualified when he cannot hear a case *impartially* pursuant to MCR 2.003(B)." *Cain v Dep't of Corrections*, 451 Mich 470, 494 (1996) (emphasis in original). "The court rule sets forth a list of situations that are deemed to be the equivalent of an inability to hear a case impartially. . . . MCR 2.003(B)(1) requires a showing of *actual* bias. Absent actual bias or prejudice, a judge will not be disqualified pursuant to this section."[12] *Id*. at 494-495 (emphasis in original).

Moreover, concerning the exhortation in Canon 2 to avoid the "appearance of impropriety," this must be read in the context of Canon 3(C), which states with regard to the specific question of judicial disqualification that a judge "should raise the issue of disqualification whenever the

[12] Unlike the disqualification rules of some states, there is no "appearance of impropriety" language contained in MCR 2.003(B), doubtless because its drafters were concerned about such language vitiating the specific provisions set forth in the rule.

judge has cause to believe that grounds for disqualification may exist *under MCR 2.003(B)*." (Emphasis added.) Thus, Canon 3(C) is specific and directly on point. The "appearance of impropriety" standard is relevant not where there are specific court rules or canons that pertain to a subject, such as judicial disqualification, but where there are *no* specific court rules or canons that pertain to a subject and that delineate what is permitted and prohibited judicial conduct. Otherwise, such specific rules and canons would be of little consequence if they could always be countermanded by the vagaries of an "appearance of impropriety" standard. Here, there are specific rules and canons that pertain to judicial disqualifications, and these must be understood as defining what does and what does not constitute an impropriety in this realm.

Moreover, even if the "appearance of impropriety" standard is relevant here—which we do not believe it to be in light of the specific commands of MCR 2.003(B) and Canon 3(C)—this standard cannot be equated with *any* person's perception of impropriety, lest a judge find himself or herself subject to a barrage of recusal motions on the part of *any* person who apprehends an impropriety, however unreasonable this apprehension. Rather, this standard must be assessed in light of what can be gleaned from existing court rules and canons, historical practices and expectations, and common sense. As observed by Chief Justice Rehnquist in responding to a motion that he disqualify himself from a case involving his son's law firm:

> [The "appearance of impropriety"] inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances. I have already explained that my son's personal and financial concerns will not be affected by our disposition of the [matters in this case]. Therefore, I do not believe that a well-informed individual would conclude that an appearance of impropriety exists simply because my son represents, in another case, a party that is also a party to litigation pending in this Court. [*Microsoft Corp v United States,* 530 US 1301, 1302 (2000) (citations omitted).]

Apart from the justices themselves, there is no public body in Michigan that is authorized, before the fact, to conclusively determine what constitutes the "appearance of impropriety." To adopt a different understanding of this concept than that set forth by Chief Justice Rehnquist, where specific rules and canons of conduct are in place, would subject judges, especially justices of this Court, to vague, subjective, and increasingly politically directed, allegations of misconduct, against which no justice could effectively defend himself or herself.[13]

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[13] Plaintiffs reference several opinions of a state bar committee on judicial ethics. In response, we note that these opinions are merely advisory, that they are not binding on any court, and that they are merely the opinions of volunteer lawyers of a state bar committee. While we are

9. RECUSAL AND THE SUPREME COURT

The issue of recusal by justices of the Supreme Court involves special considerations given Const 1963, art 6, § 2. This is because, unlike members of the trial courts or the Court of Appeals, there can be no replacement of a justice who must recuse himself or herself. Unlike those courts in which a substitute judge can take the place of a recused judge, there is no such availability on the Supreme Court. Instead, upon a recusal by a justice, this Court must proceed with less than a full contingent of its members. Not only does this increase the likelihood of an even division of the Court's members—effectively rendering null and void the work of the Court and leaving intact lower court decisions that a majority of justices may view as wrongly decided—it also deprives the public and litigants of the full collegial body that they have selected as the state's court of last resort. These unfortunate consequences do not mean that a justice must not recuse himself or herself in appropriate instances, but they do suggest that a justice must consider carefully the implications of a disqualification decision. That is, when it is not necessary to recuse, it is necessary not to recuse. Each unnecessary recusal adversely affects the functioning of the Court.

It is for similar reasons that the federal courts have developed the "duty to sit" doctrine. Pursuant to this doctrine, there is an obligation to

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respectful of their efforts, we can only observe that these opinions are inconsistent with MCR 2.003, and are entirely lacking in analysis as to why a policy different than MCR 2.003 should obtain in this state (explained no doubt by the committee's assertion that "[i]t is not within the committee's province to research appellate decisions, statutory law, or court rules, or to express an opinion as to any provision of law applicable to the contemplated conduct which is the subject of an inquiry"). State Bar of Michigan, General Information <http://www.michbar.org/generalinfo/ethics/request.cfm> (accessed January 12, 2006).

Moreover, the view of this committee—that a judge can *never* participate in *any* case involving a law firm or public agency in which a relative is employed, regardless of the relative's position and regardless of the relative's relationship to the case—will ensure that a judge's spouse who is a lawyer will effectively become unemployable. No law firm of any size and no public employer will ever hire a lawyer whose mere presence forces the recusal of a judge who is that lawyer's relative. The committee's rule is unworkable, unfair, and lacks any grounding in the actual court rules or historical practices of this state. Nor is the committee's rule mitigated at all, in our judgment, by the committee's allowance that a judge may participate in a case *if all lawyers agree to allow such participation*. This is a recipe for legal gamesmanship and political machination, enabling lawyers to pick and choose which judges will be permitted to hear their cases.

remain on any case absent good grounds for recusal. *Laird v Tatum*, 409 US 824, 837 (1972) (noting that the court of appeals had unanimously concluded that judges have a duty to sit when not disqualified that is equally as strong as the duty not to sit when disqualified). "[W]here the standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited." *In re Aguinda*, 241 F3d 194, 201 (CA 2, 2001); cf. *SCA Services v Morgan*, 557 F2d 110, 113 (CA 7, 1977); explanatory note I.3 to 28 USCS 455.

10. CAMPAIGN CONTRIBUTIONS

Although plaintiffs have not raised the issue of campaign contributions, the issue has been a recurrent subject of media accounts that have commented on our spouses' employment, and we briefly address this in order to avoid recurrent motions for recusal.

That a judge has at some time received a campaign contribution from a party, an attorney for a party, a law firm employing an attorney for a party, or a group having common interests with a party or an attorney, cannot reasonably require his or her disqualification. For there is no justice in Michigan in modern times who has not received campaign contributions from such persons. Nor is there a justice whose opponents have not received campaign contributions from such persons. And, increasingly, "opposition" campaigns have arisen in which contributions are specifically undertaken against particular justices. It is simply impossible for the Supreme Court, as well as most other courts in Michigan, to function if a lawful campaign contribution can constitute a basis for a judge's disqualification. For if a contribution to a judicial candidate can compel a judge's disqualification, then a contribution to an opponent, or the funding of an opposition campaign, must operate in a similar fashion. If so, it would be a simple expedient for a party or a lawyer to "mold" the court that will hear his or her cases by tailoring contributions and opposition contributions.

Even more fundamentally, however, "We, the people, of the State of Michigan," through the Constitution, have created a system of judicial selection in our state in which candidates are nominated by, and elected through, a political process. It is a different system of judicial selection than that which exists in other states and in the federal system, and reasonable persons can debate the merits and demerits of this system. Each of us in different forums has urged various reforms of this system. Nonetheless, the present system has been ordained by our Constitution, and it defines the environment in which those aspiring to judicial office must undertake their efforts.

The premise of our system of judicial selection in Michigan is that judges will periodically be held accountable for their performance. There are no lifetime appointments to judicial positions, and there are no unaccountable committees who determine whether judges should be maintained in office. Thus, the most notable strength of our system of judicial selection is that it requires candidates for judicial office to go out among the electorate and explain why they should be placed in office. This system fosters communication with the electorate, speech-making,

debate, the search for support and endorsements, campaign advertising, expressions of judicial philosophy, and efforts to persuasively explain why the election of one or the other candidate ought to be preferred.

Such campaigns must be directed toward an electorate in excess of four million people. In the case of Supreme Court justices, such campaigns will typically involve the expenditure of hundreds of thousands, or even millions, of dollars on television, radio, newspaper, and other advertising, with opposition campaigns expending similar amounts. These expenditures are not funded magically, but are raised from among the electorate, and from organizations that represent those among the electorate.

Indeed, given the premise of our system of judicial selection that there *should* be periodic elections for judicial office, it would seem that it is better that campaigns be well-funded and informative, and that candidates be afforded the fullest opportunity to explain their differing perspectives on the judicial role, than that campaigns be poorly funded and result in candidates securing election on the basis of little more than a popular surname.

There will simply be no end to the alleged "appearance of impropriety" if every contribution to a candidate, or every contribution to an opposing candidate, or every independent opposition campaign, is viewed as raising an ethical question concerning a judge's participation in a case in which a contributor or an opposition contributor is involved. Again, while cogent arguments have been made in favor of judicial selection reform, until such reforms are adopted by the people of Michigan, there is little alternative to active judicial participation in the electoral process and the concomitant need to raise funds in order to effectively participate and communicate in this process. If justices of the Supreme Court, in particular, were to recuse themselves on the basis of campaign contributions to their or their opponents' campaigns, there would be potential recusal motions in virtually every appeal heard by this Court, there would be an increasing number of recusal motions designed to effect essentially political ends, and there would be a deepening paralysis on the part of the Court in carrying out its essential responsibilities.

Of considerable relevance to the subject of campaign contributions as a basis for recusal is the Legislature's establishment of limits on individual and political action committee contributions to Michigan judicial candidates. MCL 169.252 and 169.269. Such limits must be understood as clearly reflecting the Legislature's, and the people's, understanding that contributions in these amounts will not supply a basis for disqualification. That is, lawful contributions made within these limits, lawfully reported and lawfully disclosed, cannot fairly constitute a basis for judicial disqualification. Otherwise, these statutes, just as MCR 2.003 and Canon 3(C), would be little more than cleverly devised snares to be exploited by those wishing to undermine individual judges. A judge who plays by the rules should not be required to recuse himself or herself on the basis of such conduct. Thus, we assume, as have all the justices before us, that the Legislature decided that lawful campaign contributions would not give rise to a basis for judicial recusal.

11. CONCLUSION

Pursuant to MCR 2.003(B)(6), we would each disqualify ourselves if our respective spouses were participating as lawyers in this case, or if any of the other requirements of this court rule were not satisfied. However, because our spouses are not so participating, and because none of the listed grounds exists, we are obligated *not* to recuse ourselves from participation.[14] The motion to disqualify is denied.

CAVANAGH, J., states as follows:

I do not participate in the decision on the motion for disqualification of Chief Justice TAYLOR and Justice MARKMAN. Historically, while such motions are always addressed to the entire Court, the decision on whether to grant or deny such a motion is, and always has been, left to the sole discretion of the challenged justice. Currently, our court rules do not address disqualification of a justice of this Court. I am now persuaded that minimal due process concerns demand that they should. To this end, I have proposed to the Court the following court rule:

DISQUALIFICATION OF JUSTICE

(A) Who May Raise.

A party may raise the issue of a justice's disqualification by motion or the justice may raise it.

(B) Grounds for Disqualification.

Disqualification of a justice is warranted if any of the following apply:

(1) The justice is actually biased or prejudiced against or for a party or attorney in the proceeding.

(2) The justice's impartiality might reasonably be questioned.

(3) The justice has personal knowledge of disputed evidentiary facts concerning the proceeding.

(4) The justice has been consulted or employed as an attorney in the matter in controversy.

(5) The justice was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(6) The justice knows that he or she, individually or as a fiduciary, or the justice's spouse, parent, or child wherever residing, or any other member of the justice's family residing in the justice's household, has a more than de minimis economic or other interest in the subject matter in controversy.

(7) The justice or the justice's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(a) is a party to the proceeding, or an officer, director, or trustee of a party;

(b) is acting as a lawyer in the proceeding;

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[14] Plaintiffs' application for leave to appeal remains pending at this time.

(c) is known by the justice to have a more than de minimis interest that could be substantially affected by the proceeding; or

(d) is to the justice's knowledge likely to be a material witness in the proceeding.

(C) Procedure.

(1) *Ruling*. The Supreme Court shall decide the motion for disqualification of a justice. The challenged justice shall not participate in the determination. The Supreme Court's decision shall include the reasons for its grant or denial of the motion for disqualification.

(2) *Motion Granted*. When a justice is disqualified, the proceeding will be decided by the remaining justices of the Supreme Court.

It is my sincere hope that this Court will consider and act on this revision, or a variation of it, at one of our administrative conferences in March.

WEAVER, J., states as follows:

I do not participate in the decision regarding the motion to disqualify Chief Justice TAYLOR and Justice MARKMAN and, therefore, do not address whether Chief Justice TAYLOR and Justice MARKMAN should recuse themselves because their spouses work for the Attorney General, who represents the state of Michigan in this matter.

I write separately, however, because the statement of Chief Justice TAYLOR and Justice MARKMAN denying this motion makes numerous incorrect conclusions regarding issues related to the appropriate standards for a justice's participation or nonparticipation in a case. It is unnecessary to respond to every conclusion they draw, because the proper forum for such a discussion is in the context of public and formal proposals for revision of the Michigan Court Rules governing disqualification.[1] It should be noted that the views expressed by Chief Justice TAYLOR and Justice MARKMAN do not reflect those of all their colleagues, and are not binding on future decisions of this Court or on the decisions of individual justices on motions for their disqualification.

I

Chief Justice TAYLOR and Justice MARKMAN assert that "there can be no replacement of a [Michigan Supreme Court] justice who must recuse himself or herself." *Ante* at 1040. For this proposition, they rely on the federal "duty to sit" doctrine that the justices of the United States Supreme Court apply to themselves. However, the federal "duty to sit" doctrine is inapplicable to Michigan Supreme Court justices. A federal statute prohibits the temporary replacement of a United States Supreme

[1] MCR 1.201 provides for notice to the State Bar of Michigan and various associations of Michigan judges of amendments to the Michigan Court Rules and for public hearings on proposed amendments. This Court may dispense with the notice requirements only if "there is a need for immediate action or if the proposed amendment would not significantly affect the delivery of justice." MCR 1.201(D).

Court justice by a retired federal judge.[2] But when a Michigan Supreme Court justice does not participate in a case for any reason, the Michigan Constitution permits that justice to be replaced by an active or retired judge.

Michigan's constitution, Const 1963, art 6, § 23, as amended in 1968, allows this Court to assign active or retired judges to perform the judicial duties of Michigan Supreme Court justices. Const 1963, art 6, § 23 provides in pertinent part:

> . . . The supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.

This provision does not distinguish the "judicial duties" of Michigan Supreme Court justices from those of other judges. It plainly provides for temporary assignments of active or retired judges to perform "judicial duties"; it grants this Court the authority to "authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments."[3] The "judicial duties" referenced by Const 1963, art 6, § 23 do not exclude, and therefore include, the "judicial duties" of Supreme Court justices who are, for any reason, unable to perform them.[4] Thus, in light of the plain text of Const 1968, art 6, § 23, Chief Justice TAYLOR and Justice MARKMAN's analogy to the federal courts' "duty to sit" doctrine is incorrect and misleading.

II

Chief Justice TAYLOR and Justice MARKMAN also express concern about

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[2] The statute authorizing the assignment of retired Supreme Court justices and retired district and circuit judges to judicial duties specifically excludes assignments to the United States Supreme Court. 28 USC 294(d). Federal circuit and district judges may be temporarily assigned to other federal circuit or district courts. 28 USC 291 and 292. There is no specific statutory provision for temporary assignment of active federal circuit or district judges to the United States Supreme Court.

[3] Const 1963, art 6, § 23, as amended in 1968.

[4] Numerous other state supreme courts appoint a trial judge or court of appeals judge to sit on the supreme court whenever a justice is not participating in a case (Alaska, Arizona, Connecticut, Hawaii, Georgia, Kansas, Louisiana, Maryland, Ohio, South Carolina, Utah, Vermont, Virginia, West Virginia, and Wyoming), or when a case is evenly divided due to a recusal (Florida, Missouri, Oklahoma, South Dakota, and Texas), or when more than one justice recuses himself or herself or there would not otherwise be a quorum of justices to sit on the case (Maine, Minnesota, Mississippi, New Jersey, New York, New Hampshire, New York, and Rhode Island), or when there is a constitutional issue in the case (Nebraska).

the application of a standard for judicial disqualification that is based on the appearance of impropriety. Canon 2 of the Michigan Code of Judicial Conduct expressly provides that a judge "must avoid all impropriety and appearance of impropriety."[5] In their motion for disqualification, plaintiffs argue that the employment of Chief Justice TAYLOR's spouse and Justice MARKMAN's spouse in the Attorney General's office creates an appearance of impropriety even if their spouses are not involved in the case.

In response, Chief Justice TAYLOR and Justice MARKMAN argue that the mandate of Canon 2 that judges avoid appearances of impropriety is irrelevant to the question of the plaintiffs' motion for their disqualification because MCR 2.003(B), which defines the grounds for judicial disqualification, does not expressly include the appearance of impropriety as a ground for judicial disqualification. It must be noted, however, that MCR 2.003(B) provides a *nonexclusive* list of the grounds for disqualification.[6] The grounds that are listed in MCR 2.003(B) are simply the most obvious examples of when a judge can be deemed unable to "impartially hear a case . . . ." MCR 2.003(B). This Court has previously recognized that "there may be situations in which the appearance of impropriety on the part of a judge or decisionmaker is so strong as to rise to the level of a due process violation."[7]

Chief Justice TAYLOR and Justice MARKMAN defend their decision not to recuse themselves by citing the American Bar Association Model Code of Judicial Conduct (Model Code),[8] Canon 3(E), which they assert is "consistent with" MCR 2.003(B)(6). *Ante* at 1032. But Chief Justice TAYLOR and Justice MARKMAN fail to mention that the Model Code bases its disqualification policies on the appearance of impropriety standard. Canon 3(E) provides that a judge shall disqualify himself or herself in a proceeding "in which the judge's impartiality might reasonably be questioned . . . ."

The ABA Model Code of Judicial Conduct was adopted in 1924. Canon 2 originally provided that a judge *should* avoid both impropriety and the appearance of impropriety. In 1972, language was added to Canon 3 in order to make the standard for judicial disqualifi-

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[5] Canon 2(A) provides:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

[6] *Cain v Dep't of Corrections,* 451 Mich 470, 509 n 45 (1996).

[7] *Cain, supra* at 513 n 48.

[8] See Garwin (ed), Annotated Model Code of Judicial Conduct (ABA Center for Professional Responsibility, 2004).

cation more objective.[9] In 1990, further revisions made the disqualification rule mandatory by replacing "should" with "shall." Currently Canon 2 of the Model Code states, "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."[10] Canon 3(E)(1) states that a judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ."[11]

Judge M. Margaret McKeown[12] has noted that the appearance of impropriety standard achieves two ends. First, when a judge recuses himself or herself to avoid the appearance of impropriety, the result is that the judge avoids risking actual bias. Second, when a judge recuses himself or herself, the judge eliminates the appearance of impropriety and thereby engenders public confidence in the judiciary.[13]

In commenting on the effect recusal has on the public's confidence in the judiciary, Judge McKeown further notes:

> The guiding principles of the Canons—integrity, impartiality, and avoidance of the appearance of impropriety—serve as daily reminders of the public trust placed in judges. The Canons also sensitize judges to the public's expectation of the judiciary. The Canons are not just for the benefit of judges, but for the judged and the public at large.
>
> . . . "Public confidence in the integrity and impartiality of the judiciary is undermined when a judge's conduct creates the perception that a case has been prejudged or that there is a bias against a party, regardless of whether the perceived bias or prejudice exists." . . .
>
> Confidence in the judiciary's integrity also is the foundation of judicial independence. Indeed, decisionmaking by a respected neutral is the essential function of a court. All of the foundations of judging—such as respect for the text of the law and precedent —reinforce the message of impartiality. The appearance standard similarly undergirds judicial independence. [14]

Finally, I cannot agree with Chief Justice TAYLOR and Justice MARKMAN's suggestion that application of the appearance of impropriety standard would "vitiate" the current provisions of MCR 2.003(B). See *ante* at 1038 n 12. The court rules do not diminish the standards of

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[9] See McKeown, *Don't shoot the canons: Maintaining the appearance of propriety standard,* 7 J App Prac & Process 45, 47 (2005).

[10] Model Code, Canon 2.

[11] *Id.*, Canon 3(E).

[12] Federal Ninth Circuit Court of Appeals.

[13] McKeown, *supra* at 48-49.

[14] *Id.* at 52-53 (citation omitted).

conduct imposed on members of the judiciary by the Code of Judicial Conduct. Indeed, it is difficult to conceive how the application of a stricter and higher standard of conduct, especially for Supreme Court justices, could possibly "make imperfect, faulty, or impure; spoil; [or] corrupt"[15] MCR 2.003(B)'s nonexclusive list of grounds for the disqualification of a judge.

III

Chief Justice TAYLOR and Justice MARKMAN also reject plaintiffs' argument that a justice should only participate in a case in which the justice's spouse is employed by a legal representative of a party when all parties agree that the justice can participate. Chief Justice TAYLOR and Justice MARKMAN opine that to allow the parties input on a justice's participation in such a way would "politicize and introduce gamesmanship into the judicial process." *Ante* at 1030. However, Chief Justice TAYLOR and Justice MARKMAN overlook the fact that MCR 2.003(D) codifies the very process that they fear and allege will politicize the judicial process and encourage gamesmanship.

MCR 2.003(D) provides that "*[i]f* it appears *that there may be grounds for disqualification,* the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification."[16] The rule does not limit the application of this process to cases of proven actual bias and prejudice. The process may be employed anytime "there *may be* grounds for disqualification . . . ."[17] Rather than introducing games and politics into the judicial process, this rule ensures that the record in a case reflects that the parties and the judge willingly proceeded, despite the presence of a *potential* ground for the judge's disqualification.

IV

Chief Justice TAYLOR and Justice MARKMAN make a misleading and disingenuous suggestion that public opinion regarding when a justice should participate where his or her spouse works for a legal representative of a party is to be found in the electoral process. They ignore the fact that it is the responsibility of the justices of this Court to draft and adopt the rules of procedure governing the disqualification of judges. As aptly noted by Justice BOYLE in comments regarding attorney disciplinary rules:

> It is not a satisfactory answer for this Court to say a rule is a rule. If the rules we have promulgated for disciplinary proceedings are not functioning as envisioned in real world applications, it is

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[15] *Webster's New World Dictionary* (3rd college ed) defining "vitiate."

[16] MCR 2.003(D)(emphasis added).

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

> our responsibility, after allowing for input through publication and comment, to fairly and sensibly address the problem. [*Grievance Administrator v Deutch*, 455 Mich 149, 171 (1997) (BOYLE, J. concurring).]

If, as it begins to appear, the public's confidence in the judiciary is being eroded by the standards by which a justice decides to participate in a case, it is incumbent on this Court to address the public's concerns in a clear, orderly, fair, specific, and public way.

Moreover, waiting to cast a vote at that justice's next election (anywhere from one to seven years away) is not a practical or adequate remedy. It is without question not a fair process to require a party, whose case may be influenced by a justice's relationship with a party's legal representative, to wait until the justice's next election to cast a lone vote against an incumbent justice. That is why a current court rule, MCR 2.003(C)(3), permits a party to request a review of a judge's decision to deny a request for recusal.[18]

V

Without question, the current rules regarding disqualification are imperfect and need revision as they apply to justices of this Court. Indeed, a majority of this Court has at times refused to apply provisions of the existing rule on disqualification, MCR 2.003, to themselves.[19]

Lack of clarity and order even persists regarding whether a justice should publish his or her reasons for denying a motion to recuse himself or herself. Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN assert that a justice need not do so. I disagree. As I have stated before, Const 1963, art 6, § 6 provides that "[d]ecisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . . ."[20] The provision requires that justices give written reasons for each decision, which is indicated by their joining an opinion or by writing their own separate opinions. There is no

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[18] MCR 2.003(C)(3)(a) and (b) provide that when a challenged judge denies the motion, in courts having two or more judges, "on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo . . . [or] in a single-judge court, or if the challenged judge is the chief judge, . . . the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo."

[19] See *Gilbert v DaimlerChrysler Corp,* 470 Mich 749 (2004), reh den 472 Mich 1201 (2005), in which a party's request to have the decisions of justices to participate in the case reviewed consistently with the procedure required by MCR 2.003(C)(3) was ignored. 469 Mich 883 (2003) (recusal motion denied.)

[20] Art 6, § 6 of the 1963 Michigan Constitution states, in full:

more fundamental purpose for this constitutional 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 participate or not participate in a case can change the outcome of a case, the decision is a matter of public significance. 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, art 6, § 6 requires that a justice's self-initiated decision and reasons not to participate, or a challenged justice's decision and reasons to participate or not participate, should be in writing and accessible to the public.

The rules governing the disqualification standards and procedures for Michigan Supreme Court justices should be made clear, orderly, fair, specific, and public. They should require the highest and strictest standards for Michigan Supreme Court justices.

The time for this Court to address the procedures governing the disqualification of justices is long overdue; at stake is the public's trust and confidence in the independence of Michigan's Supreme Court.

For almost three years, I have repeatedly called for this Court to recognize, publish for public comment, place on a public hearing agenda, and address the need to have clear, orderly, fair, specific, and public procedures concerning the participation or nonparticipation of justices.[21] This has not been done, although there have been eight public hearings held by this Court on other administrative matters and thus eight opportunities to do so. While this Court opened an administrative file regarding the disqualifications procedures for justices on May 20, 2003,[22] it has yet to adequately address the matter.[23]

> 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.

[21] 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. Since then, I have repeatedly called for this Court to address the question. See, e.g., *Graves v Warner Bros*, 469 Mich 853, 854 (2003), *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003), *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 96 (2005), *Grievance Administrator v Fieger*, 472 Mich 1244, 1245 (2005), *Scalise v Boy Scouts of America*, 473 Mich 853 (2005), *McDowell v Detroit*, 474 Mich 999, 1000 (2006), and *Stamplis v St John Health Sys*, 474 Mich 1017 (2006).

[22] See ADM 2003-26.

[23] The dates of the eight public hearings held on other administrative matters since May 2003 are: September 23, 2003, January 29, 2004, May

VI

As I have said previously, I am opposed to the entry of any order in a case such as this that involves a request for the disqualification of a justice until this Court publishes proposals for public comment, places the issue on at least one public hearing for administrative matters, and resolves and makes clear for all to know the proper, orderly, fair, and specific procedures for handling motions for the disqualification of Supreme Court justices from participation in a case.

KELLY, J., states as follows:

I do not participate in Chief Justice TAYLOR and Justice MARKMAN's decision to deny the motion to disqualify them from ruling on this case. Following the Court's established procedure, I leave the decision to the discretion of the challenged justices.

However, I believe this time-honored unwritten procedure is deeply flawed, and I agree with Justice WEAVER that the Court should establish a particularized, written, and published procedure to govern motions to disqualify a Supreme Court justice from participation in a case. I applaud Justice CAVANAGH for proposing such a court rule.

Among the flaws in the present procedure is that it makes no provision for a situation in which a majority of justices disagree with the justice who refuses to recuse himself or herself. For example, the challenged justice might misapprehend the extent of the appearance of impropriety of sitting on a case. Also, because each recusal decision is issued as an order of the Court, it appears to come from all the justices, whereas that is not the case.

In addition to the provisions suggested by Justice CAVANAGH and Justice WEAVER, a justice should be ineligible to sit in judgment of a case in which he or she ruled in a lower court. The justices of the United States Supreme Court follow this rule. Also, the Court should investigate the possibility that a substitute judge may sit in place of a disqualified justice. In that way, there would always be seven impartial and disinterested votes on every case.

CORRIGAN, J., states as follows:

I am not participating in Chief Justice TAYLOR and Justice MARKMAN's denial of this disqualification motion, as they must decide the issue for themselves.[1] I write separately to note that accepting plaintiffs' argument requires reverting to a long-discredited assumption about the role of women in society and regressing from progress hard won.

In *Bradwell v Illinois*, 83 US 130, 139-142 (1873), Justice Bradley concurred in denying a license to practice law to a woman. He stated:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the

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27, 2004, September 15, 2004, January 27, 2005, May 26, 2005, September 29, 2005, and January 25, 2006.

[1] I note that, like Justice YOUNG, I agree with their legal analysis of the ethical issues raised.

> female sex evidently unfits it for many of the occupations of civil life. . . . The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state . . . . [*Id*. at 141.]

He then concluded that a woman's consequent incapacity to contract prevented her from competently serving as an attorney. *Id*. Subsequently, this misconception of the capacity of women has received the criticism it warrants. See, e.g., *Frontiero v Richardson*, 411 US 677, 684-686 (1973).

Similar to the proposition in *Bradwell*, plaintiffs' argument would impose a constraint on professional couples and most certainly on a married professional woman's ability to practice law. Where her spouse engages in the same profession, either she or he must submit to a disability on employment. Professional advancement for one would require a corresponding narrowing of opportunity for the other. Here, plaintiffs' implication of an appearance of impropriety evaporates where no ex parte communication threads between the state office and the justices and where a Chinese Wall[2] separates these justices' spouses from participating in cases before our Court. No impropriety exists in realizing the equality for which women have long struggled. I reject the notion, more than 100 years after *Bradwell*, that our Court should remotely diminish the benefit received from the active participation of women before and in our state's bench and bar.

YOUNG, J., states as follows:

Historically, in response to a motion to disqualify, the subject justice decides for himself or herself whether there are valid grounds for disqualification and therefore whether to participate in the case. Rarely has a Michigan Supreme Court justice provided an explanation for the decision on such a motion, and in no case that I have found has another justice commented on the subject justice's decision.

Of late, a majority of the justices of this Court have become the recurrent targets of an increasing number of calculated and opportunistic motions to disqualify. Because this pattern does not appear to be abating, I believe that it is appropriate on this occasion to depart from our historic practice of silence and to comment on the joint statement of Chief Justice TAYLOR and Justice MARKMAN rejecting the motion to disqualify themselves in this case.

I have not participated in their decisions on this motion because, as noted, decisions on such motions are left to the individual justice.

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[2] The ethics term "Chinese Wall" refers to a mechanism for screening judges or attorneys from a particular matter to prevent conflicts of interest. See Black's Law Dictionary (7th ed).

However, I support their joint statement and fully concur in the legal analysis of the ethical questions presented in it.

Leave to Appeal Granted January 31, 2006:

MUNICIPAL EMPLOYEES RETIREMENT SYSTEM OF MICHIGAN v DELTA CHARTER TOWNSHIP, No. 129041. We further order that this case be argued and submitted to the Court together with the case of *City of Mt Pleasant v State Tax Comm* (Docket No. 129453), lv gtd 474 Mich ___ (2006), at such future session of the Court as both cases are ready for submission. Reported below: 266 Mich App 510.

Summary Dispositions January 31, 2006:

PEOPLE v BOGAR, No. 128592. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 260571.

WEAVER and CORRIGAN, JJ. We would deny leave to appeal.

BESSINGER v OUR LADY OF GOOD COUNSEL, No. 128870. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Workers' Compensation Appellate Commission (WCAC). On remand, the WCAC shall clarify its position on the following issue: Notwithstanding that plaintiff's telemarketing job did not pay the maximum wages, was the telemarketing job within his qualifications and training at the time plaintiff suffered his back injury? We retain jurisdiction. Court of Appeals No. 259974.

KELLY, J. I would deny leave to appeal.

ZUDER v TAILORED BUILDING SYSTEMS, INC, No. 129163. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 259733.

SEHLKE v VANDERMAAS, No. 129833. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and reinstate the Clinton Circuit Court's order granting a change in custody. The Court of Appeals clearly erred by finding that the trial court acted prematurely by granting a change in physical custody. The trial court held an evidentiary hearing on the best interests of the child, and both parties participated in this hearing. Neither party objected to the trial court's decision to hold a best interests evidentiary hearing on plaintiff's request for a change in physical custody of the child. Under these circumstances, the Court of Appeals erred by remanding this case to the circuit court for an evidentiary hearing on plaintiff's request for a change in custody. In all other respects, leave to appeal is denied. Reported below: 268 Mich App 262.

Remand Order in Case Pending on Application for Leave to Appeal Entered January 31, 2006:

THOMAS v HAWKINS, No. 130108. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for further proceedings. At a November 18, 2005, hearing, Judge Michael F. Sapala stated, "I'm satisfied that the conflict of interest does not exist, this other receiver is to be dissolved." We direct the circuit court to reconsider whether Melvin Butch Hollowell had a conflict of interest and to make specific findings addressing the following issues:

(1) whether receiver Hollowell had or has any professional relationships with La-Van Hawkins, Mr. Hawkins's ex-wife, Wendy Hawkins, any of the individuals comprising the group or association that purchased the Sweet Georgia Brown restaurant on November 15, 2005, or the Sweet Georgia Brown restaurant, and, if so, the parameters and duration of that professional relationship;

(2) whether receiver Hollowell had or has any personal relationships with LaVan Hawkins, Mr. Hawkins's ex-wife, Wendy Hawkins, or any of the individuals comprising the group or association that purchased the Sweet Georgia Brown restaurant on November 15, 2005, and, if so, the parameters and duration of that personal relationship;

(3) whether, if such existing or former personal or professional relationships are found, there would naturally be a tendency on Hollowell's part to take actions, as a receiver, in other than a completely disinterested manner, see *Sellars v Lamb*, 303 Mich 604, 610-611 (1942), and, if so, whether Hollowell should be disqualified from serving as receiver;

(4) whether Hollowell disclosed information regarding bids and the sale of the restaurant he negotiated to his co-receiver, Bryan D. Marcus, during the period that Marcus served as co-receiver, and, if not, whether such nondisclosure was justified;

(5) whether Hollowell disclosed information regarding bids and the sale of the restaurant he negotiated to creditors of La-Van Hawkins to the extent such disclosure was appropriate;

(6) whether the sale Hollowell negotiated was the result of an arms-length and even-handed competitive bidding process;

(7) how many bids were submitted and how many bidders participated in the bidding process; and

(8) whether the $1.5 million sale price Hallowell negotiated fairly represents the value of the restaurant.

The Wayne Circuit Court may conduct additional proceedings or evidentiary hearings, if necessary, and is directed to submit its findings of

fact and conclusions of law to this Court within 35 days of the date of this order. The stay imposed by this Court's order of December 21, 2005, is modified to allow continued tax payments to the State Treasurer's office during the pendency of the stay. The application for leave to appeal the December 2, 2005, order of the Court of Appeals remains under consideration. We retain jurisdiction. Court of Appeals No. 266779.

Leave to Appeal Denied January 31, 2006:

PEOPLE v JAMES TAYLOR, No. 128530; Court of Appeals No. 257595.

KELLY, J. I would remand this case for resentencing.

FARMERS INSURANCE GROUP v DEPARTMENT OF NATURAL RESOURCES, No. 128893; Court of Appeals No. 252488.

KELLY, J. I would grant leave to appeal.

DEDOES INDUSTRIES, INC v TARGET STEEL, INC, No. 129019; Court of Appeals No. 254413.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v MARCUS MILLER, No. 129190; Court of Appeals No. 255941.

KELLY, J. I would hold this case in abeyance for *Davis v Washington*, cert gtd ___ US ___; 126 S Ct 547; 163 L Ed 2d 458 (2005).

PEOPLE v MOLER, No. 129218; Court of Appeals No. 253230.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

WHITE v COHEN PODIATRY, PC, No. 129227; Court of Appeals No. 261137.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

DEKORTE v DEPARTMENT OF TRANSPORTATION, No. 129253; Court of Appeals No. 252490.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

MEKLIR v FELDMAN, No. 129296. This order denying leave to appeal is without prejudice to defendants Stanley G. Feldman's and Stanley Ltd., Inc.'s right to contest the total amount of plaintiffs' damages. Court of Appeals No. 253089.

NISWONGER v QUALITY DAIRY COMPANY, No. 129314; Court of Appeals No. 251885.

CAVANAGH and KELLY, JJ. We would reverse the judgment of the Court of Appeals and reinstate the Ingham Circuit Court's October 16, 2003, denial of defendant's motion for summary disposition for the reasons stated by the circuit court.

PEOPLE v RICORD, No. 129448; Court of Appeals No. 263520.

CAVANAGH, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

KELLY, J. I would remand this case to the Montcalm Circuit Court with instructions to vacate the $300 fine.

PEOPLE v RONALD NEAL, No. 129460; reported below: 266 Mich App 654.

PEOPLE v MELMS, No. 129776; Court of Appeals No. 262391.

KELLY, J. I would grant leave to appeal.

PEOPLE v BURKHARDT, No. 129886; Court of Appeals No. 255396.

KELLY, J. I would remand this case to the St. Joseph Circuit Court for resentencing because I believe the circuit court lacked authority to impose the judgment of sentence that orders restitution in the amount of $1,540 to pay for a home security system and related costs. A home security system in this case does not constitute actual medical service or a device relating to psychological care, as required by MCL 769.1a(4)(a) and MCL 780.766(4)(a).

In re JOHN-COBB (DEPARTMENT OF HUMAN SERVICES v JOHN), No. 129927. The motion to stay is also denied. Court of Appeals No. 264927.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

Reconsideration Denied February 2, 2006:

SORKOWITZ v LAKRITZ, WISSBRUN & ASSOCIATES, PC, No. 126562. Order of summary disposition entered at 474 Mich 925. Reported below: 261 Mich app 642.

Order Granting Oral Argument in Cases Pending on Application for Leave to Appeal February 3, 2006:

BARNES v JEUDEVINE, No. 129606. Pursuant to MCR 7.302(G)(1), we direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. The parties shall include among the issues to be addressed at oral argument: (1) whether plaintiff lacked standing to proceed under the Paternity Act, MCL 722.711 *et seq*., where the subject child's mother was married at the time of the child's conception, see *Girard v Wagenmaker*, 437 Mich 231 (1991); and (2) whether the default judgment of divorce amounted to a judicial determination that the child was born or conceived during the marriage but was not the issue of the marriage. The parties may file supplemental briefs within 28 days of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 252840.

Summary Dispositions February 3, 2006:

PEOPLE v PATRICK LEWIS, No. 127261. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Kent Circuit Court for a new trial. MCR 7.302(G)(1). Defendant was prejudiced by the erroneous admission of a poor quality tape recording of a conversation to which he was a party. The jurors were allowed to use a transcript of the recording that had been prepared by the police but not reviewed for accuracy by the trial court and not made part of the record. In light of this disposition, the remaining questions presented and the

motion to remand are rendered moot and are therefore denied. On remand, if defendant again establishes that he is indigent and entitled to appointed counsel, we direct the Kent Circuit Court to appoint a different attorney. Court of Appeals No. 244589.

CORRIGAN, J. (*dissenting*). I would allow the parties to file supplemental briefs in this case before acting to reverse the judgment of the Court of Appeals. Unlike our usual practice in cases in which we hear oral argument on the application, the parties here were not invited to file supplemental briefs before oral argument. Because defendant filed a pro se application for leave to appeal, neither defense counsel nor the prosecutor has focused any written efforts on the alleged errors in the Court of Appeals majority and dissenting opinions. I would accord the parties such an opportunity before issuing any order.

WEAVER, J. I join the statement of Justice CORRIGAN.

PEREZ v FORD MOTOR COMPANY NO 1, No. 128510. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to that court for reconsideration in light of *Elezovic v Ford Motor Company*, 472 Mich 408 (2005). We do not retain jurisdiction. Court of Appeals No. 249737.

CAVANAGH, J. (*dissenting*). I would grant leave to appeal to reexamine the wisdom of holding an agent of an employer individually liable under the Civil Rights Act, MCL 37.2101 *et seq*.

WEAVER and KELLY, JJ. We join the statement of Justice CAVANAGH.

PEREZ v FORD MOTOR COMPANY NO 2, No. 128512. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to that court for reconsideration in light of *Elezovic v Ford Motor Company*, 472 Mich 408 (2005). We do not retain jurisdiction. Court of Appeals No. 249737

CAVANAGH, WEAVER, and KELLY, JJ. We would deny leave to appeal.

Leave to Appeal Denied February 3, 2006:

DONOHO v WAL-MART STORES, INC, No. 127537. The motion for leave to file brief amicus curiae is denied as moot. Court of Appeals No. 256525.

CORRIGAN, J. (*concurring*). I concur in the majority's decision to deny leave to appeal on the facts of this case. Nonetheless, I remain interested in the problem presented. The question is not whether the prevailing attorney should receive a fee, but from whom. Defendant raises a jurisprudentially significant issue involving the longstanding improper interpretation of the term "prorate." MCL 418.315(1) apparently directs that attorney fees be prorated rather than added to the medical benefits as discussed in Commissioner Richard Leslie's concurrence in *Stankovic v Kasle Steel Corporation*, 2000 Mich ACO 124.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN v HALLER, No. 128841; Court of Appeals No. 250272.

MARKMAN, J. (*dissenting*). Jeffrey Haller purposely struck Bradley Dinnan with his truck and as a result was convicted of assault. Dinnan sued Haller, who is insured by plaintiff. Plaintiff brought this action for

a declaratory judgment, seeking a determination that it had no duty to defend or to indemnify given the criminal act exclusion contained in its policy. The trial court ruled in favor of Haller, concluding that the exclusion contravened the mandatory coverage requirements of the no-fault act, and the Court of Appeals affirmed.

The insurance policy at issue states that coverage for bodily injury and property damage arising out of a criminal act is excluded. The issue here is whether this exclusion contravenes the mandatory coverage requirements of the no-fault act.

MCL 500.3009(1) provides that an automobile insurance policy must cover at least $20,000 worth of bodily injury liability in "any 1 *accident*," and MCL 500.3131(2) states that it does "not require coverage in this state other than that required by section 3009(1)." (Emphasis added.) Therefore, the no-fault act arguably covers accidents and nothing other than accidents. In this case, Haller was convicted of assault—a crime that cannot be committed accidentally. Therefore, I question whether coverage under these circumstances is mandatory.

As this Court stated in *Kreiner v Fischer,* 471 Mich 109, 114 (2004), "with the enactment of the no-fault act, 1972 PA 294, effective October 1, 1973, the Legislature abolished tort liability generally in motor vehicle accident cases and replaced it with a regime that established that a person injured in such an accident is entitled to certain economic compensation from his own insurance company regardless of fault." MCL 500.3135(3)(a) provides that tort liability arising from the use of a motor vehicle is abolished except as to "[i]ntentionally caused harm to persons or property." Tort liability remains where one intentionally causes harm to persons or property.

Even assuming that no-fault liability coverage is required under these circumstances, I question whether plaintiff is required to pay the full contractual amount ($300,000), as the Court of Appeals held, rather than the statutory minimum ($20,000). The policy at issue specifically states, "Terms of this policy which are in conflict with the statutes of the state . . . are amended to conform to such statutes." If coverage is required, it would only seem to be required in the amount of $20,000. See also *State Farm Mut Automobile Ins Co v Shelly,* 394 Mich 448 (1975); *Citizens Ins Co of America v Federated Mut Ins Co,* 448 Mich 225 (1995) (holding that the statutory minimum coverage applies when a policy exclusion has been struck down under the no-fault act).

Because, in my judgment, these questions are significant, I would grant leave to appeal.

TAYLOR, C.J. I join the statement of Justice MARKMAN.

PEOPLE v DORCHY, No. 129801; Court of Appeals No. 263104.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to resolve what is, in my judgment, a significant constitutional question: whether the exception set forth in *Harrison v United States*, 392 US 219, 222 (1968), to the general rule that a defendant who chooses to testify in a first trial waives the privilege against compulsory self-incrimination in a second trial is applicable where, as here, such defendant testified in the first trial only after the government introduced evidence later found to be in

violation of the Sixth Amendment. I would also resolve the apparent conflict between the the Court of Appeals decision in this case, which concluded that the *Harrison* exception applies only to evidence that is *both* illegally obtained and improperly admitted, and the Court of Appeals decision in *People v Armentero*, 148 Mich App 120, 126 (1986), which concluded that the *Harrison* exception applies to evidence that infringes upon any "basic constitutional value."

KELLY, J. I join the statement of Justice MARKMAN.

In re EW (DEPARTMENT OF HUMAN SERVICES v WILLIS), No. 130290; Court of Appeals No. 262180.

Leave to Appeal Granted February 24, 2006:

In re PETITION BY TREASURER OF WAYNE COUNTY FOR FORECLOSURE (WAYNE COUNTY TREASURER v PERFECTING CHURCH), No. 129341. The parties are directed to include among the issues to be briefed: (1) whether the trial court retained jurisdiction to grant relief from the judgment of foreclosure pursuant to MCR 2.612(C), notwithstanding the provisions of MCL 211.78l(1) and (2); and (2) whether MCL 211.78l permits a person to be deprived of property without being afforded due process. Persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 261074.

Summary Dispositions February 24, 2006:

MACLACHLAN v CAPITAL AREA TRANSPORTATION AUTHORITY, No. 128131. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the Ingham Circuit Court's order granting defendant city of Lansing summary disposition based on governmental immunity. MCR 7.302(G)(1). There was no defect in the roadway rendering it unsafe for public travel at all times. Cf. *Haliw v Sterling Hts*, 464 Mich 297, 310 (2001). Court of Appeals No. 252221.

KELLY, J. (*dissenting*). The majority reinstates the summary disposition for defendant and finds that "[t]here was no defect in the roadway rendering it unsafe for public travel at all times." This conclusion is at odds with credible evidence that plaintiff presented, as well as with the Court's own decision in *Nawrocki v Macomb Co Rd Comm,* 463 Mich 143 (2000). The case should be remanded to the trial court for proceedings to resolve the factual question whether the portion of the road in question was unsafe for pedestrian travel.

Plaintiff's decedent died in a fatal automobile accident on December 15, 2000. Decedent was a regular rider of the Capital Area Transportation Authority (CATA) bus system. He stepped down from the bus that he had ridden that day onto a city street, only to find his way to the curb blocked. A three-to four-foot wall of ice and snow extended several feet into the street. Left with no access to the sidewalk, he began walking

along the street in search of a break in the wall that blocked his way to safety. Before he could find one, he was struck by a car. He died from his injuries two days later.

In *Nawrocki*, this Court held that MCL 691.1402(1) imposes an actionable duty on the state to protect pedestrians from dangerous conditions in the improved portion of the roadway. *Id.* at 162. When the harm is to a pedestrian, the question becomes whether the roadway was "actually unsafe for pedestrian travel." *Id.* at 162 n 20.[1]

In reversing the Court of Appeals decision and reinstating the trial court's grant of summary disposition for the defendant, the majority ignores *Nawrocki*. It also ignores that a fact question exists. The testimony and pictures submitted by plaintiff (attached[2]) suffice to raise a genuine question of material fact regarding whether the roadway in question was dangerous for pedestrian travel.

I would remand this case to the trial court for further proceedings to determine whether the portion of the road at issue was dangerous for pedestrian travel.

[1] When the accident involves a pedestrian, the duty is enhanced, as stated in *Nawrocki*, *supra* at 172 n 28:

> We acknowledge that repairing and maintaining the improved portion of the highway in a condition reasonably safe and convenient for *public* travel represents a higher duty of care on the part of the government than repairing and maintaining it for *vehicular* travel. [Emphasis in original.]

[2] Both photographs show the curb's edge, the height of the snow bank, and the fact that the snowbank extended into the roadbed.

CAVANAGH, J. I join the statement of Justice KELLY.

JAMES v AUTO LAB DIAGNOSTICS & TUNE UP CENTERS, No. 128355. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the decision of the Workers' Compensation Appellate Commission because, under the undisputed facts, plaintiff's attendance at the seminar was not an incident of his employment. As a result, plaintiff is not entitled to benefits because his injury on the trip to the seminar did not arise out of and in the course of his employment. *Camburn v Northwest School Dist (After Remand)*, 459 Mich 471 (1999). Court of Appeals No. 257993.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. (*dissenting*). I would remand to the Court of Appeals for consideration as on leave granted and for the application of *Camburn v Northwest School Dist (After Remand),* 459 Mich 471 (1999).

KELLY, J. (*dissenting*). I would deny leave to appeal. The record contains ample facts to support the decision of the magistrate, the Workers' Compensation Appellate Commission, and the Court of Appeals that plaintiff's injury arose out of and in the course of his employment.

Leave to Appeal Denied February 24, 2006:

PITTS v BEAM, No. 128374; Court of Appeals No. 260426.

CAVANAGH, J. (*dissenting*). I would grant leave to appeal and direct the parties to specifically brief and argue the applicability of *Altman v Nelson*, 197 Mich App 467 (1992), under the facts of this case.

KELLY, J. (*dissenting*). The Court should grant leave to appeal in this case. The underlying facts are that plaintiff and defendant had a relationship while defendant was married to her now-deceased husband.

The parties' relationship produced a child who was born on January 17, 2001, during defendant's marriage. Defendant's husband died eight days after the birth.

Plaintiff and defendant continued their relationship until the fall of 2002. Its termination caused plaintiff to file a complaint for paternity. Paragraph 5 of his complaint alleged that "[d]efendant was not married at the time of conception, nor at the time of the birth of the minor child." Defendant failed to answer, and the court entered an order of filiation on December 16, 2002. Defendant admits that she was served with the complaint, but claims that she did not receive notice of the order.

Nearly two years after the order was entered, defendant took action to have it rescinded. The trial court refused but, on February 25, 2005, the Court of Appeals vacated the decision of the trial court and rescinded the order of filiation. It based its decision on the legal conclusion that plaintiff never had standing to pursue an order of filiation under the Child Custody Act, MCL 722.21 *et seq.*, or the Paternity Act, MCL 722.711(a), as interpreted by *Girard v Wagenmaker*, 437 Mich 231 (1991).

We granted oral argument and directed the parties to argue whether

> the allegation in plaintiff's October 16, 2002, Complaint for Paternity that "the Defendant was not married at the time of conception [of the minor child], nor at the time of the birth of the minor child," constitutes fraud on the court within the meaning of MCR 2.612(C)(2), and whether this issue was abandoned by defendant on appeal to the Court of Appeals. [474 Mich 893, 894 (2005).][1]

The issues presented in this case ought to be reviewed by this Court after full briefing and oral argument. Principal among them is whether plaintiff committed a fraud on the court.[2] The decision in *Matley v Matley*,[3] appears to be on point and to require a different result than was reached here. On remand in *Matley*, the Court of Appeals held that fraud on the court cannot exist where both parties are aware of the relevant facts. *Matley* (*On Remand*), *supra* at 101–102.

In this case it is uncontested that both parties knew the relevant facts when the order of filiation was signed. Defendant argues that plaintiff perpetuated a fraud on the trial court when, knowing that the child had been conceived and born during wedlock, she failed to respond to the complaint. In so doing, he argues, she made possible an order of filiation that would not have been issued had she answered and answered truthfully. Should this Court rescind the order, defendant concludes, it would reward defendant's inaction in the paternity proceedings.

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[1] The order mistakenly cited MCR 2.612(C)(2) instead of MCR 2.612(C)(3).

[2] This issue was not raised directly by either of the parties.

[3] 461 Mich 897 (1999); *Matley v Matley* (*On Remand*), 242 Mich App 100 (2000).

Plaintiff is correct. By failing to respond, defendant made the filiation order possible. Now that she no longer wishes plaintiff to be the legally responsible father of her child, she uses the same inaction as the basis for voiding the order. We should not encourage such manipulation of the legal system.

I am concerned, also, that the Court of Appeals disregarded *Altman v Nelson,*[4] which, under MCR 7.215(J)(1), it was required to follow when deciding this case. In *Altman*, an earlier panel of the Court of Appeals extensively explored the difference between subject-matter jurisdiction and standing. It concluded that a litigant's lack of standing does not prevent a court from exercising its powers where subject-matter jurisdiction has been established. *Altman, supra* at 473.

The Court should grant leave to appeal in this case to carefully consider the issues recited in our October 27, 2005, order at 474 Mich 893 and the additional issue of the significance to this matter of the *Altman* case.

PEOPLE v MCCLAIN, No. 129916; Court of Appeals No. 255816.

CAVANAGH, J. I would grant leave to appeal.

MARKMAN, J. (*dissenting*). I dissent from the majority's decision to deny leave. MCL 750.520d(1)(b) provides that a person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration by "force or coercion," which term is defined in MCL 750.520b(1)(d)(ii) and (f)(v) to include the act of overcoming a victim "through concealment or by the element of surprise." Because I do not believe that the prosecutor presented sufficient evidence of such conduct, I would reverse this conviction.

Here, there is absolutely no evidence whatsoever that defendant did anything to "conceal" his identity from, or to "surprise," the complainant, much less engage in any force or coercion. Unlike the defendant in *People v Crippen*, 242 Mich App 278 (2000), with whom defendant has been compared by the Court of Appeals, defendant did not disguise himself in any way, and did absolutely nothing to prevent the complainant from seeing who had climbed into her bed. Although the complainant asserted that she consented to defendant's presence, and voluntarily engaged in sexual foreplay and intercourse, under the mistaken belief that defendant was actually her fiancé, there was simply no affirmative conduct by defendant that reasonably suggests that he "overcame" the complainant "through concealment or by the element of surprise."

Moreover, it simply defies common experience that complainant would engage in sexual foreplay and sexual intercourse with the defendant for more than 20 minutes under the mistaken apprehension that he was her fiancé, especially given that her fiancé weighed over 100 pounds more than the 125-pound defendant. Once she allegedly learned his identity, her response was to chide him for his conduct, and make coffee for both of them.

Defendant's conduct while at his friend's home, in entering the bedroom of the fiancé of his friend's father, cannot be condoned.

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[4] 197 Mich App 467 (1992).

Whatever the propriety of this conduct, however, it did not amount to the commission of third-degree criminal sexual conduct.

Reconsideration Denied February 27, 2006:

PEOPLE v MCKAY, No. 126930. Leave to appeal denied at 474 Mich 967. Court of Appeals No. 255596.

CAVANAGH, KELLY, and MARKMAN, JJ. We would grant reconsideration and, on reconsideration, would hold this case in abeyance for *People v Francisco* (Docket No. 129035).

KOSMAL v AMERITECH, No. 127064. Summary disposition entered at 474 Mich 851. Court of Appeals No. 254936.

HOSTE v CHRYSLER CORPORATION PLYMOUTH, No. 127200. Leave to appeal denied at 472 Mich 943. Court of Appeals No. 245804.

KELLY, J. I would grant reconsideration and, on reconsideration, would remand this case to the trial court for further proceedings.

DAYMON v FUHRMAN, No. 127425. Leave to appeal denied at 474 Mich 920. Court of Appeals No. 249007.

NEWMAN EQUITIES v MERIDIAN CHARTER TOWNSHIP, No. 127533. Summary disposition entered at 474 Mich 911. Reported below: 264 Mich App 215.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

FARM BUREAU GENERAL INSURANCE COMPANY v DETROIT EDISON COMPANY, No. 127549. Leave to appeal denied at 473 Mich 882. Court of Appeals No. 248576.

SCOTT v ELECTRONIC DATA SYSTEMS CORPORATION, No. 127581. Leave to appeal denied at 474 Mich 885. Court of Appeals No. 248458.

PEOPLE v OLSZEWSKI, No. 127607. Summary disposition entered at 474 Mich 946. Court of Appeals No. 247776.

BIELAT v SOUTH MACOMB DISPOSAL AUTHORITY, No. 127667. Leave to appeal denied at 474 Mich 885. Court of Appeals No. 249147.

PEOPLE v AMBROSE, No. 127868. Leave to appeal denied at 474 Mich 931. Court of Appeals No. 256405.

ZAMMIT v MEADOWBROOK INSURANCE CARRIER, No. 127892. Leave to appeal denied at 474 Mich 859. Court of Appeals No. 248776.

HELVIE v HIDDEMA, No. 127968. Summary disposition entered at 474 Mich 889. Court of Appeals No. 250417.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

In re MCCORMICK ESTATE (BRAVERMAN v MCCORMICK), No. 128005. Leave to appeal denied at 473 Mich 885. Court of Appeals No. 258065.

PEOPLE v LOVE, No. 128037. Leave to appeal denied at 474 Mich 854. Court of Appeals No. 250140.

CHARLEVOIX COUNTY BUILDING DEPARTMENT v BARKLEY, No. 128053. Leave to appeal denied at 474 Mich 869. Court of Appeals No. 256198.

SCALISE v BOY SCOUTS OF AMERICA, No. 128085. Leave to appeal denied at 473 Mich 853. 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 reconsideration and, on reconsideration, would grant leave to appeal.

WEAVER, J. (*dissenting*). I do not participate in deciding plaintiff's motion to reconsider the denial of plaintiff's motion to disqualify Chief Justice TAYLOR. As I stated in my dissent to the order entered in this matter on July 8, 2005, 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 recusal of Supreme Court justices from participation in a case. See *Scalise v Boy Scouts of America*, 473 Mich 853 (2005). For that reason, I do not decide or address the merits of the motion for reconsideration of the Court's denial of plaintiff's application for leave to appeal.

PEOPLE v LANCE EVANS, No. 128103. Leave to appeal denied at 474 Mich 898. Court of Appeals No. 255347.

PEOPLE v RENO, No. 128116. Leave to appeal denied at 474 Mich 865. Court of Appeals No. 256872.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v MAN LEWIS, JR, No. 128172. Leave to appeal denied at 474 Mich 898. Court of Appeals No. 259267.

KELLY, J. I would grant reconsideration and, on reconsideration, would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

DIETRICH & ASSOCIATES v ROGERS, No. 128179. Leave to appeal denied at 474 Mich 898. Court of Appeals No. 250702.

PEOPLE v JAHNER, No. 128201. Leave to appeal denied at 474 Mich 955. Court of Appeals No. 255405.

PEOPLE v JOBEY HENDERSON, No. 128231. Leave to appeal denied at 474 Mich 856. Court of Appeals No. 258118.

PEOPLE v CULHANE, No. 128250. Leave to appeal denied at 474 Mich 874. Court of Appeals No. 251163.

DONOHUE v INTERMODAL TRANSPORTATION SERVICES, INC, No. 128416. Leave to appeal denied at 474 Mich 951. Court of Appeals No. 249700.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v TROUT, No. 128469. Leave to appeal denied at 474 Mich 857. Court of Appeals No. 251613.

LOMAX v DELTA TUBE & FABRICATING CORPORATION, No. 128476. The motion for leave to file brief amicus curiae is granted. Leave to appeal denied at 474 Mich 913. Court of Appeals No. 258744.

YOHN v UNIVERSITY OF MICHIGAN BOARD OF REGENTS, No. 128640. Leave to appeal denied at 474 Mich 933. Court of Appeals No. 252056.

CANYON CONSTRUCTION, INC v STEPHENS, No. 128692. Leave to appeal denied at 474 Mich 905. Court of Appeals No. 259208.

PEOPLE v KENDRICKS, No. 128704. Leave to appeal denied at 474 Mich 972. Court of Appeals No. 251882.

PEOPLE v SPICER, No. 128804. Leave to appeal denied at 474 Mich 935. Court of Appeals No. 258161.

PEOPLE v JONNARD NELSON, No. 128898. Leave to appeal denied at 474 Mich 936. Court of Appeals No. 259873.

KELLY, J. I would grant reconsideration and, on reconsideration, would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

GRANT v AAA MICHIGAN, WISCONSIN, INC, No. 128936. Summary disposition entered at 474 Mich 988. Reported below: 266 Mich App 597.

CZYZYK v IRONS, No. 128955. The motion for stay pending reconsideration is denied as moot. Leave to appeal denied at 474 Mich 973. Court of Appeals No. 253126.

SCHULTZ v HENRY FORD HEALTH SYSTEMS, No. 128993. Summary disposition entered at 474 Mich 948. Court of Appeals No. 252643.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v DUNLAP, No. 129027. Leave to appeal denied at 474 Mich 909. Court of Appeals No. 262643.

KELLY, J. I would grant reconsideration and, on reconsideration, would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v LEWIS NIXON, JR, No. 129144. Leave to appeal denied at 474 Mich 939. Court of Appeals No. 261381.

PEOPLE v CLEMONS, No. 129147. Leave to appeal denied at 474 Mich 939. Court of Appeals No. 259309.

PICKL v MICHAELS, No. 129151. Leave to appeal denied at 474 Mich 957. Court of Appeals No. 251496.

KELLY, J. I would grant reconsideration and, on reconsideration, would remand this case to the trial court for it to rule on plaintiffs' fraud and breach of contract claims.

PEOPLE v BRUCE HOWARD, No. 129160. Leave to appeal denied at 474 Mich 939. Court of Appeals No. 259953.

PEOPLE v LANTON, No. 129186. Leave to appeal denied at 474 Mich 974. Court of Appeals No. 255638.

PEOPLE v DENISE POWELL, No. 129192. Summary disposition entered at 474 Mich 928. Court of Appeals No. 256878.

PERKINS v LEAPHART, No. 129195. Leave to appeal denied at 474 Mich 858. Court of Appeals No. 263280.

PEOPLE v RUELAS, No. 129271. Leave to appeal denied at 474 Mich 940. Court of Appeals No. 260055.

PEOPLE v HODGSON, No. 129273. Leave to appeal denied at 474 Mich 940. Court of Appeals No. 259913.

PEOPLE v JERMAINE BROWN, No. 129286. Leave to appeal denied at 474 Mich 975. Court of Appeals No. 258878.

BURNETT v ATTORNEY GRIEVANCE COMMISSION, No. 129302.

HYLAND v DEPARTMENT OF CORRECTIONS, No. 129328. Leave to appeal denied at 474 Mich 941. Court of Appeals No. 262991.

MATUSCAK v WALGREEN COMPANY, No. 129374. Leave to appeal denied at 474 Mich 976. Court of Appeals No. 261319.

ANDERSON v FORD MOTOR COMPANY, No. 129379. Leave to appeal denied at 474 Mich 977. Court of Appeals No. 253090.

PEOPLE v KEITH, No. 129410. Leave to appeal denied at 474 Mich 977. Court of Appeals No. 252187.

PEOPLE v ANTHONY, No. 129440. Leave to appeal denied at 474 Mich 977. Court of Appeals No. 263005.

PEOPLE v TJ SUTTON, No. 129457. Leave to appeal denied at 474 Mich 942. Court of Appeals No. 253177.

TAYLOR v USA LAWYERS SERVICE, No. 129502. Leave to appeal denied at 474 Mich 942. Court of Appeals No. 252808.

Leave to Appeal Denied February 27, 2006:

PEOPLE v MICHAEL REED, No. 127991; Court of Appeals No. 231665.

PEOPLE v SALYERS, No. 128170; Court of Appeals No. 248540.

PEOPLE v DRAKE, No. 128617; Court of Appeals No. 254806.

PEOPLE v TRAN, No. 128626; Court of Appeals No. 250332.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v HINDS, No. 128648; Court of Appeals No. 250668.

NORTH POINTE INSURANCE COMPANY v STEWARD, No. 128694; reported below: 265 Mich App 603 (on remand).

LAZECHKO v AUTO-OWNERS INSURANCE COMPANY, Nos. 128828, 128829; Court of Appeals Nos. 251061, 251245.

DITMORE v LOCHNER, No. 128946; Court of Appeals No. 251572.

PEOPLE v TIERNEY, No. 128949; reported below: 266 Mich App 687.

SCOTT v FARMERS INSURANCE EXCHANGE, No. 129044; reported below: 266 Mich App 557.

COVENANT HEALTHCARE SYSTEMS v FAKIH, No. 129065; Court of Appeals No. 252473.

PEOPLE v PILLETTE, No. 129070; Court of Appeals No. 254587.

BOARD OF TRUSTEES OF THE POLICEMEN/FIREMEN RETIREMENT SYSTEM OF THE CITY OF DETROIT v CITY OF DETROIT, Nos. 129084, 129085; Court of Appeals Nos. 253343, 260069.

AZZAWI v WINDSOR TOWNSHIP, No. 129113. The motion to dismiss and for damages equal to its costs and actual attorney fees is granted. We remand this case to the Michigan Tax Tribunal for a determination of actual damages. MCR 7.316(D). Court of Appeals No. 261357.

JONES v REYNOLDS, No. 129133; Court of Appeals No. 250616.

In re MCEVOY (PEOPLE v MCEVOY), No. 129207; Court of Appeals No. 254116.

TERRACE LAND DEVELOPMENT CORPORATION v SEELIGSON & JORDAN, No. 129240. The motion for adjournment or abeyance is denied as moot. Court of Appeals No. 251699.

AMVD CENTER, INC v CRUM & FORSTER INSURANCE, No. 129246; Court of Appeals No. 252467.

In re WIDDIFIELD ESTATE (WIDDIFIELD v IZUTSU), No. 129251; Court of Appeals No. 252678.

MCCLARY v STATE GAMING CONTROL BOARD, No. 129360; Court of Appeals No. 253011.

BENGSTON v DELTA COUNTY, No. 129380; reported below: 266 Mich App 612.

YEOMANS v WAYNE COUNTY, Nos. 129381, 129382; Court of Appeals Nos. 252216, 252392.

ASSOCIATED BUILDERS AND CONTRACTORS, SAGINAW VALLEY AREA CHAPTER v DEPARTMENT OF CONSUMER & INDUSTRY SERVICES DIRECTOR, No. 129384. The motions for consolidation of reply briefs, for an extension of the permitted brief length, and for an extension of the time for filing the reply are

granted. The application for leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Reported below: 267 Mich App 386.

DILLON-BARBER v REGENTS OF THE UNIVERSITY OF MICHIGAN, No. 129396; Court of Appeals No. 250596.

PEOPLE v PRELESNIK, No. 129429; Court of Appeals No. 255448.

PEOPLE v EARLE, No. 129445; Court of Appeals No. 244245.

KRANIAK v FOX, No. 129461; Court of Appeals No. 253162.

STATE FARM FIRE & CASUALTY COMPANY v WILLIAMS, No. 129504; Court of Appeals No. 254536.

NOBLES v DEPARTMENT OF CORRECTIONS, No. 129507; Court of Appeals No. 263388.

AERC OF MICHIGAN, LLC v CITY OF GRAND RAPIDS, No. 129514; reported below: 266 Mich App 717.

MONROE v DENISTON, No. 129518; Court of Appeals No. 264069.

JAMES M DOYLE LIVING TRUST v KRUPP, No. 129543; Court of Appeals No. 261823.

CASS v DEPARTMENT OF CORRECTIONS, No. 129557; Court of Appeals No. 264668.

BEATTY v BEATTY, No. 129558; Court of Appeals No. 261568.

AUSTIN v DEPARTMENT OF COMMUNITY HEALTH, No. 129559; Court of Appeals No. 259481.

TKACHIK v MANDEVILLE, No. 129574; Court of Appeals No. 262601.

LADD v GORMAN, No. 129583; Court of Appeals No. 262966.

PEOPLE v GUERRA, No. 129609. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260588.

FLAGSTAR BANK v CHARTER ONE BANK, No. 129615; Court of Appeals No. 253992.

PEOPLE v GEORGE HARRIS, No. 129619; Court of Appeals No. 253450.

PEOPLE v EDWARD HILL, No. 129626. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253327.

RIVERS v MOORE, No. 129627; Court of Appeals No. 261547.

FIRST APOSTOLIC LUTHERAN CHURCH v BEKKALA, No. 129666; Court of Appeals No. 252866.

PEOPLE v KONESKO, No. 129675; Court of Appeals No. 254865.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

In re DENIAL OF PETITIONER VJT, INC (VJT, INC v MICHIGAN GAMING CONTROL BOARD), No. 129691; Court of Appeals No. 260937.

ORGANIZATION OF SCHOOL ADMINISTRATORS & SUPERVISORS, AFSA, AFL-CIO v DETROIT PUBLIC SCHOOLS, No. 129713; Court of Appeals No. 262917.

PARS PETROLEUM, LTD v ZAHRAIE, No. 129737; Court of Appeals No. 262074.

PEOPLE v DOWELL, No. 129746. The motion to remand is also denied. Court of Appeals No. 254896.

PEOPLE v MACDONALD, No. 129754; Court of Appeals No. 262639.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v MAYS, No. 129768; Court of Appeals No. 264665.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v GORDON MITCHELL, No. 129769; Court of Appeals No. 264014.

CITY OF DEARBORN v O'BRIEN, No. 129781; Court of Appeals No. 263132.

PEOPLE v BENJAMIN SUTTON, No. 129786; Court of Appeals No. 263777.

PEOPLE v DANIEL MCINTEE, No. 129808; Court of Appeals No. 255240.

BURNETT v VASSAR, No. 129813; Court of Appeals No. 264132.

LAFARGE MIDWEST, INC v FRANKENMUTH MUTUAL INSURANCE COMPANY, No. 129814; Court of Appeals No. 253591.

PEOPLE v RICHARD NELSON, No. 129817; Court of Appeals No. 262896.

PEOPLE v GALMORE, No. 129820; Court of Appeals No. 264370.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v BURBRIDGE, Nos. 129824, 129826; Court of Appeals Nos. 247816, 249484.

ANSARI v SCHAEFER, No. 129831; Court of Appeals No. 260744.

PEOPLE v DONYELLE WOODS, No. 129844; Court of Appeals No. 254993

PEOPLE v LESLIE GORDON, No. 129856; Court of Appeals No. 254639.

PEOPLE v MAZUREK, No. 129857; Court of Appeals No. 264662.

PEOPLE v VICTOR PARKER, No. 129858; Court of Appeals No. 264143.

PEOPLE v HARDRICK, No. 129864; Court of Appeals No. 256124.

HEDRICK-FUNCH v ADP TOTALSOURCE I, INC, No. 129878; Court of Appeals No. 264479.

PEOPLE v CHARLES ARTHUR, No. 129890; Court of Appeals No. 254056.

NOA v NOA, No. 129897; Court of Appeals No. 255310.

HOLLAND v PRONATIONAL INSURANCE COMPANY, No. 129918; Court of Appeals No. 254975.

HUNT v HUNT, No. 129931; Court of Appeals No. 256167.

LAMAR v DEPARTMENT OF CORRECTIONS, No. 129953; Court of Appeals No. 262800.

CUDNOHUFSKY v MAKI, No. 129954; Court of Appeals No. 257835.

GRANBERRY v GMAC ROCHESTER FLINT, No. 129962; Court of Appeals No. 263513.

HOLDEN v CANNON MUSKEGON CORPORATION, No. 129973; Court of Appeals No. 262585.

PEOPLE v CARLOS AYALA, No. 129976; Court of Appeals No. 253602.
KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v BURNS-PERRY, No. 129979; Court of Appeals No. 254213.

PEOPLE v THOMAS FRENCH, No. 129993; Court of Appeals No. 261763.

PEOPLE v TYRPIN, No. 129995; Court of Appeals No. 254010.

PEOPLE v KEITH ROGERS, No. 129998; Court of Appeals No. 249496.

DONKERS v DONKERS, No. 130000; Court of Appeals No. 262852.

SHEPLER'S INC v CITY OF MACKINAC ISLAND, No. 130001; Court of Appeals No. 263151.

PEOPLE v BURNELL, No. 130005; Court of Appeals No. 254952.

PEOPLE v LUCILLA HARRIS, No. 130008; Court of Appeals No. 256065.

PEOPLE v LINDENSMITH, No. 130013; Court of Appeals No. 257259.
KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v MELVIN FREEMAN, No. 130014; Court of Appeals No. 256306.

MACARTHUR v RAMSEY HAVENWYCK, INC, No. 130029; Court of Appeals No. 262600.

PEOPLE v PAUL W MONROE, No. 130130; Court of Appeals No. 265349.

PEOPLE v BRUCE WILLIAMS, No. 130155; Court of Appeals No. 254930.

PEOPLE v JOE JACKSON, No. 130172; Court of Appeals No. 265616.

BIORESOURCE, INC v CITY OF DETROIT, No. 130204. The Court is not persuaded that the questions presented should be reviewed by this Court before consideration by the Court of Appeals. Court of Appeals No. 266668.

PEOPLE v ALTER, No. 130209; Court of Appeals No. 266133.

PEOPLE v PETTIFORD, No. 130216; Court of Appeals No. 265212.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v MICHAEL WARD, No. 130255. The motion for immediate consideration is granted. Court of Appeals No. 265679.

ADRIAN ENERGY ASSOCIATES, LLC v PUBLIC SERVICE COMMISSION, No. 130314. The motion for immediate consideration is granted. Court of Appeals No. 261718.

Interlocutory Appeals

Leave to Appeal Denied February 27, 2006:

PEOPLE v WHITWORTH, No. 129967. The trial court initially declined to appoint counsel to assist defendant in filing an application for leave to appeal to the Court of Appeals in this case. Appellate counsel has now been appointed, and an application for leave to appeal filed in the Court of Appeals. Court of Appeals No. 263558.

Summary Dispositions March 8, 2006:

PEOPLE v FARHAT, No. 128313. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court, in light of the prosecution's concession of error, to amend the judgment of sentence to reflect that defendant was not convicted as an habitual offender and that he was convicted of only one, not two, counts of armed robbery. In all other respects the application is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 259544.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v BARRON, No. 128323. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to the Court of Appeals for reconsideration in light of *People v Bell*, 473 Mich 275 (2005). The Court of Appeals is also directed to reconsider its decision as to the admission of testimony regarding the content of an anonymous tip. Because the claim of error was not preserved by a timely objection, it must be reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750 (1999). We further vacate the portion of the Court of Appeals

opinion concerning an error in sentencing scoring since a correction in the scoring of offense variable 12 will not afford relief to defendant. Court of Appeals No. 251402.

H A SMITH LUMBER & HARDWARE COMPANY v DECINA, No. 128560. Pursuant to MCR 7.302(G) (1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for further consideration. On remand, the Oakland Circuit Court is directed to articulate in writing, and to file with the Clerk of the Supreme Court within 120 days of this order, its written explanation of the legal bases for its attorney fee awards to plaintiff-appellee H.A. Smith Lumber & Hardware Company and defendant-appellee William Gardella, doing business as Williams Glass Company. We retain jurisdiction. Reported below: 265 Mich App 380.

PEOPLE v FELDER, No. 128721. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that part of the April 19, 2005, judgment of the Court of Appeals that affirmed the felony-firearm second offense enhancement, in light of the prosecutor's concession that the factual support the trial court relied on for defendant's sentence enhancement in this case was inaccurate, and that defendant has not been previously convicted of felony-firearm. This case is remanded to the Wayne Circuit Court for resentencing. In all other respects the application is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 252307.

ADAIR v STATE OF MICHIGAN, No. 129467. The motion to disqualify is denied. The January 31, 2006, statements of the justices concerning that motion are incorporated herein by reference. The application for leave to appeal is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the August 4, 2005, judgment of the Court of Appeals, 267 Mich App 583 (2005), and remand this case to the Court of Appeals for a reevaluation of plaintiffs' claims. In reevaluating plaintiff's claims on remand, the Court of Appeals shall not apply the standard it articulated, 267 Mich App at 595, under which the state is liable only if "the new data [plaintiffs] are now required to collect and maintain are data for which the districts have no use and would not otherwise collect and maintain but for the dictates of the CEPI [Center for Educational Performance and Information]." Rather, the Court of Appeals shall reevaluate plaintiffs' claims under both the "new activity or service" and the "increase in the [level] of any activity or service" prongs of Const 1963, art 9, § 29's prohibition of unfunded mandates, in accordance with our conclusion in *Adair v Michigan*, 470 Mich 105, 130 (2004) (*Adair II*), that plaintiffs have alleged, "that the state is not merely requiring different data from the school districts, but also requiring the districts to actively participate in maintaining data that the state requires for its own purposes. An off-loading of state funding responsibilities onto local units of government without the provision of funds presents a colorable claim under Headlee." In evaluating plaintiffs' claims, the Court of Appeals may consider the extent to which plaintiffs possess and use the computer and other facilities and equipment required for plaintiffs to perform data collection, maintenance, and reporting

required under the CEPI dictates for purposes unrelated to those dictates, and the extent to which, as a result of the adoption of Proposal A, Const 1963, art 9, § 11, the state already furnishes the funding with which plaintiffs purchase such computer and other facilities and equipment. In performing its fact-finding functions on remand, the Court of Appeals may employ the referral procedure prescribed by MCL 600.308a(5), and shall apply the provisions of MCL 21.231 *et seq*. and the definitions contained therein. We do not retain jurisdiction. Reported below: 267 Mich App 583.

WEAVER, J. (*concurring*). I do not participate in the decision regarding the motion to disqualify Chief Justice TAYLOR and Justice MARKMAN and, therefore, do not address whether Chief Justice TAYLOR and Justice MARKMAN should recuse themselves because their spouses work for the Attorney General, who represents the state of Michigan in this matter.

I am opposed to the entry of any order in a case such as this that involves a request for the disqualification of a justice until this Court publishes proposals for public comment, places the issue in at least one public hearing for administrative matters, and resolves and makes clear for all to know the proper, orderly, fair, and specific procedures for handling motions for the disqualification of Supreme Court justices from participation in a case.

As I said in my statement responding to Chief Justice TAYLOR and Justice MARKMAN's statement denying the motion for disqualification, "The time for this Court to address the procedures governing the disqualification of justices is long overdue; at stake is the public's trust and confidence in the independence of Michigan's Supreme Court." *Adair v Michigan,* 474 Mich 1044, 1050 (2006).

Nevertheless, because the Court is proceeding to decide the merits of the case, I concur in the decision to vacate the August 4, 2005, judgment of the Court of Appeals, 267 Mich App 583 (2005), and remand this case to the Court of Appeals for a reevaluation of plaintiffs' claims.

KELLY, J. I would remand the case to the Court of Appeals so that it may refer it to the circuit court for findings of fact in order that the Court of Appeals can rule on the merits and find damages, if any.

MULLER v MULLER, No. 130041. The application for leave to appeal the October 27, 2005, judgment of the Court of Appeals is denied. The Oakland Circuit Court entered an order in this case that "neither party shall have an unrelated member of the opposite sex overnight while having parenting time with the minor children." Granted the authority to place "[r]estrictions on the presence of third parties during parenting time" under MCL 722.27a(8)(c), the trial court based its decision on the "best interests" of the children, giving particular emphasis to plaintiff's (the mother's) moral objections to cohabitation, when defendant (the father) claimed that he personally held no opinion on that concern. The trial court did not base its decision, in whole or in part, on MCL 750.335, which prohibits "lewd or lascivious cohabitation." Therefore, this case does not implicate the constitutionality of MCL 750.335, but rather only raises the question whether the trial court abused its discretion in restricting the presence of unrelated members of the opposite sex during

parenting time. *Brown v Loveman*, 260 Mich App 576, 591-592 (2004). The Court of Appeals found no abuse of discretion by the trial court, and we affirm this determination. Court of Appeals No. 259271.

KELLY, J. I would remand this case to the trial court for further proceedings.

In re HAWTHORNE (DEPARTMENT OF HUMAN SERVICES V HAWTHORNE), No. 130486. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the Macomb Circuit Court's order terminating respondent's parental rights to her children. There was clear and convincing evidence supporting termination of respondent's parental rights pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). There was also clear and convincing evidence that termination of respondent's parental rights was not contrary to the best interests of the children. MCL 712A.19b(5). Court of Appeals No. 262433.

Leave to Appeal Denied March 8, 2006:

AUSTIN V CORBIN, No. 127889; Court of Appeals No. 247056.
CAVANAGH and KELLY, JJ. WE would grant leave to appeal.

PEOPLE V TROSTLE, No. 129050; Court of Appeals No. 253862.
KELLY, J. I would grant leave to appeal.

PATTERSON V ROSCOMMON COUNTY ROAD COMMISSION, No. 129214; Court of Appeals No. 253662.
CORRIGAN and MARKMAN, JJ. We would grant leave to appeal.

PEOPLE V STEVEN RAY, No. 129756; Court of Appeals No. 263294.
KELLY, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE V KEGLER, No. 129839; reported below: 268 Mich App 187.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

MCDANIELD V HEMKER, No. 129843; reported below: 268 Mich App 269.

Summary Dispositions March 10, 2006:

GORE V FLAGSTAR BANK, FSB, No. 127669. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Oakland Circuit Court for entry of a judgment notwithstanding the verdict on behalf of defendant, for the reasons set forth in the May 14, 2003, opinion and order of the Oakland Circuit Court. MCR 7.302(G)(1). Court of Appeals No. 248919.

TAYLOR, C.J. (*concurring*). I concur in the majority's decision to reverse the Court of Appeals and to remand this case to the circuit court for entry of a judgment notwithstanding the verdict on behalf of defendant. Plaintiffs' promissory estoppel claim, even if it is not pre-

cluded by the existence of a contract, cannot provide these plaintiffs with a basis for recovery. In order to justify reliance and thus supply the predicate for an estoppel theory, a promise must be "actual, clear, and definite." *First Security Savings Bank v Aitken,* 226 Mich App 291, 312 (1997), overruled in part on other grounds *Smith v Globe Life Ins Co,* 460 Mich 446 (1999). Here there was no such promise. The letter from defendant stating that plaintiffs' loan application had been conditionally approved, upon which they base their promissory estoppel argument, expressly states that defendant's conditional approval was "[s]ubject to additional cond[itions]; loan may not be approvable." This statement alone prevents the letter from constituting an actual, clear, and definite promise sufficient to justify reliance. Furthermore, under Michigan law a " 'plaintiff cannot construct a detrimental reliance or estoppel theory on a conditional promise, especially when the condition did not take place.' " *First Security, supra* at 316, quoting *Bivans Corp v Community Nat'l Bank of Pontiac,* 15 Mich App 178, 182 (1968). It is undisputed that plaintiffs never satisfied some of the conditions upon which defendant made approval of their loan contingent. Accordingly, for these reasons, I concur in the majority's decision.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. I would deny leave and I dissent from the majority's order and join Justice KELLY's dissent.

KELLY, J. (*dissenting*). I must dissent from the majority's decision in this case. I cannot agree that the trial court was correct in granting a judgment notwithstanding the verdict (JNOV), and I believe that the Court of Appeals judgment should be affirmed.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs, James and Bobbie Gore, owned a bowling alley. They borrowed money, signing a promissory note and giving a first mortgage on the bowling alley to National Bank of Detroit (NBD). As additional collateral, they gave NBD a second mortgage on their farm. Plaintiffs later defaulted on the note, and NBD foreclosed on both mortgages.

At the sheriff's sale, NBD bought the farm property for $175,000. Knowing that the redemption period was to expire on March 31, 1999, plaintiffs sought financing from defendant, Flagstar Bank, to redeem the property.

James Gore met with defendant's loan officer. According to Gore, he informed the officer of the reasons plaintiffs needed the loan. Specifically, he told defendant's loan officer that the farm was in foreclosure, that it was a working farm, and that it consisted of approximately 53 acres. Not only did the loan officer fail to raise an objection to completing the loan after learning these facts, he expressly stated that they would not hinder the financing process.

The parties' discussion and preparation for the financing agreement spanned several weeks. Plaintiffs sent defendant numerous documents. Defendant's appraiser visited the farm to evaluate and appraise it. The appraisal specifically noted that the property was a farm and detailed the

acreage of the property. As part of the process, plaintiffs agreed not to seek financing from any other lending institution.

One week before the redemption period expired, NBD agreed to an extension. NBD asked defendant to fax it a letter indicating that defendant had approved the loan to plaintiffs. Defendant replied by sending an approval letter to NBD stating that plaintiffs' loan had been approved subject to conditions stated in the letter. On the basis of defendant's assurances, plaintiffs did not seek alternative financing and began selling other property to prepare for redeeming the farm.

Several months later and shortly before the extended redemption period expired, defendant decided that it would not make the loan. Plaintiffs mustered a last-minute effort to obtain alternative financing, but could not do so in the short time before the redemption period expired. As a result, they lost their farm.

Plaintiffs sued defendant, alleging, among other things, breach of contract, promissory estoppel, and fraud. At trial, defendant claimed that the property did not meet the conditions listed in its approval letter. Specifically, defendant claimed that the loan could not be approved because the farm was in foreclosure, was a working farm, and consisted of more than ten acres. The last two factors were not listed in the approval letter. Defendant claimed that they were encompassed by the statement in the letter that its approval was subject to additional conditions.

The jury ruled in favor of defendant on the breach of contract and fraud counts. But it ruled for plaintiffs on the promissory estoppel theory, awarding them $206,856 in damages.

In granting defendant's motion for JNOV, the trial court found that the jury's determinations indicated that a contract existed. The judge believed that the faxed approval letter constituted a contract. He ruled that, since a contract existed, it was error to allow the jury to consider promissory estoppel. The Court of Appeals disagreed and reversed the grant of JNOV.

NO CONTRACT EXISTED IN THIS CASE

I believe that the trial court erred in finding that a contract existed between the parties, precluding the promissory estoppel claim. First, the jury never found that a contract existed. It found merely that the faxed approval letter constituted a writing in satisfaction of the statute of frauds, MCL 566.132.

Moreover, its determination for defendant on plaintiffs' contract claim weighs against a conclusion that it even implied that a contract existed. A reviewing court must always strive to read jury verdicts consistently. If there is an interpretation that provides a logical explanation for the jury's findings, the verdict is not inconsistent. *Granger v Fruehauf Corp*, 429 Mich 1, 7 (1987). In this case, the trial court, and a majority of this Court, reads an inconsistency into the jury's verdict where none existed. This is contrary to all established practices in reviewing a jury's verdict.

The jury found not that a contract existed, but that plaintiffs' claims against defendant were "based upon a promise or commitment which is in writing and signed with an authorized signature by the Defendant." *Gore v Flagstar Bank, FSB,* unpublished opinion per curiam of the Court of Appeals, issued November 9, 2004 (Docket No. 248919), slip op at 3. Whereas this finding means the writing meets the requirements of the statute of frauds, it is insufficient to constitute a finding that there was a contract.

Secondly, there exists no legal rationale for finding a contract in this case. The faxed approval letter contains neither consideration nor a promise from plaintiffs. Therefore, it could not constitute a contract. Mutuality of obligation and mutuality of agreement are essential elements of a contract. *Detroit Trust Co v Struggles*, 289 Mich 595, 599 (1939). The approval letter was not signed by plaintiffs. The document did not reflect any form of consideration from plaintiffs. Instead, the faxed approval letter merely contained a promise from defendant. This one-sided document cannot constitute a contract. The trial court erred in relying on it when determining that a contract existed.

Even if we should accept defendant's view of the facts, which the jury rejected, defendant's approval letter could not possibly be construed as a contract. As discussed in more detail below, defendant admitted that it was impossible for plaintiffs to meet one of the letter's listed conditions for approval. Therefore, the letter, which defendant represents as an offer and acceptance was, under defendant's asserted facts, a denial. It is axiomatic that a document cannot constitute a contract when the only offer it makes it also withdraws.

IT WAS NOT ERROR TO SUBMIT PROMISSORY ESTOPPEL TO THE JURY

In presenting a case to a jury, a party need not choose between promissory estoppel and a contract claim. The party can state as many claims as he or she has, even if the claims are inconsistent. MCR 2.111(A)(2)(b). Michigan courts have applied this rule of law expressly to cases involving both contract and promissory estoppel claims. See *HJ Trucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 573-574 (1999).

The only exception to the rule arises when a court finds that an enforceable contract exists. Promissory estoppel does not apply if the performance that satisfies the detrimental reliance requirement of the promissory estoppel claim is the same performance that represents consideration for the written contract. *General Aviation, Inc v Cessna Aircraft Co*, 915 F2d 1038, 1042 (CA 6, 1990), quoting *General Aviation, Inc v Cessna Aircraft Co*, 703 F Supp 637, 647 n 10 (WD Mich, 1988). In essence, if there is an existing contract between the parties, one party is not given the proverbial second bite of the apple.

But this case does not present such a situation, and plaintiffs did not receive a second bite of the apple. No contract existed. Plaintiffs were not attempting to substitute detrimental reliance for established consideration. Hence, it was correct to submit the promissory estoppel theory to

the jury, and the trial court erred in finding otherwise. Accordingly, the Court of Appeals properly reversed the JNOV and reinstated the jury's verdict.

THE JURY PROPERLY FOUND PROMISSORY ESTOPPEL

The elements of promissory estoppel are: (1) a promise, (2) that the promisor should reasonably expect to induce action or forbearance on the part of the promisee, (3) that in fact induces such action or forbearance, and (4) injustice can be avoided only by performance of the promise. Restatement Contracts 2d, § 90, p 242. Promissory estoppel involves a threshold inquiry into the circumstances surrounding both the making of the promise and the reliance on the promise as a question of law. The existence and scope of the promise are questions of fact for the jury. Therefore, findings on the latter questions will not be set aside unless they are clearly erroneous. *State Bank of Standish v Curry*, 442 Mich 76, 84 (1993), quoting 4 Williston, Contracts (4th ed), § 8:5, pp 84-85, 102-103.

In this case, defendant made a promise that it would provide financing to plaintiffs. In repeated discussions with plaintiffs, defendant made clear that, to receive a loan from defendant, plaintiffs must forgo seeking other financing. Therefore, defendant reasonably knew that its promise would result in forbearance by plaintiffs. It is undisputed that defendant's actions actually induced such forbearance; plaintiffs did not seek financing from other institutions until after defendant withdrew its approval. Finally, plaintiffs lost their property because of defendant's failure to fulfill its promise. Thus, equity requires enforcement of the promise.

All of the elements of promissory estoppel were satisfied in this case, and the jury's finding that a promise existed was not clearly erroneous. Therefore, the jury's determination must be affirmed. The trial court erred in setting it aside. *State Bank of Standish*, 442 Mich 84.

Defendant contends that the promissory estoppel claim cannot stand because the promise it is based on is a conditional promise. To the contrary, the claim can stand. A promise may be conditional or performable at a future time and still be the basis of promissory estoppel if the condition is satisfied. Restatement Contracts 2d, § 91, p 250.[1] Again, the existence and scope of the promise are questions of fact. *State Bank of Standish*, 442 Mich 84. Therefore, whether unsatisfied conditions ex-

[1] Several courts have adopted the Restatement position on this topic. They generally hold that one can base a claim of promissory estoppel on a conditional promise if the condition is satisfied. See *Kemira, Inc v Williams Investigative & Security Services*, 215 Ga App 194, 199; 450 SE2d 427 (1994); *Advanced Marine Tech v Burnham Securities, Inc*, 16 F Supp 2d 375, 381-382 (SD NY, 1998); *Nelson v Elway*, 908 P2d 102, 110 (Colo, 1995).

isted, what the conditions were, and whether plaintiffs satisfied them are questions of fact for the jury. In this case, the jury resolved them in plaintiffs' favor.

Defendant claimed that the following conditions were not met: (1) the property could not be a working farm; (2) the property could not be over ten acres; (3) and the NBD mortgage had to be current. When it issued its loan approval letter, defendant knew that plaintiffs could not satisfy any of these conditions, yet did not assert them as problems. Under the circumstances, it was completely reasonable for the jury to conclude that these "conditions" were nonexistent at the time of the promise.

Defendant's attorney admitted at oral argument that plaintiffs could never satisfy at least one of the conditions that defendant claims existed: plaintiffs could not change the fact that the property consisted of more than ten acres. The same is true with respect to both of the other alleged conditions. Plaintiffs never suggested to defendant that they would transform their working farm to a nonworking farm, and defendant never requested it. Moreover, the fact that the NBD loan was not current was plaintiffs' motivation in seeking financing, and this fact was well known to defendant when it approved the loan.

Essentially, defendant argues that plaintiffs should have read the approval letter as the opposite of what it is. They should have looked at it as a denial letter, because they could never meet the conditions contained in or inferred from it.

Such an argument is simply unreasonable. Given that the letter indicated that plaintiffs' loan was approved, plaintiffs reasonably believed that none of the facts known to defendant at the time of the approval precluded the loan. This is especially true with respect to facts that plaintiffs could not alter. It was not clearly erroneous for the jury to have found that plaintiffs had met all known conditions for defendant to make the loan.[2] Consequently, the trial court erred in granting a JNOV.

CONCLUSION

The trial court erred in concluding that a contract existed in this case. The jury made no such finding, and the faxed approval letter did not meet the requirements of a contract. Instead, the jury correctly found that all the elements of promissory estoppel had been met. Accordingly, it was error for the trial court to grant a JNOV for defendant. The Court of Appeals correctly reversed this determination. The judgment of the Court of Appeals should be affirmed.

HEIKKILA V NORTH STAR TRUCKING, INC, Nos. 127780, 127823, 127836. The motion to disqualify is denied. In lieu of granting leave to appeal, we reverse, in part, the judgment of the Court of Appeals and reinstate summary disposition for appellant North Star Steel Company for the reasons stated in part II of Court of Appeals Judge KELLY's concurrence and dissent. MCR 7.302(G)(1). Court of Appeals No. 246761.

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[2] In fact, it could be argued that any other conclusion would lead to an absurd result.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. I would deny leave to appeal. I do not participate in deciding plaintiff's motion to disqualify Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN. This Court should publish proposals for public comment, place the issue on a public hearing for administrative matters, resolve, and make clear for all to know the proper procedures for handling motions for the recusal of Supreme Court justices from participation in a case. See *Scalise v Boy Scouts of America,* 473 Mich 853 (2005). This Court opened an administrative file on the question on May 20, 2003, but has yet to address the matter. 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 may affect the decision and outcome in a case. See *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 96-104 (2005) (WEAVER, J., concurring).

KELLY, J. I would deny leave to appeal. I do not participate in the decision to deny the motion to disqualify. I agree with Justice WEAVER in urging the Court to establish a particularized procedure to handle motions to disqualify a Supreme Court justice from participation in a case.

CORRIGAN, J. I would peremptorily reverse the judgment of the Court of Appeals and reinstate summary disposition in favor of appellants, for the reasons stated in Court of Appeals Judge KELLY's concurrence and dissent.

PEOPLE v BUEHLER, No. 129923. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to that court to consider: (1) whether the circuit court provided substantial and compelling reasons for imposing a sentence that the circuit court acknowledged was a departure from the guidelines, see *People v Babcock*, 469 Mich 247, 257-258 (2003), and (2) whether any term of imprisonment that may be imposed by the circuit court is controlled by the legislative sentencing guidelines or by the indeterminate sentence prescribed by MCL 750.335a. We do not retain jurisdiction. Reported below: 268 Mich App 475.

CAVANAGH, J. I would deny leave to appeal.

Leave to Appeal Denied March 17, 2006:

POLICE OFFICERS ASSOCIATION OF MICHIGAN v OTTAWA COUNTY SHERIFF, No. 127503; reported below: 264 Mich App 133.

GRACE v LEITMAN, No. 130642. On order of the Court, the motions for immediate consideration and for stay of proceedings and the application for leave to appeal the March 3, 2006, order of the Court of Appeals are considered. Immediate consideration is granted. The application for leave to appeal is denied, because we are not persuaded that the question presented should be reviewed by this Court. The motion for stay of proceedings is denied as moot. Concerning the instant disqualification motion, it can never be the case, in our judgment, that a judge can be

required to disqualify himself or herself on the basis of hostile conduct directed toward the judge by the *attorney* or *litigant*, rather than on the basis of the *judge's* own conduct. To require recusal in these circumstances would be to incentivize hostile conduct by an attorney or litigant desirous of excluding disfavored judges from participation in their cases. *People v Bero*, 168 Mich App 545, 552 (1988). Where, as here, the focus of the disqualification motion concerns past adverse characterizations of Judge TALBOT by defendant attorney, we do not believe that it can be sustained unless Judge TALBOT himself is of the view that he harbors attitudes toward the attorney that preclude his fair consideration of the case. Because he has apparently decided that he does not harbor such views and that his disqualification is not required, there is no basis, in our judgment, upon which either the chief judge of the Court of Appeals or any member of this Court can reach a contrary conclusion. Court of Appeals No. 257896.

CORRIGAN, J. (*concurring*). I concur in the order of denial. I write separately to note that Justice WEAVER correctly identifies the applicability of MCR 2.003 to judges of the Court of Appeals. On its face, the rule expressly requires that "[t]he challenged judge shall decide the [disqualification] motion." MCR 2.003(C)(3). Yet MCR 2.003(C)(3) further provides, "If the challenged judge denies the motion, (a) in a court having two or more judges, *on the request of a party*, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo . . . ." (Emphasis added.)[1] We have no record that either party requested that Judge TALBOT refer this motion to Chief Judge WHITBECK.

The court rules do not preclude an appeal upon a failure to refer to the chief judge. I would open an administrative file to consider including in the rule the requirement of *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 23 (1989) ("Having failed to pursue the remedy provided by MCR 2.003(C)(3)(a), [the party] waived any claim of disqualification.").

Because of the failure of our court rules to make an explicit provision in this regard, I have analyzed the merits, and I join the order.

CAVANAGH, J. The order denying the motion to disqualify was entered by the challenged judge alone, "acting under MCR 7.211(E)(2)." I believe this was contrary to the specific text of MCR 7.211(E)(2), which provides:

> (E) Decision on Motions.
>
> (2) The chief judge or another designated judge may, acting alone, enter an order disposing of an administrative motion. Administrative motions include, but are not limited to:
>
> (a) a motion to consolidate;
>
> (b) a motion to extend the time to file a transcript or brief;
>
> (c) a motion to strike a nonconforming brief;

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[1] Nor does the rule require reference to the State Court Administrative Office, since these facts involve neither a single judge court nor the chief judge. See MCR 2.003(C)(3)(b).

(d) a motion for oral argument in a case that has not yet been placed on a session calendar;

(e) a motion to adjourn the hearing date of an application, complaint, or motion;

(f) a motion to dismiss a criminal appeal on the grounds that the defendant has absconded;

(g) a motion to file an amicus curiae brief;

(h) a motion to allow an out-of-state attorney to appear and practice.

I note that the order here was not entered by the panel to whom the motion was assigned, by the chief judge of the Court of Appeals, or by a judge "designated" by that Court. Even if it were argued that the challenged judge was "designated" pursuant to the rule, the subject motion was not one of those enumerated in the rule and can hardly be characterized as an "administrative motion."

I would stay further proceedings in the Court of Appeals and remand for proper disposition of the motion for disqualification.

WEAVER, J. I join Justice CAVANAGH's statement, and would stay further proceedings in the Court of Appeals and remand for proper disposition of the motion for disqualification.

Further, I note that even if Judge TALBOT's denial of the motion for disqualification had been made under the correct court rule, MCR 2.003, instead of MCR 7.211(E)(2), the review of that denial would not be properly before this Court. When a judge denies a motion for his or her disqualification, on the request of the party challenging the judge, the motion is to be referred to the chief judge, who shall decide the motion de novo. MCR 2.003(C)(3)(a).[1]

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[1] Rule 2.003 Disqualification of Judge

* * *

(C) Procedure.

* * *

(3) *Ruling.* The challenged judge shall decide the motion. If the challenged judge denies the motion,

(a) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;

(b) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.

MCR 2.003 applies to Court of Appeals judges. MCR 2.001 governs when the rules in chapter 2 of the court rules, including MCR 2.003, apply to a court. MCR 2.001 provides:

> The rules in this chapter [which include MCR 2.003] 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.

That MCR 2.003 governs the disqualification of Court of Appeals judges is further shown by Canon 3 of the Michigan Code of Judicial Conduct. The Code of Judicial Conduct expressly applies to all judges, including the judges of the Court of Appeals and the justices of the Supreme Court. Canon 3(C) and (D) state that the disqualification of a judge and remittals for the disqualification of a judge are governed by the provisions of MCR 2.003(B) and (D), respectively.

The Michigan Court of Appeals is a court established by the Constitution of the state of Michigan. The Court of Appeals is not a court of limited jurisdiction; nor is there a rule on motions for recusal that provides a different procedure applicable specifically to the Court of Appeals. Therefore, MCR 2.003 applies to the Court of Appeals.

Pursuant to MCR 2.003, the challenged judge decides the motion asking for his or her disqualification. If the motion is denied and a party requests review of the denial, the chief judge or a judge appointed by the state court administrator then reviews de novo the judge's decision not to recuse himself or herself. MCR 2.003(C)(3).

Thus, when a challenged Court of Appeals judge denies a motion for recusal, the party challenging the judge should request that the chief judge of the Court of Appeals review the motion de novo. Until that procedure is followed, the issue is not properly before this Court. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14 (1989).

KELLY, J. I join the statements of Justice CAVANAGH and Justice WEAVER

Reconsideration Denied March 20, 2006:

MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND v FARMINGTON INSURANCE AGENCY, LLC, No. 127834. The motion for extension of time for filing objections to the bill of costs is granted. Summary disposition entered at 474 Mich 1010. Court of Appeals No. 249013.

CAVANAGH and KELLY, JJ. We would grant reconsideration.

Summary Dispositions March 22, 2006:

COOPER-REID v STATE OF MICHIGAN, No. 129136. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 260962.

KELLY, J. I would deny leave to appeal.

BENJAMIN v BOTSFORD GENERAL HOSPITAL, No. 129484. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 262117.

KATZ v SPAULDING, No. 129758. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and that portion of the Wayne Circuit Court's September 8, 2003, order that requires plaintiff to reimburse defendants' attorney fees of $53,000. There is no basis in the record for a determination that plaintiff's primary purpose in initiating his prescriptive easement lawsuit was to harass, embarrass, or injure defendants, as MCL 600.2591 requires. There is also no basis in the record for a determination that plaintiff or his attorneys filed any document or documents for the improper purpose of needlessly increasing defendants' litigation costs, as MCR 2.114 requires. We remand this case to the Wayne Circuit Court for entry of an order denying defendants' motion for attorney fees. Court of Appeals No. 253204.

SLOAN v CITY OF MADISON HEIGHTS, No. 130027. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the decision of the Court of Appeals and reinstate the orders of the Oakland Circuit Court granting summary disposition in favor of the plaintiff. The plain language of the collective bargaining agreement that provided health insurance to "retirees and their spouses" did not limit spousal coverage to the person who was the retiree's spouse at the time of retirement or at the time of the agreement's expiration. Court of Appeals No. 254371.

Leave to Appeal Denied March 22, 2006:

PEOPLE v KACZOROWSKI, No. 128779; Court of Appeals No. 260428.

HURON VALLEY SCHOOLS v SECRETARY OF STATE, No. 129127; reported below: 266 Mich App 638.

KELLY, J. I would grant leave to appeal.

SEVELIS v SELLERS, No. 129239; Court of Appeals No. 252398.

BEAUCHAMP v FORD MOTOR COMPANY, No. 129279; Court of Appeals No. 256175.

KELLY, J. I would grant leave to appeal.

PEOPLE v SWANSON, No. 129300; Court of Appeals No. 252906.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v JACQUELINE COLE, No. 129362; Court of Appeals No. 261548.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v DAVID SUTTON, JR, No. 129377; Court of Appeals No. 252932.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v DENNIS THOMAS, No. 129419; Court of Appeals No. 255126.

KELLY, J. I would grant leave to appeal.

PEOPLE v ARNOLD, No. 129443; Court of Appeals No. 252484.

KELLY, J. I would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

PEOPLE v MEMMER, No. 129499; Court of Appeals No. 254839.

KELLY, J. I would remand this case to the trial court for resentencing in accordance with *People v Babcock*, 469 Mich 247 (2003).

CRUICKSHANK v CITY OF PONTIAC, No. 129513; Court of Appeals No. 261369.

KELLY, J. I would deny leave to appeal because I believe this case is moot.

MACDONALD v AUTO-OWNERS INSURANCE COMPANY, No. 129525; Court of Appeals No. 253085.

CAVANAGH, J. I would grant leave to appeal.

GAINFORTH v BAY HEALTH CARE, No. 129530; Court of Appeals No. 260054.

KELLY, J. I would grant leave to appeal.

EMBOSSING PRINTERS, INC v DEPARTMENT OF TREASURY, No. 129605. To the extent that the Court of Appeals opinion rejects the "incidental to service" test adopted by this Court in *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13 (2004), it is vacated. Court of Appeals No. 252894.

CAVANAGH, J. I would deny leave to appeal without the further statement found in the majority's order.

PEOPLE v STERLING JONES, No. 129845; Court of Appeals No. 254261.

KELLY, J. I would remand this case to the trial court for resentencing.

TROST v MILZ, No. 129861; Court of Appeals No. 261715.

CAMPBELL v GENERAL MOTORS CORPORATION, No. 129986; reported below: 268 Mich App 468.

CAVANAGH, J. I would grant leave to appeal.

WASWICK v OCCIDENTAL CHEMICAL CORPORATION, No. 130258. The motion for immediate consideration is granted. Court of Appeals No. 265885.

PEOPLE v JOHNIGAN, No. 130673. The motion for immediate consideration is granted. Reported below: 265 Mich App 463.

CASEY v AUTO-OWNERS INSURANCE COMPANY, No. 130727. The motion for immediate consideration is granted. The motion for stay is denied as moot. Court of Appeals No. 266576.

Reconsideration Denied March 22, 2006:

PEOPLE v CHAABAN, No. 128516. If the defendant on retrial again requests to represent himself, the prosecutor may raise in the trial court any appropriate challenge to the defendant's request. See *People v Williams*, 470 Mich 634, 642 (2004). Summary disposition entered at 474 Mich 917. Court of Appeals No. 253513.

Leave to Appeal Granted March 24, 2006:

KARACZEWSKI v FARBMAN STEIN & COMPANY, No. 129825. The parties shall include among the issues addressed whether appellants' proposed overruling of *Boyd v W G Wade Shows,* 443 Mich 515 (1993), is justified under the standard for applying stare decisis discussed in *Robinson v Detroit,* 462 Mich 439, 463-468 (2000). Court of Appeals No. 256172.

Summary Dispositions March 24, 2006:

BARRETT v MT BRIGHTON, INC, No. 126544. We reverse the judgment of the Court of Appeals for the reasons stated by the Court of Appeals dissent. MCR 7.302(G)(1). Pursuant to the Ski Area Safety Act of 1962 (SASA), "[e]ach person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. . . ." MCL 408.342(2). The Court of Appeals majority held that "[a] snowboard rail constitutes a danger a skier assumes while engaged in snowboarding, but an alpine skier should not be deemed to have assumed such a risk since snowboard rails are not inherent in or necessary to the sport of downhill skiing." *Barrett v Mt Brighton, Inc (On Remand),* unpublished opinion per curiam, issued June 3, 2004 (Docket No. 222777), slip op, p 2. The Court of Appeals majority erred in finding support in the SASA and our opinion in *Anderson v Pine Knob Ski Resort, Inc*, 469 Mich 20 (2003), for the proposition that different skiers accept different dangers. As noted by the Court of Appeals dissent, the SASA broadly defines "skier" to include a person "wearing skis or utilizing a device that attaches to at least 1 foot or the lower torso for the purpose of sliding on a slope." MCL 408.322(g). It does not distinguish among alpine skiers, cross-country skiers, and snowboarders. Our opinion in *Anderson* does not reach a contrary conclusion. Accordingly, plaintiff, while engaged in alpine skiing, is held to have accepted the risks associated with all types of skiing, including snowboarding. The Livingston Circuit Court should have granted defendant's motion for summary disposition on this ground. We further agree with the Court of Appeals dissent that there was no violation of MCL 408.326a(c) and (e), but that, even if a violation of that statute had been found, "there is nothing to support the conclusion that [plaintiff] would have stayed off the snowboard run had he known its degree of difficulty." Opinion by ZAHRA, J., dissenting, p 2. Accordingly, we remand this case to the Livingston Circuit Court for entry of an order granting summary disposition in favor of defendant. Court of Appeals No. 222777 (on remand).

CAVANAGH, J. (*dissenting*). I respectfully dissent from the majority's decision to reverse the judgment of the Court of Appeals and remand for entry of an order granting summary disposition in favor of defendant. I would deny leave to appeal in this case. However, I must point out that the reasoning on which the majority bases its decision to reverse is fundamentally flawed.

The majority bases its decision on the Court of Appeals dissent in *Barrett v Mt Brighton*, which states on pp 1-2 that "MCL 408.342(2) provides that skiers accept the dangers inherent in the sport of skiing *as a whole*; it does not expressly provide or even imply that skiers only accept the dangers inherent in their particular form of skiing." *Barrett v Mt Brighton, Inc (On Remand)*, dissenting opinion of ZAHRA, J., issued June 3, 2004 (Docket No 222777) (emphasis added). I do not agree with the premise that a skier accepts the risks inherent in the sport of skiing as a whole with no regard to the type of skiing being engaged in. However, even assuming that this is true, contrary to the majority's belief, a snowboarding rail is not an *obvious and necessary* danger that *inheres* in the sport of skiing *as a whole*.

"Inhere" means "[t]o be inherent or innate." *The American Heritage Dictionary of the English Language*, *Third Edition* (1992). "Inherent" means "[e]xisting as an essential constituent or characteristic; intrinsic." *Id*. While I have no doubt that it is enjoyable to ride a snowboarding rail, I fail to see how a snowboarding rail is *essential* to the sport of *skiing*. There are numerous skiing events, even a number of events that specifically relate only to snowboarding, that have *nothing* to do with riding a snowboarding rail. Further, as confirmed at oral argument, defendant no longer even *has* a snowboarding rail at its facility. So for the majority to reverse because it believes that a snowboarding rail is an inherent danger that is obvious and necessary to skiing when the sport of skiing is routinely engaged in without snowboarding rails and defendant no longer even has a rail ignores the nature of the sport and the facts of this case.

Further, I also believe that it is unreasonable to conclude that a snowboarding rail that at its highest point was approximately 14 inches off the ground is an *obvious* and necessary danger inherent in the sport of skiing. The statute lists examples of obvious and necessary dangers, such as ski lift towers, other skiers, and properly marked or plainly visible pieces of snow-making or snow-grooming equipment. A snowboarding rail measured in inches is certainly not akin to a ski lift *tower* or *properly marked or plainly visible* piece of snow-making or snow-grooming equipment so that it can be classified as an obvious and necessary danger inherent in the sport of skiing.

Accordingly, I respectfully dissent.

KELLY, J. I join the statement of Justice CAVANAGH.

MARKMAN, J. (*dissenting*). I respectfully dissent from the majority's order reversing the Court of Appeals judgment, and instead would grant leave to appeal. MCL 408.342(2) provides, "Each person who participates in the sport of skiing accepts the dangers that *inhere in that sport* insofar as the dangers are obvious and *necessary* . . . ." (Emphasis added.) I would grant leave to consider whether a snowboarding rail constitutes a

danger that both "inhere[s]" in the sport of skiing and is "necessary" to such sport. More specifically, (1) to what class of persons does "necessary" pertain, a single skier, a majority of skiers, or all skiers; (2) to what endeavor does "necessary" pertain, the sport of skiing, the business of a ski resort, or both; (3) to what specific activities does "necessary" pertain, all types of skiing, including alpine, cross-country and snowboarding, or only to a single type of skiing; and (4) if Mt. Brighton no longer has a snowboarding rail, as plaintiff alleges, yet continues to entertain snowboarding, how can a snowboarding rail be said to be "necessary"? The present case affords an opportunity to clearly and efficiently address these questions in order to avoid unnecessary future litigation.

ARANT v PEREGRINE METALFORMING, INC, No. 129717. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals shall include among the issues addressed whether the Workers' Compensation Appellate Commission violated its statutory standard of review when it substituted plaintiff's proposed commencement date for the specific loss of his right hand, without any citation to the record, for the record-supported date chosen by the magistrate. The Court of Appeals shall also address the applicability of the one-year-back rule, MCL 418.833(1), in light of plaintiff's prior receipt of specific loss benefits for the same date of injury. We do not retain jurisdiction. Court of Appeals No. 260861.

KELLY, J. I would deny leave to appeal.

Summary Disposition on Reconsideration March 24, 2006:

WEST v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 127007. The motion for reconsideration of this Court's order of October 13, 2005, is granted. We vacate our order dated October 13, 2005. 474 Mich 880. On reconsideration, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration in light of *Rory v Continental Ins Co,* 473 Mich 457 (2005), and *Devillers v Auto Club Ins Ass'n,* 473 Mich 562 (2005), including consideration of whether the contractual limitations period in this case may be judicially tolled. Leave denied at 474 Mich 880. Court of Appeals No. 251003.

KELLY, J. I would deny the motion for reconsideration.

Leave to Appeal Denied March 24, 2006:

LEWIS v ST JOHN HOSPITAL, No. 129529. The motion to disqualify Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN is denied. Court of Appeals No. 252712.

WEAVER, J. (*dissenting*). I do not participate in the decision regarding the motion to disqualify Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN.

I am opposed to the entry of any order in this case at this time and would hold this case in abeyance until this Court publishes proposals for public comment, places the issue on a public hearing for administrative

matters, 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. This Court opened an administrative file on the question on May 20, 2003, but has yet to address the matter publicly. 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. See *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n,* 472 Mich 91, 96-101 (2005) (WEAVER, J., concurring).

KELLY, J. I do not participate in the decision to deny the motion to disqualify. I agree with Justice WEAVER in urging the Court to establish a particularized written procedure to handle motions to disqualify a Supreme Court justice from participation in a case.

CAVANAGH, J. I join the statement of Justice KELLY.

In re YOUNG (DEPARTMENT OF HUMAN SERVICES v YOUNG), No. 130658; Court of Appeals No. 264192.

Summary Dispositions March 27, 2006:

CANTALUPO HOMES & DEVELOPMENT, INC v GP ENTERPRISES, INC, No. 129687. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of the question whether plaintiff is entitled to a continuing lien on the improvements under MCL 570.1107(3). We do not retain jurisdiction. Court of Appeals No. 261327.

PEOPLE v TOWER, No. 129982. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals order and remand this case to the Genesee Circuit Court for correction of the presentence investigation report. In all other respects, leave to appeal is denied. Court of Appeals No. 265541.

Reconsideration Denied March 27, 2006:

HARRIS v RAHMAN, No. 126922. Summary disposition entered at 474 Mich 1001. Court of Appeals No. 247253.

CAVANAGH, J. I would grant reconsideration and, on reconsideration, would deny leave to appeal.

KELLY, J. I would grant reconsideration and, on reconsideration, would deny leave to appeal, because I believe the case should be remanded to the circuit court for trial.

PEOPLE v CRUTCHER, No. 128065. Leave to appeal denied at 474 Mich 854. Court of Appeals No. 244277.

WOODLAND OIL COMPANY v OTWELL MAWBY, PC, No. 128709. Summary disposition entered at 474 Mich 987. Court of Appeals No. 249246.

SHOAFF v BALDWIN, Nos. 128733, 128734. Leave to appeal denied at 474 Mich 972. Court of Appeals Nos. 248606, 248609.

SMITH v SMITH, No. 128780. Leave to appeal denied at 474 Mich 972. Court of Appeals No. 251773.

CAVANAGH, J., did not participate.

PEOPLE v MICHIELUTTI, No. 128902. Summary disposition entered at 474 Mich 889. Reported below: 266 Mich App 223.

KELLY, J. I would grant reconsideration and, on reconsideration, would deny leave to appeal.

CORRIGAN, J. I would grant reconsideration of the cooperation issue only and, on reconsideration, would remand this case to the sentencing court for resentencing.

MOAK v MURFIN, No. 129503. Leave to appeal denied at 474 Mich 978. Court of Appeals No. 260389.

PEOPLE v VIRGIL GREEN, No. 129587. Leave to appeal denied at 474 Mich 980. Court of Appeals No. 252045.

KELLY, J. I would grant reconsideration and, on reconsideration, would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

WILLIAMS v DEPARTMENT OF CORRECTIONS, No. 129604. Leave to appeal denied at 474 Mich 981. Court of Appeals No. 261020.

Interlocutory Appeals

Leave to Appeal Denied March 27, 2006:

RHINES v SAUNDERS, No. 129956; Court of Appeals No. 258020.

HOMER TOWNSHIP v BILLBOARDS BY JOHNSON, INC, No. 130039; Court of Appeals No. 256216.

Leave to Appeal Denied March 27, 2006:

ENTECH PERSONNEL SERVICES, INC v FELICIANO TRANSPORT, INC, No. 127890; Court of Appeals No. 249003.

GARZA v MEXICAN INDUSTRIES IN MICHIGAN, INC, No. 127938; Court of Appeals No. 256698.

PEOPLE v OLONDAH WILSON, No. 128462; Court of Appeals No. 251320.

PEOPLE v TREMBLE, No. 128659. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257439.

PEOPLE v KENNETH BROWN, No. 129254; Court of Appeals No. 250867.

PEOPLE v THOMAS THORP, No. 129400; Court of Appeals No. 255579.

PEOPLE v WALDRON, No. 129414; Court of Appeals No. 253080.

ASSOCIATED BUILDERS & CONTRACTORS OF MICHIGAN SELF-INSURED WORKERS COMPENSATION FUND v ACKER STEEL ERECTORS, INC, No. 129459. The application for leave to appeal as cross-appellant is denied. Court of Appeals No. 250973.

FADLALLAH v DEARBORN PUBLIC SCHOOLS, No. 129463; Court of Appeals No. 262731.

PEOPLE v ROBERT LEE, No. 129471; Court of Appeals No. 263026.

PEOPLE v MCMULLEN, No. 129521; Court of Appeals No. 253122.

ALLSTATE INSURANCE COMPANY v HILL, No. 129560; Court of Appeals No. 261543.

TERRA ENERGY, LTD v WHITE PINE ENTERPRISES, LLC, No. 129673; Court of Appeals No. 254159.

PEOPLE v HONSINGER, No. 129695; Court of Appeals No. 250932.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v RUDDER, No. 129701. The motion to supplement is denied. Court of Appeals No. 255069.

PEOPLE v PEPAJ, No. 129707; Court of Appeals No. 255370.

PEOPLE v WILLARD POWELL, No. 129724; Court of Appeals No. 264147.

PEOPLE v GREGORY ROBINSON, No. 129736; Court of Appeals No. 254863.

PEOPLE v DENNEY, No. 129750; Court of Appeals No. 254997.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

NALEPKA v HNATIO, No. 129760; Court of Appeals No. 262000.

MESLEH v YOUNG, No. 129780; Court of Appeals No. 262514.

PEOPLE v PRENTIS WILSON, No. 129791. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261520.

In re THE HUGHES REVOCABLE TRUST (TAYLOR v SHIPLEY), No. 129795; Court of Appeals No. 255928.

PEOPLE v JERRY CUNNINGHAM, No. 129802. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261169.

PEOPLE v ENGLISH, No. 129811. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260891.

PEOPLE v EARL SULLIVAN, No. 129812. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261176.

PEOPLE v JAMES ROBINSON, No. 129821. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 265452.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v ADAM PRICE, No. 129828; Court of Appeals No. 261427.

PEOPLE v ANTHONY HART, No. 129834; Court of Appeals No. 255453.

PEOPLE v SKINNER, No. 129837. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262165.

PEOPLE v THOMPKINS, No. 129838. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262003.

PEOPLE v TONY MILLER, No. 129847; Court of Appeals No. 256496.

PEOPLE v MASSENBURG, No. 129848. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261426.

PEOPLE v DALION DAVIS, No. 129850. The motion to remand is denied. Court of Appeals No. 264485.

PEOPLE v COPELAND, No. 129851; Court of Appeals No. 253676.

PEOPLE v REX HARRISON, No. 129859; Court of Appeals No. 264163.

BUNKLEY v DEPARTMENT OF CORRECTIONS, No. 129860; Court of Appeals No. 264690.

PEOPLE v KEVIN ROBINSON, No. 129865. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261303.

PEOPLE v MOURGUET, No. 129868. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261242.

PEOPLE v DANIEL, No. 129872. The motion to remand is denied. Court of Appeals No. 251430.

PEOPLE v HURU CLARK, No. 129873. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261300.

PEOPLE v CROMER, No. 129874; Court of Appeals No. 264840.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

In re DONALSON (DONALSON v OAKLAND CIRCUIT JUDGE), No. 129882; Court of Appeals No. 262573.

PEOPLE v STRADLEY, No. 129903. The motion to remand is denied. Court of Appeals No. 263772.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v WAYNE, No. 129905. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261574.

PEOPLE v JOHN ANDERSON, JR, No. 129909; Court of Appeals No. 263704.

PEOPLE v JEFFREY HARRIS, No. 129915; Court of Appeals No. 255723.

COLLINS v DAVIS, No. 129935; Court of Appeals No. 256055.

PEOPLE v NATHAN WILSON, No. 129960. We note that relief is not prohibited by MCR 6.502(G) because this appeal does not involve the denial of a motion for relief from judgment. Rather, defendant filed a petition for deoxyrebonucleic acid (DNA) testing under MCL 770.16. However, defendant has failed to demonstrate that the DNA evidence he seeks would be material to his identity as the perpetrator under MCL 770.16(3). Court of Appeals No. 264283.

PEOPLE v DEANGELO HAMILTON, No. 129963. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262020.

PEOPLE v DORIAN JONES, No. 129969; Court of Appeals No. 254409.

PEOPLE v BRINDLEY, No. 129971; Court of Appeals No. 265440.

DAVIS v CITY OF SOUTHFIELD, No. 129988; Court of Appeals No. 252347.

PEOPLE v NEPH, No. 129990; Court of Appeals No. 265504.

PEOPLE v THOMAS JACKSON, No. 129991; Court of Appeals No. 254768.

PEOPLE v STURGIS, No. 129994; Court of Appeals No. 254348.

PEOPLE v KALVIN WASHINGTON, No. 130011; Court of Appeals No. 256061.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v MARVIN JACKSON, No. 130015; Court of Appeals No. 265252.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v TODD, No. 130016; Court of Appeals No. 257442.

TAYLOR v RAJANI, No. 130020; Court of Appeals No. 256058.

CASEY v CLOWERS, No. 130024; Court of Appeals No. 262142.

PEOPLE v ALLEN MCDONALD, No. 130034; Court of Appeals No. 265215.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v CALONI, No. 130035; Court of Appeals No. 254187.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

THOMPSON v DAIMLERCHRYSLER CORPORATION, No. 130040; Court of Appeals No. 262840.

RADULOVICH v TENAGLIA, No. 130046; Court of Appeals No. 262999.

PEOPLE v CRAIG, No. 130050; Court of Appeals No. 264663.

PEOPLE BERNARD MURPHY, No. 130052; Court of Appeals No. 254964.

ROSS v MODERN MIRROR & GLASS COMPANY, No. 130077; Court of Appeals No. 255863.

PEOPLE v JAMAL RUSSELL, No. 130083; Court of Appeals No. 265344.

PEOPLE v CHARLES HENRY, No. 130089; Court of Appeals No. 264374.

PEOPLE v JILES, No. 130090; Court of Appeals No. 254934.

PEOPLE v TARA SIMS, No. 130092; Court of Appeals No. 265554.

BAKER v BAKER, No. 130102; Court of Appeals No. 253718.

HANN v DEPARTMENT OF CORRECTIONS, No. 130105. The motion for immediate consideration is denied. Court of Appeals No. 264535.

PEOPLE v LANGO, No. 130114; Court of Appeals No. 257150.

PEOPLE v CRISMAN, No. 130119; Court of Appeals No. 264027.

PEOPLE v JEFFREY RUSSELL, No. 130121; Court of Appeals No. 254624.

FRITZ v YELLOW TRANSPORTATION, INC, No. 130122; Court of Appeals No. 264378.

PEOPLE v SANDRA PARKER, No. 130124; Court of Appeals No. 255767.

PEOPLE v HAY, No. 130128; Court of Appeals No. 256448.

BLACK v PRATT, No. 130132; Court of Appeals No. 261784.

CAUGHN v BOSCH BRAKING SYSTEM CORPORATION, No. 130134; Court of Appeals No. 264059.

PEOPLE v TYRONE WARD, No. 130138. The motion to remand is denied. Court of Appeals No. 255814.

PEOPLE v DENNIS ALLEN, No. 130141; Court of Appeals No. 262219.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v PINKAVA, No. 130142; Court of Appeals No. 255818.

PEOPLE v DILS, No. 130145; Court of Appeals No. 256737.

PEOPLE v MCCUTCHEON, No. 130147; Court of Appeals No. 256842.

PEOPLE v RODRIGUEZ, No. 130149; Court of Appeals No. 256226.

WILSON v GENERAL MOTORS CORPORATION, No. 130176; Court of Appeals No. 263890.

PEOPLE v DOLPH CLARK, No. 130177; Court of Appeals No. 263101.

WRIGHT v VOLWAY, No. 130188; Court of Appeals No. 255075.

PEOPLE v DESHAWN MASON, No. 130210; Court of Appeals No. 254637.

WALLER v FORD MOTOR COMPANY, No. 130213; Court of Appeals No. 263255.

WILLIAMS v WHITFIELD, No. 130214; Court of Appeals No. 254906.

PHILLIPS v ESTATE OF HEIKKINEN, No. 130215; Court of Appeals No. 258703.

AT&T COMMUNICATIONS OF MICHIGAN v PUBLIC SERVICE COMMISSION, No. 130228; Court of Appeals No. 254832.

PEOPLE v GARCIA-MEDINA, No. 130229; Court of Appeals No. 257546.

BRIGHTON TOWNSHIP v CONELY, No. 130230; Court of Appeals No. 263881.

PEOPLE v CARPENTER, No. 130233; Court of Appeals No. 256568.

PEOPLE v VALLADOLID, No. 130234; Court of Appeals No. 256738.

PEOPLE v DONALD HART, Nos. 130264, 130266, 130268; Court of Appeals Nos. 265738, 265739, 265740.

PEOPLE v BRIDGES, No. 130279. The motion for immediate consideration is denied. Court of Appeals No. 266972.

STEEL ASSOCIATES, INC v CITY OF DETROIT, No. 130289. The application for leave to appeal as cross-appellant is denied. Court of Appeals No. 254025.

VICKS v DAIMLERCHRYSLER CORPORATION, No. 130291; Court of Appeals No. 263789.

CORRIGAN, J. I would deny leave to appeal but I continue to adhere to my concurring statement in *Donoho v Wal-Mart Stores, Inc*, 474 Mich 1057 (2006).

GILBERT v ZEKELMAN, No. 130399; Court of Appeals No. 263073.

KEY SAFETY SYSTEMS, INC v DYNACAST, INC, No. 130504. The motion for immediate consideration is granted. The motion to strike is denied as moot. Court of Appeals No. 268249.

Leave to Appeal Granted March 29, 2006:

FLUOR ENTERPRISES, INC v DEPARTMENT OF TREASURY, No. 129149. The application for leave to appeal as cross-appellant is also granted. Reported below: 265 Mich App 711.

TAXPAYERS OF MICHIGAN AGAINST CASINOS v STATE OF MICHIGAN, Nos. 129816, 129818, 129822; reported below: 268 Mich App 226 (on remand).

Summary Dispositions March 29, 2006:

PEOPLE v ERNEST TUCKER, No. 129742. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court so that defendant may be given the opportunity to withdraw his December 8, 2003, guilty plea. The circuit court failed to honor a sentence agreement under *People v Cobbs*, 443 Mich 276 (1993). We do not retain jurisdiction. Court of Appeals No. 261305.

MALLORY v MOKA CORPORATION, No. 129871. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that portion of the Workers' Compensation Appellate Commission decision affirming the magistrate's finding of the specific loss of plaintiff's left arm and hand, and we remand this case to the magistrate for reconsideration of plaintiff's specific loss claim in light of *Cain v Waste Management, Inc (After Remand),* 472 Mich 236 (2005). If the magistrate should find that plaintiff did not demonstrate the specific loss of her left arm and hand, she shall also address whether plaintiff unreasonably refused offers of reasonable employment during all relevant periods, up to the time of hearing, when such offers were made—an issue the magistrate categorized as moot because of her original specific loss determination. We do not retain jurisdiction. Court of Appeals No. 262626.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA v DORSEY, No. 129880. The motion for admittance pro hac vice is granted. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, for the reasons stated in the partial dissent in the Court of Appeals, we reverse that part of the Court of Appeals opinion that granted a new trial, and remand this case to the Court of Appeals for consideration of the issues defendants raised in their motion for new trial that the Court of Appeals did not reach. Should the Court of Appeals affirm the circuit court's denial of defendants' motion for new trial, it shall reinstate mediation sanctions. We do not retain jurisdiction. Reported below: 268 Mich App 313.

GEE v ARTHUR B MYR INDUSTRIES, INC, No. 129940. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether the current claim for attendant care benefits under MCL 418.315(1) is barred by the doctrine of res judicata. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals No. 262691.

ESTATE OF DALE v ROBINSON, Nos. 130021, 130079, 130082. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals Nos. 263947, 263680, 263915.

MCGUIRE v SANDERS, No. 130076. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the decision of the Court of Appeals and remand this case to the Wayne Circuit Court for entry of an order of summary disposition in favor of Hamilton's Henry VIII Lounge, Inc. The retail licensee that sold alcohol to the allegedly visibly intoxicated defendant driver and was thereby made potentially liable under the dram shop statute, MCL 436.1801, was defendant Garter Belt, Inc., doing business as Leggs Lounge, not defendant Hamilton's Henry VIII Lounge, Inc., doing business as Hamilton Placement. Reported below: 268 Mich App 719.

KELLY, J. I would deny leave to appeal.

PEOPLE v JEROME MONTGOMERY, No. 130332. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that portion of the Court of Appeals judgment that pertains to this defendant for the reasons stated in the dissenting opinion, and reinstate defendant's convictions for kidnapping, conspiracy to kidnap, and first-degree home invasion. We remand this case to the Court of Appeals for consideration of the remaining issues that were raised by defendant, but not addressed by the Court. We do not retain jurisdiction. Court of Appeals No. 255641.

KELLY, J. I would deny leave to appeal.

Reconsideration Granted March 29, 2006:

PEOPLE v LAWRENCE DELL, No. 129618. The motion for reconsideration of this Court's order of December 27, 2005, is granted. We vacate our order dated December 27, 2005. On reconsideration, the application for leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Leave to appeal denied at 474 Mich 981. Court of Appeals No. 261013.

Leave to Appeal Denied March 29, 2006:

PEOPLE v BRENNAN, No. 127872; Court of Appeals No. 250288.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v NATHAN JONES, No. 129506; Court of Appeals No. 244066.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v LEO GLOVER, No. 129508; Court of Appeals No. 254263.

KELLY, J. I would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

PEOPLE v WEBB, No. 129610; Court of Appeals No. 248962.

KELLY, J. I would reinstate the trial court's vacaton of the conviction for carrying a concealed weapon and remand this case for resentencing.

PEOPLE v WILKENS, No. 129706; reported below: 267 Mich App 728.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would remand this case to the trial court for resentencing.

PEOPLE v AARON, No. 129740; Court of Appeals No. 262397.

KELLY, J. I would remand this case for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

PEOPLE v HOUGH, No. 129779. The motion for appointment of counsel is denied. Court of Appeals No. 264422.

KELLY, J. I would remand this case to the Court of Appeals for consideration as on leave granted and for appointment of counsel.

PEOPLE v COX, No. 129892; reported below: 268 Mich App 440.

KELLY, J. I would grant leave to appeal.

PEOPLE v VEASLEY, No. 129972; Court of Appeals No. 253805.

PEOPLE v MIRELES, No. 129992; Court of Appeals No. 265307.

MICHIGAN CIVIL RIGHTS INITIATIVE v BOARD OF STATE CANVASSERS No 1, No. 130342. The motion to file brief amicus curiae is granted. Reported below: 268 Mich App 506.

KELLY, J. I would grant leave to appeal.

MICHIGAN CIVIL RIGHTS INITIATIVE v BOARD OF STATE CANVASSERS No 2, No. 130344. The motion for stay and the miscellaneous motions are denied. Reported below: 268 Mich App 506.

KELLY, J. I would grant leave to appeal.

HAMILTON v BANK ONE NATIONAL ASSOCIATION, No. 130774. The motion for immediate consideration is granted. Court of Appeals No. 265062.

Leave to Appeal Granted March 31, 2006:

PEOPLE v APGAR, No. 127651. The parties are directed to include among the issues briefed whether the prosecution is an "aggrieved party" within the meaning of MCR 7.203(A), in light of the fact that the Court of Appeals affirmed defendant's conviction. Court of Appeals No. 247544.

PEOPLE v NYX, No. 127897; Court of Appeals No. 248094.

ROWLAND v WASHTENAW COUNTY ROAD COMMISSION, No. 130379. The parties shall include among the issues addressed: (1) whether appellant's proposed overruling of *Hobbs v Dep't of State Hwys*, 398 Mich 90, 96

(1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356-357 (1996), is justified under the standard for applying stare decisis discussed in *Robinson v Detroit,* 462 Mich 439, 463-468 (2000); and, if so, (2) whether a decision overruling *Hobbs* and *Brown* should have retroactive or prospective application under the standard discussed in *Pohutski v City of Allen Park*, 465 Mich 675, 695-699 (2002). Court of Appeals No. 253210.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal March 31, 2006:

PEOPLE v RANDY SMITH, No. 130245. The application for leave to appeal the December 22, 2005, judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are considered. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties are directed to file supplemental briefs within 56 days of the date of this order addressing: (1) whether statutory involuntary manslaughter, MCL 750.329, is a necessarily included lesser offense of murder; and, if so, (2) whether a rational view of the evidence in this case supports a conviction of statutory involuntary manslaughter; and, if so, (3) whether the Oakland Circuit Court's failure to give a jury instruction on statutory involuntary manslaughter was harmless error. The application for leave to appeal as cross-appellant remains pending. The Prosecuting Attorneys Association of Michigan and the Criminal Defense Association of Michigan are invited to file briefs amicus curiae on Issue (1) set forth above. Court of Appeals No. 256066.

CAVANAGH, J. I would deny leave to appeal.

Summary Dispositions March 31, 2006:

RUTHRUFF v TOWER HOLDING CORPORATION, No. 129469. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals shall include among the issues addressed whether the Workers' Compensation Appellate Commission misapprehended its appellate function by disregarding the factual findings of the magistrate, and whether it disregarded the Court of Appeals express instruction on remand to resolve this case by determining whether plaintiff was "required to bring a lunch" to work. Court of Appeals No. 262073.

CAVANAGH, J. I would deny leave to appeal.

KELLY, J. (*dissenting*). I would deny leave to appeal. In addition, I point out that the order incorrectly characterizes the Court of Appeals express instruction in its judgment remanding this matter. The remand was not to resolve this case by determining whether plaintiff was required to bring a lunch to work. The Court of Appeals remanded "for an application of the statutory presumption and a determination of whether plaintiff's injury arises out of his employment." The record was to be reopened to "allow a determination of the exact nature of the risk involved in this case." The Court directed that the magistrate "determine the nature of the risk present in light of the evidence and apply the

appropriate test for determining whether plaintiff's injury is one arising out of employment."[1] *Ruthruff v Tower Holding Corp* (*On Reconsideration*), 261 Mich App 613, 622-623 (2004).

FRAIM v CITY SEWER OF FLINT, No. 129787. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we affirm in part and reverse in part the judgment of the Court of Appeals. We affirm the Court of Appeals ruling that the trial court correctly denied defendant's motion for summary disposition. However, we conclude that no material question of fact exists on the applicability of the open and obvious doctrine. The open and obvious doctrine is inapplicable to this case, because defendant did not possess or control the premises within which plaintiff was injured. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516 (2001). We remand this case to the Genesee Circuit Court for further proceedings not inconsistent with this order. We do not retain jurisdiction. Court of Appeals No. 253073.

Leave to Appeal Denied March 31, 2006:

PETOSKEY INVESTMENT GROUP, LLC v BEAR CREEK TOWNSHIP, Nos. 127655, 127656. The motion for leave to file brief amicus curiae is granted. The application for leave to appeal is denied as moot. This Court cannot provide appellant Zachary M. Kuznicki any meaningful relief in light of the consent judgment reached between plaintiff-appellee Petoskey Investment Group, LLC, and Emmett County and the fact that the challenged development project is underway. Under these circumstances, as appellant has conceded, this appeal is moot. Court of Appeals Nos. 246641, 248801.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

THOMAS v HAWKINS, No. 130108. The application for leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Plaintiff's motion for immediate consideration of his motion to modify order is granted. Plaintiff's motion to modify order is denied as moot. The December 21, 2005, order staying trial court proceedings is dissolved. Court of Appeals No. 266779.

In re WEST (DEPARTMENT OF HUMAN SERVICES v PATTON), No. 130706; Court of Appeals No. 264194.

Summary Disposition April 5, 2006:

MULARONI v MULARONI, No. 128060. Pursuant to MCR 7.302(G)(1), in

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[1] If plaintiff was not required to bring a lunch, then the risk was of a personal nature. If he was required to bring a lunch, then it might be considered a neutral risk case. In addition, this might be viewed as a mixed risk case, where "compensability exists if the employment was a contributing factor . . . ." *Ruthruff v Tower Holding Corp (On Reconsideration)*, 261 Mich App 613, 622 (2004).

lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals. The agreement provides, and defendants conceded below and in this Court, that plaintiff's "initial interest" in the "property and/or the limited liability company" that the parties contemplated forming was 50 percent of the difference between the purchase price (together with the costs of obtaining rezoning, with interest at 8 percent) and the value of the property as rezoned. We remand this case to the Wayne Circuit Court to determine (1) upon retrial, 50 percent of the net increase in the vacant property's value as a result of the rezoning, in accordance with the formula in paragraph 3 of the agreement of August 30, 1996; and (2) whether the trust entity that is a member of the limited liability corporation that holds title to the subject property is the trust entity named as a defendant in this action and, if not, to correct any misnomer.

If plaintiff accepts remittitur in the amount of $841,000, the amount that defendants concede would be due to plaintiff if he is entitled to recover 50 percent of the property's net increase in value after rezoning, the circuit court may deny retrial on that issue.

In all other respects, the application for leave to appeal and the applications for leave to appeal as cross-appellants are denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 251282.

Leave to Appeal Denied April 5, 2006:

PEOPLE v ECKMYRE, Nos. 128924, 128925; Court of Appeals Nos. 252872, 253861.

KELLY, J. I would peremptorily reverse the judgment of the Court of Appeals and remand this case for a new trial on the basis of the trial judge's failure to give an instruction on the burden of proof.

PEOPLE v MICHAEL CARROLL, No. 129114. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 259113.

ROEHRIG v STATE AUTO MUTUAL INSURANCE COMPANY, No. 129301; Court of Appeals No. 252742.

CORRIGAN, J. I would grant leave to appeal to consider Judge GRIFFIN's Court of Appeals dissent.

PEOPLE v GRIGSBY, No. 129367; Court of Appeals No. 262974.

PEOPLE v JAMES EVANS, No. 129512; Court of Appeals No. 262392.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v JEROME ATKINS, No. 129611; Court of Appeals No. 261579.

KELLY, J. I would hold this case in abeyance for *People v McCuller* (Docket No. 128161).

PEOPLE v JOHNETTA SULLIVAN, No. 129798; Court of Appeals No. 263654.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal April 7, 2006:

GOLDSTONE v BLOOMFIELD TOWNSHIP PUBLIC LIBRARY, No. 130150. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties are directed to file supplemental briefs within 56 days of the date of this order limited to the issue whether defendant's challenged library policy is a violation of Const 1963, art 8, § 9. The Michigan Municipal League and the Michigan Library Association are invited to file briefs amicus curiae on the issue identified above. Other persons or groups interested in the determination of that issue may move the Court for permission to file briefs amicus curiae. Reported below: 268 Mich App 642.

STARKS v MICHIGAN WELDING SPECIALISTS, INC, No. 130283. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties are directed to file supplemental briefs within 56 days of the date of this order addressing: (1) whether defendant is liable to plaintiff under the fifth narrow exception to the traditional rule of a corporation purchaser's nonliability for the purchased corporation's liabilities, when the purchase is accomplished by an exchange of cash for assets — that is, " ' "where the transferee corporation was a mere continuation or reincarnation of the old corporation," ' " *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 702 (1999) (citations omitted); (2) whether that fifth stated narrow exception discussed in *Foster* is precluded when there is a tertiary relationship (*id.,* p 704) between the purchasing entity and the purchased entity; (3) whether the continuity of enterprise doctrine as discussed in *Foster* has application beyond product liability cases; and, if so, (4) the applicability, under the facts of this case, of the continuity of enterprise doctrine. Court of Appeals No. 257127.

Summary Dispositions April 7, 2006:

ZERRENNER v ZERRENNER, No. 127273. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals. We do not agree with the Court of Appeals that defendant has an equitable claim of restitution based on uncompensated services performed for plaintiff's law firm. Plaintiff's law firm was a separate asset, not a marital asset, which did not appreciate in value during the time of the parties' marriage as required by MCL 552.401. Because plaintiff's law firm was not a marital asset, the decision in *Postema v Postema*, 189 Mich App 89 (1991), and similar cases on which the Court of Appeals relied, cannot justify defendant's claim to equitable restitution. In all other respects, the application for leave to appeal is denied. The application for leave to appeal as cross-appellant is also considered,

and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 246321.

WEAVER, J. I would deny leave to appeal as I would not peremptorily reverse this case.

TINGLEY v WARDROP, Nos. 128901, 128907, 128909. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the May 5, 2005, Court of Appeals judgment and the June 24, 2004, Court of Appeals judgment, and we remand this case to the Court of Appeals for reconsideration in light of *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608 (2004), and plaintiffs' second amended complaint. We do not retain jurisdiction. Reported below: 266 Mich App 233.

MARKMAN, J. (*concurring*). I concur in the majority's order remanding this case to the Court of Appeals for reconsideration in light of *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co,* 471 Mich 608 (2004), and plaintiffs' second amended complaint. I write separately only to respond to the dissent.

First, the dissent asserts that in *Nat'l Wildlife*, this Court "fundamentally changed and heightened the burden to establish standing to pursue statutory causes of action when they created new Michigan law and superimposed federal constitutional standing constraints on plaintiffs." *Post*. With all due respect, this characterization of *Nat'l Wildlife* is in error. Rather, for the reasons set forth at length in that opinion, we merely reaffirmed traditional understandings of the separation of powers under both the Michigan and the United States Constitutions, explaining the importance of standing for the "preservation of a judiciary operating within proper boundaries." *Nat'l Wildlife, supra* at 612.

Second, the dissent asserts that this Court "does not have jurisdiction," *post*, over this appeal. Such an assertion is correct only if the Court of Appeals is allowed to render an unreviewable decision in a dispute over which it lacks jurisdiction, something that the Court of Appeals itself subsequently recognized to be the case. In the process, the Court of Appeals conferred standing where the trial court had previously concluded standing did not exist. The dissent asserts that the Court of Appeals may render a decision that it has no jurisdiction to render, and that a party has no ability to appeal such decision. I respectfully disagree.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

WEAVER, J. (*dissenting*). This Court does not have jurisdiction over the subject matter of this appeal. I, therefore, dissent from the majority's order vacating the June 24, 2004, judgment of the Court of Appeals and its order remanding this case to the Court of Appeals for reconsideration in light of *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co,* 471 Mich 608 (2004).

In *Nat'l Wildlife,* a majority of four justices of this Court fundamentally changed and heightened the burden to establish standing to pursue

statutory causes of action when they created new Michigan law and superimposed federal constitutional standing constraints on plaintiffs.[1]

Defendants appeal from an opinion that was issued by the Court of Appeals on May 5, 2005. As will be explained here later, the Court of Appeals did not have jurisdiction to issue that opinion. Because the Court of Appeals did not have jurisdiction to issue its May 5, 2005, opinion, this Court has no jurisdiction over the subject matter of this appeal. Therefore, I would deny leave to appeal for lack of jurisdiction and allow this case to proceed properly in the circuit court on remand from the first Court of Appeals opinion in this case, which was issued on June 24, 2004.[2]

The Court of Appeals has jurisdiction as provided by law. Const 1963, art 6, § 10. The law provides in relevant part that the Court of Appeals has jurisdiction over "all final judgments from the circuit court . . . ." MCL 600.308(1)(a). The Court of Appeals did have jurisdiction over this case when plaintiffs appealed to the Court of Appeals from the circuit court order that granted defendants' motions for summary disposition.

In the first Court of Appeals opinion, the Court concluded that the plaintiffs had standing pursuant to MCL 324.11151(1), because the statute "expressly permits an individual to bring a civil action to remedy violations of the act and does not restrict the ability to sue to only those persons whose individual interests are harmed." The Court of Appeals, therefore, reversed the circuit court order dismissing plaintiffs' case and remanded the case to the circuit court.

Defendants did not appeal from the first Court of Appeals judgment, even though *Nat'l Wildlife* was decided during the prescribed appeal period on July 30, 2004.[3] The circuit court received the June 24, 2004, opinion of the Court of Appeals on June 25, 2005. Jurisdiction was revested in the circuit court by the issuance of the Court of Appeals

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[1] It cannot reasonably be disputed that *Nat'l Wildlife* fundamentally changed Michigan's standing doctrine. *Nat'l Wildlife* transformed the language of Michigan standing doctrine from one involving prudential limitations to one incorporating federal constitutional law that had previously been understood to not apply to state courts. See *ASARCO, Inc v Kadish,* 490 US 605, 617 (1989). Indeed, the case upon which the *Nat'l Wildlife* majority relied, *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 740 (2001), expressly acknowledged that importing federal constitutional constraints into Michigan's standing doctrine "should be seen as supplementing" Michigan standing doctrine, in other words, it changed it. *Nat'l Wildlife, supra* at 653 n 4 (WEAVER, J., concurring in result only).

[2] *Tingley v 900 Monroe, LLC*, unpublished opinion (Docket Nos. 243171, 244609).

[3] The defendants had 42 days to appeal from the Court of Appeals judgment. MCR 7.302(C).

opinion pursuant to MCR 7.215(F)(1)(b).[4] Neither party objected to the circuit court's exercise of jurisdiction.[5]

On remand, the circuit court allowed plaintiffs to file a second amended complaint and affidavits asserting standing under the test established in *Nat'l Wildlife* and the defendants requested summary disposition based on *Nat'l Wildlife*. After conducting hearings on the parties' motions in December 2004, the circuit court denied defendants' motions for summary disposition, concluding on January 20, 2005, that all but one plaintiff had alleged standing adequate to survive the test of *Nat'l Wildlife*.

Despite this progression of the case on remand in the circuit court, on February 22, 2005, the Court of Appeals on its own motion reversed its first judgment of June 24, 2004, in light of *Nat'l Wildlife*. *Tingley v Wardrop,* Docket Nos. 243171, 244609. There is no provision in the statutes or court rules for the Court of Appeals to have exercised jurisdiction over the case eight months after it issued its first opinion on June 24, 2004. Neither party had appealed from or requested reconsideration of the June 24, 2004, judgment. The June 24, 2004, judgment was the Court of Appeals final judgment in the matter. MCR 7.215(E)(1). Because that judgment was not appealed, it was in effect and enforceable pursuant to MCR 7.215(F)(1)(a). Thus, the Court of Appeals had no jurisdiction over the case when it later attempted to change the result of the case in light of the new law created by *Nat'l Wildlife*.

The Court of Appeals soon recognized that it did not have jurisdiction to reverse itself. To correct its error, on May 5, 2005, the Court of Appeals properly vacated its second order and opinion of February 22, 2005.[6] However, the Court of Appeals then attempted to reissue, reinstate, and

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[4] See *People v George,* 399 Mich 638, 639-640 (1977), addressing "how and when an opinion of the Court of Appeals becomes effective for purposes of execution or enforcement" under the 1963 General Court Rules.

[5] There is some question when and whether the Court of Appeals had remitted the record to the circuit court. However, there is no dispute that the circuit court had subject-matter jurisdiction over the case after the remand order issued. Further, if the circuit court exercised jurisdiction over the case without the record having been remitted, then its orders are merely voidable, not void. *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538 (1935). Defendants did not object to the circuit court's exercise of jurisdiction and it is not clear whether any defendant appealed from the circuit court's order on remand that denied their motions for summary disposition. Instead, the defendants attempt to bootstrap attacks on the circuit court's jurisdiction in this appeal from the Court of Appeals May 5, 2005, decision.

[6] *Reed v Yackell*, 473 Mich 520, 540 (2005).

republish its June 24, 2004, opinion that had concluded that plaintiff had standing under the statute at issue.[7]

It is from the May 5, 2005, republication of the June 24, 2004, opinion that defendants attempt to appeal. However, by correcting its jurisdictional mistake and vacating its second order and opinion, the published June 24, 2004, judgment of the Court of Appeals was again in effect and enforceable. The Court of Appeals could not reassert jurisdiction over the subject matter of the case. More importantly, the Court of Appeals could not create a new appellate time line through the republication of its June 24, 2004, opinion.

It is incorrect for this Court to permit the May 5, 2005, opinion to establish a new and extended time line under which the defendants can pursue an appeal. An error correction by the Court of Appeals should not be permitted to extend or revive a litigant's appellate rights. Nevertheless, as a result of the confusion of appeals, the circuit court stayed its proceedings in this case in July 2005 pending the resolution of these appeals.

It is not surprising that the defendants seized the opportunity created by the Court of Appeals jurisdictional error to seek leave to appeal to this Court from the May 5, 2005, opinion. As defendants may have hoped, this strategy, with this Court majority's assistance, has compensated for defendants' failure to appeal from the first Court of Appeals judgment and has apparently rendered moot the circuit court's decision to deny defendants' motions for summary disposition in light of plaintiffs' second amended complaint.

However, because the Court of Appeals did not have jurisdiction over the subject matter of the case on May 5, 2005, this Court does not have jurisdiction over this appeal. Where a lower court does not have jurisdiction over the subject matter of a case, neither does the superior appellate court. As we explained in a case where the probate court did not have subject-matter jurisdiction:

> The probate court had no jurisdiction. The circuit court had no greater jurisdiction of the case than had the probate court. The probate court having no jurisdiction, the circuit court acquired none by appeal, and this [Supreme Court] has none. [*In re Fraser Estate,* 288 Mich 392, 395 (1939) (citations omitted).]

Finally, affording defendants this opportunity is unfair. The majority's order gives defendants a second bite of the apple. It allows defendants to attack plaintiffs' standing under *Nat'l Wildlife's* heightened test, despite the fact that the defendants failed to appeal from the Court of Appeals first judgment and have been denied summary disposition by the circuit court in the proceedings on remand from the first Court of Appeals decision. It is also not clear whether the defendants ever appealed the circuit court's denial of summary disposition.

I would deny leave to appeal.

PEOPLE v RICKY HAWTHORNE, Nos. 129876, 129877. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the Court of Appeals judgment and remand this case to the Wayne Circuit Court for resentencing on the convictions for accosting and soliciting a minor for immoral purposes. As conceded by the prosecution in this Court, the sentencing judge departed above the sentencing guidelines for defendant's convictions for accosting a minor for immoral purposes without stating a substantial and compelling reason for that departure. MCL 769.34(3); *People v Babcock,* 469 Mich 247, 258 (2003). On remand, the circuit court is to determine whether a departure is appropriate and, if it determines that a departure is warranted, it must state on the record a substantial and compelling reason for that departure. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. Court of Appeals Nos. 255722, 255764.

CORRIGAN, J. (*concurring*). In deciding this case, I would be inclined to adhere to my dissenting statement in *People v Francisco*, 474 Mich 82_ (2006). Because the prosecutor conceded that the sentencing court erred in imposing the sentences for accosting and soliciting a minor for immoral purposes, I join this Court's order remanding for resentencing on the convictions for accosting and soliciting a minor for immoral purposes, even though the unpreserved error was harmless. As correctly stated by the Court of Appeals:

> An error in calculating the minimum sentencing guidelines range "affect[s] the fairness, integrity and public reputation of judicial proceedings [when it] send[s] an individual to prison . . . depriving him of his liberty for a period longer than authorized by the law." Here, however, defendant was sentenced to a minimum of fifty years in prison for each of his three CSC I [first-degree criminal sexual conduct] convictions and a minimum of fifteen years in prison for the CSC II [second-degree criminal sexual conduct] conviction; these sentences are to run concurrently with the sentences for accosting a child. Thus, the fairness, integrity or public reputation of the judicial proceedings was not seriously affected by the sentencing error. Rather, the additional $4^1/_2$ months' imprisonment imposed by the improper minimum sentences for the accosting a child convictions do not affect the length of time defendant will spend in prison. Therefore, resentencing is not required under the plain-error standard. [*People v Hawthorne*, unpublished opinion per curiam of the Court of Appeals, issued September 27, 2005 (Docket No. 255722) (citations omitted).]

WEAVER and YOUNG, JJ. We join the statement of Justice CORRIGAN.

MAYS v SCHELL, No. 129895. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the order of the Saginaw Circuit Court granting a new trial. The trial court's decision did not amount to an abuse of discretion in that it fell within a " 'principled range of outcomes.' " *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254 (2005) (citation omitted). Reported below: 268 Mich App 432.

PEOPLE v GREGORY, No. 130185. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons set forth in the dissenting opinion, and remand this case to the Court of Appeals to consider whether defendant is entitled to jail credit. Court of Appeals No. 256194.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

Interlocutory Appeals

Leave to Appeal Denied April 7, 2006:

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN v CITIZENS INSURANCE COMPANY OF AMERICA, No. 130696. The motion to stay is denied. Court of Appeals No. 266781.

PEOPLE v ACEVAL, No. 130784. The motion for immediate consideration is granted. The motion for stay is denied as moot. Court of Appeals No. 269198.

Leave to Appeal Denied April 7, 2006:

PEOPLE v SCHEIDLER, No. 128863; Court of Appeals No. 250977.

CAVANAGH and KELLY, JJ. We would remand this case to the Ogemaw Circuit Court for an evidentiary hearing on defendant's claims of juror bias regarding juror Burgher.

MARKMAN, J. (*dissenting*). Although the posttrial standard for granting a new trial on the basis of juror bias is a demanding one, *People v Daoust*, 228 Mich App 1 (1998), the allegation of bias in this case is unusually compelling and raises a serious question regarding whether defendant received a fair trial. Under the unusual circumstances of this case, I would remand for an evidentiary hearing regarding defendant's claims of bias on the part of one juror. In all other respects, I would deny defendant's application.

Defendant was convicted by a jury of child sexually abusive activity, MCL 750.145c(2), for filming underage girls engaging in sexual conduct. Defendant admitted that he filmed the activity, but claimed in defense that he believed the girls to be over 18. After trial, defendant obtained an affidavit from a juror who claimed that she had not disclosed that she had been raped by one of defendant's potential witnesses, Jason Krueger. The trial court denied defendant's motion for an evidentiary hearing, and the Court of Appeals affirmed defendant's conviction.

In *Daoust*, *supra* at 9, the Court of Appeals stated:

> [W]hen information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause.

Here, the juror stated that had she known during voir dire the extent of Kruger's involvement—that he was to attest to defendant's credibility *and* that he allegedly was a participant himself in defendant's unlawful conduct—she would not have told the judge that she could be fair and impartial. She also stated that she could not say how she would have voted had Kruger not been involved and that, had she been the defendant, she would not want herself on the jury.

It is relevant here that: (1) the juror claimed that Kruger had committed a sex crime against her, (2) the instant offense concerned illegal sexual activity, (3) there was testimony that Kruger himself participated in the illegal sexual activity, (4) the statute at issue, MCL 750.145c(2), contains a requirement regarding knowledge of the victim's age, (5) the defendant claimed to have no knowledge that the girls involved were under 18, and (6) Kruger was mentioned by a character witness for the defendant as one of three people who could vouch for defendant's trustworthiness. In other words, credibility was a key question at trial, and the juror was asked to believe that defendant had not engaged in any sexual impropriety on the basis that *her own rapist would vouch for him*.

In light of these unusual circumstances, I believe that defendant has presented sufficient evidence warranting an evidentiary hearing on the issue of juror bias. I would therefore remand to the trial court for that purpose.

In re SICURELLO (DEPARTMENT OF HUMAN SERVICES v PENLEY), No. 130763; Court of Appeals No. 264566.

In re LONG (RIDEOUT v WYRICK), No. 130782; Court of Appeals No. 264358.

Leave to Appeal Denied April 13, 2006:

PEOPLE v STOREY, No. 128741; Court of Appeals No. 251271.

WOLFE v WAYNE-WESTLAND COMMUNITY SCHOOLS, No. 129220; Court of Appeals No. 251076.

CAVANAGH, J. I would grant leave to appeal.

MALIK v CASTANEDA, No. 129313; Court of Appeals No. 262399.

KELLY, J. I would grant leave to appeal.

SBC MICHIGAN v PUBLIC SERVICE COMMISSION, No. 129345; Court of Appeals No. 251991.

PIERSON v AHERN, No. 129368. The motion to add issues is granted. The application for leave to appeal the July 19, 2005, judgment of the Court

of Appeals and the application for leave to appeal as cross-appellant are denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 260661.

DAVIS v BOTSFORD GENERAL HOSPITAL, No. 129403; Court of Appeals No. 250880.

DANA CORPORATION v DEPARTMENT OF TREASURY, No. 129573; reported below: 267 Mich App 690.

CAVANAGH, J. I would grant leave to appeal.

JEWELL v PINSON, No. 129690; Court of Appeals No. 255661.

CAVANAGH, J. I would grant leave to appeal.

HARLEYSVILLE LAKE STATES INSURANCE COMPANY v MASON INSURANCE AGENCY, INC, No. 129797; Court of Appeals No. 255195.

PEOPLE v HOUSTON, No. 129853; Court of Appeals No. 264520.

PEOPLE v ALTON ROBINSON, No. 129866; Court of Appeals No. 265451.

PEOPLE v MAURICE DANIELS, No. 129917; Court of Appeals No. 255728.

GORO v GRAND MACHINING COMPANY, No. 129945; Court of Appeals No. 262363.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

ROBERTS v OTSEGO COUNTY, No. 130017; Court of Appeals No. 254503.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v LOUDE, No. 130075; Court of Appeals No. 255724.

KELLY, J. I would grant leave to appeal.

PEOPLE v DIANE ROBINSON, No. 130101; Court of Appeals No. 264666.

PEOPLE v SEMKIW, No. 130253. The motion for immediate consideration is denied. Court of Appeals No. 255016.

PEOPLE v FRITZ, No. 130254; Court of Appeals No. 254390.

ALLEN v BENBOW, No. 130406; Court of Appeals No. 266589.

PEOPLE v RYAN STEWART, No. 130496. The motion for immediate consideration is granted. The application for leave to appeal the January 6, 2006, order of the Court of Appeals is denied, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262554.

Interlocutory Appeals

Leave to Appeal Denied April 13, 2006:

BOWENS v AFTERMATH ENTERTAINMENT, No. 129112; Court of Appeals No. 250984.

PEOPLE v THACKER, No. 129232; Court of Appeals No. 262435.

CAVANAGH, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

KELLY, J. I would reverse the circuit court ruling and reinstate the district court ruling.

TECHNOLOGY RECYLING CORPORATION v FORD MOTOR COMPANY, No. 129434; Court of Appeals No. 259369.

MARKMAN, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal April 14, 2006:

KRUSCHKE v LOVELL, No. 130030. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument the application of the discovery rule of MCL 600.5838(2) to plaintiff's claim. The parties may file supplemental briefs within 84 days of the date of this order, but they should avoid submitting mere restatements of the arguments in their application papers. The Michigan Trial Lawyers Association, the Michigan Health and Hospital Association, the Michigan State Medical Society, and the Michigan Osteopathic Association are invited to file briefs amicus curiae. Court of Appeals No. 259601.

CITIZENS INSURANCE COMPANY v PRO-SEAL SERVICE GROUP, INC, No. 130099. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall be prepared to address at oral argument: (1) whether Flowserve's complaint alleged an advertising injury within the meaning of the commercial general liability policy that Citizens Insurance Company issued to Pro-Seal, Inc., and (2) if so, whether Citizens was relieved of its duty to defend Pro-Seal by operation of the policy exclusion for actions taken with knowledge that an advertising injury would result. The parties may file supplemental briefs within 56 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Reported below: 268 Mich App 542.

Leave to Appeal Granted April 14, 2006:

BIERLEIN v SCHNEIDER, No. 128913; Court of Appeals No. 259519.

Summary Disposition April 14, 2006:

PEOPLE v DURR, No. 129439. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether offense variables 1, 9, and 12

were properly scored. We do not retain jurisdiction. Court of Appeals No. 263356.

WEAVER, J. I would deny leave to appeal as I see no need to remand this case.

CORRIGAN and YOUNG, JJ. We would deny leave to appeal.

Reconsideration Denied April 21, 2006:

KING v BRIGGS, Nos. 129639, 129640. Leave to appeal denied at 474 Mich 981. Court of Appeals Nos. 259136, 259229.

MARKMAN, J. (*concurring*). Plaintiff has filed a motion for reconsideration with regard to this Court's order denying his application for leave to appeal. Plaintiff specifically requests that this Court grant leave to clarify footnote 14 of *Waltz v Wyse,* 469 Mich 642, 652 (2004).

In *Waltz,* this Court held that although the filing of a notice of intent in compliance with MCL 600.2912b tolls the two-year period of limitations, MCL 600.5805(6), it does not toll the additional period permitted for filing wrongful death actions under the wrongful death saving provision, MCL 600.5852, because MCL 600.5856(d) only tolls the applicable "statute of limitations" and the wrongful death saving provision is not a statute of limitations.

In footnote 14 of *Waltz*, *supra* at 652, we stated, "Potentially, then, under §§ 5805(5), 5852, and 5856(d), plaintiff had *five years plus 182 days* to commence her lawsuit following the accrual of her cause of action." (Emphasis in original.) Plaintiff states that the only possible way the period for filing a complaint can be extended to "five years plus 182 days" is if the filing of the notice of intent tolls the additional period permitted for filing wrongful death actions under the wrongful death saving provision. I respectfully disagree.

A plaintiff may have "five years plus 182 days" to file a complaint if the plaintiff files a notice of intent before the expiration of the two-year limitations period. If a plaintiff files a notice of intent before the expiration of the two-year limitations period, this period may be tolled for 182 days and, if the plaintiff is issued letters of authority one year and 182 days after filing the notice of intent, the plaintiff may have until three years after the period of limitations has run to file a complaint. Two years, plus 182 days, plus three years equals "five years plus 182 days." Therefore, a plaintiff may have "five years plus 182 days" to file a complaint, not because the additional period permitted for filing a wrongful death action under the wrongful death saving provision is tolled, but because the two-year limitations period is tolled.

CAVANAGH, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal to reconsider *Waltz v Wyse*, 469 Mich 642 (2004).

Leave to Appeal Denied April 21, 2006:

HALL v DEPARTMENT OF CORRECTIONS, No. 128968. The motion to add issues is denied. The motion to file amended reply brief is granted. Court of Appeals No. 259951.

CORRIGAN, J. (*concurring*). I concur in the order denying leave to appeal. Petitioner, a prisoner in a state correctional facility, was found guilty at a formal disciplinary hearing of being an accomplice to an attempted escape and to possession of dangerous contraband. His request for a rehearing was denied. He then filed a petition for appellate review in the circuit court, but the court dismissed the petition because it was not filed within 60 days of the denial of the motion for rehearing, as required by MCL 791.255(2). The Court of Appeals denied petitioner's application for leave to appeal.

Petitioner then applied for leave to appeal in this Court. In his application, petitioner attempted to explain why his petition was not filed timely in the circuit court. He asserted that he had mailed the appeal documents to a friend before the filing deadline, and that when the friend mailed the documents back to the prison, the prison officials refused to turn the papers over to petitioner because they contained information regarding another prisoner's escape.

Justice KELLY's dissenting statement repeats the above accusations that petitioner has leveled, but Justice KELLY fails to mention that this Court has already ordered, received, and considered a response from the Attorney General on this matter. In his response, the Attorney General states that an administrative hearing was held, at which the rejection of the mail was upheld. There was no indication at the hearing that the rejected mail delivery contained petitioner's appeal papers.

The Attorney General also attached a response to a grievance that was prepared following the administrative hearing upholding the rejection of the mail. This grievance response reflects that the mail was not allowed into the correctional facility for the following reasons:

> 1. It was for the purposes of operating a business enterprise from within the facility.
>
> 2. The publications enclosed in the mail were not received directly from a vendor.
>
> 3. *It depicted, encouraged, or described methods of escape from a correctional facility*.
>
> 4. *It was written in code, or in a foreign language that could not be interpreted by institutional staff to the extent necessary to conduct an effective search*. [Grievance response (emphasis added).]

In any event, the Attorney General states that petitioner had full access to the prison law library and copy facilities. Petitioner could easily have prepared and mailed the simple, two-page petition form that was required to file a timely appeal in the circuit court. Thus, the rejection of the mail did not affect petitioner's ability to perfect a timely appeal.

In light of the Attorney General's response, I find no basis to conclude that the prison officials were responsible for petitioner's untimely filing of his appeal. Accordingly, I concur in the denial of the application for leave to appeal.

KELLY, J. (*dissenting).* Petitioner, an inmate in the state prison system, was found guilty at a formal disciplinary hearing of being an accomplice to an attempted escape and to possession of dangerous contraband. He sought leave to appeal in the circuit court, but his papers arrived after the expiration of the 60-day deadline. The reason for his late filing, petitioner claims, is that prison officials delayed his application.

Petitioner asserts that he mailed appeal papers to a friend for advice and photocopying well before the filing deadline. The friend mailed the requested copies to petitioner at the prison, and they were delivered there on April 30, 2004. The deadline for filing petitioner's appeal was May 6. But the prison officials refused to turn the papers over to petitioner because, they asserted, they contained information on another prisoner's escape.

The prison officials did not notify petitioner that the papers were being held until May 4, 2004. Petitioner immediately requested an administrative hearing, and one was held on May 18, 2004. The prison officials still refused to give petitioner the papers after the conclusion of the hearing. Petitioner relates that he then prepared new papers and mailed them to the court as a delayed petition on May 26, 2004. The petition was received and filed at the circuit court on June 2, 2004, 27 days after the deadline. The circuit court dismissed petitioner's appeal because a delayed application is not permitted under the statute.

After the Court of Appeals refused to hear his case, petitioner appealed to this Court. He urges that his application for leave should be granted and that the original filing deadline should be deemed tolled. He claims that, but for the prison officials' conduct, his appeal would have been filed on time.

I would remand this case to the circuit court for a determination whether petitioner could have filed within the deadline but for the acts of the prison officials. If the court were to find that the prison officials precluded petitioner's timely filing, the appeal should be heard as if the petition had been filed on time.

PEOPLE V GUSTER, No. 129800; Court of Appeals No. 256196.

KELLY, J. (*dissenting*). The complainant, defendant's girlfriend, accused him of sexually assaulting her. Defendant contended that any sexual contact between them was consensual. The jury believed the complainant and convicted defendant of criminal sexual conduct in the third degree.

Defendant appealed to the Court of Appeals, arguing, among other things, that the judge denied him a fair trial by consistently referring to the complainant in the jury's presence as "the victim." The Court of Appeals recognized that the judge had repeatedly used the term "victim" in place of "complainant." But it concluded that the judge's instruction to the jury to disregard any apparent bias by the court was sufficient to protect defendant's rights. I cannot agree.

Conviction or exoneration in this case hinged on the credibility of defendant and of the complainant. The jury's verdict may have teetered on a small point. The trial judge's repeated reference to the complainant as "the victim" could have tipped the jury in favor of conviction.

I am aware that MCL 750.520a(p) defines "the person alleging to have been subjected to criminal sexual conduct" as "the victim." But, referring to the complainant as "the victim" where a factual question exists whether there even was a victim necessarily places the defendant at an unfair disadvantage. In such cases, I believe that the judge should not use the statutory term for the complaining witness during a jury trial.

I disagree with the Court of Appeals conclusion that the curative instruction safeguarded defendant's right to a fair trial. When a judge repeatedly suggests to jurors that there was a victim, it is improbable that a simple instruction suffices to remove the thought from the jurors' minds.

In this case the judge's references to the complainant as the victim had the practical effect of undermining defendant's defense that there had been no victim. For these reasons, I would reverse the decision of the Court of Appeals, vacate defendant's conviction, and remand this case for a new trial.

The facts here illustrate the importance, when cases are tried before juries, of trial judges remaining constantly vigilant not to inappropriately influence jurors' decisions. The right to a fair trial being a cornerstone of our jurisprudence, judges must make every effort to ensure that those accused of committing a crime receive a fair trial. It is crucial for trial judges to remember the powerful influence they exert over juries. A judge's suggestion to the jury that the accuser is truthful places the fairness of the proceedings in doubt, and the standard jury instruction should not be relied on to erase it.

REID v CITY OF DETROIT, No. 129884; Court of Appeals No. 254449.

MARKMAN, J. (*concurring*). I concur in the decision to deny leave to appeal on the basis that plaintiffs' claims are barred by governmental immunity, see MCL 691.1407(1); *Pohutski v City of Allen Park,* 465 Mich 675 (2002), and do not meet the requirements of a compensable taking, see *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537 (2004), lv den 472 Mich 943 (2005).

I write separately to bring to the Legislature's attention that this is at least the third recent case in which property owners in Detroit have suffered losses of their property because of negligent maintenance of an adjacent property owned by the city. See also *Farmers Ins Group v Dep't of Natural Resources* (Docket No. 128893), lv den 469 Mich 1055 (2006); and *Farm Bureau Insurance v Detroit* (Docket No. 129631), lv pending. I urge the Legislature to consider whether, in view of current governmental immunity and takings law in Michigan, further legal remedies are warranted for property owners in these circumstances.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v SPRATT, No. 130197; Court of Appeals No. 254767.

KELLY, J. (*dissenting).* I would deny defendant's application for leave to appeal. However, I would vacate the armed robbery conviction on double jeopardy grounds and remand the case to the trial court for correction of the judgment of sentence. Although defendant did not raise a double jeopardy argument, his codefendant Jackson did raise the issue and the Court of Appeals vacated Jackson's armed robbery conviction.

People v Jackson, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2005 (Docket No. 254768); lv den 474 Mich 1094 (2006). In the interest of consistency and equal justice, the same result should apply for defendant.

CAVANAGH, J. I concur in the statement of Justice KELLY.

Interlocutory Appeal

Leave to Appeal Denied April 21, 2006:

ELIZANDO v GOFF, No. 130752; Court of Appeals No. 265072.

Reconsideration Denied April 24, 2006:

MACLACHLAN v CAPITAL AREA TRANSPORTATION AUTHORITY, No. 128131. Summary disposition entered at 474 Mich 1059. Court of Appeals No. 252221.

Summary Dispositions April 26, 2006:

DEPARTMENT OF EDUCATION v GROSSE POINTE PUBLIC SCHOOLS, Nos. 129249, 129250. The motion to file brief amicus curiae is granted. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals. The Court of Appeals erred in considering the substance of the issues involved in this case because, as stated by dissenting Court of Appeals Judge TALBOT, those issues are moot in light of the fact that Grosse Pointe Public Schools has paid for the individual educational evaluation at issue. Although the Court of Appeals correctly cited the test for determining when a moot issue ought to be reviewed, i.e., when "the issue is one of public significance that is likely to recur, yet evade judicial review," *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112 (2002), we agree with the dissent that the Court erred in considering the issues on the basis of a mere finding that the issues "could" recur and evade judicial review. We do not retain jurisdiction. Reported below: 266 Mich App 258.

In re CUMMIN ESTATE (MURPHY v HEGYI), No. 129622. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse that part of the judgment of the Court of Appeals that affirmed the probate court's imposition of a constructive trust on the proceeds of respondent's sale of the property at issue. Judge WILDER correctly concluded in *In re Cummin Estate*, 258 Mich App 402 (2003), that an agent may engage in self-dealing if the principal consents and has knowledge of the details of the transaction and the passage of time and the change in decedent's mental status could not affect respondent's authority to transfer the property if decedent had consented to the transaction with knowledge of its details. *Id.*, pp 409-410. Judge WILDER also correctly concluded that the Estates and Protected Individuals Code (EPIC) prohibition against self-dealing, MCL 700.1214, does not apply because respondent had an accrued right in the property before EPIC took effect on April 1, 2000, MCL

700.8101(2)(d). *Id.*, p 408. Application of these conclusions to the probate court's factual findings that respondent and her husband credibly testified that decedent requested respondent to transfer the property to herself, together with the lack of any evidence that decedent ever changed her mind in that regard, preclude the imposition of a constructive trust in favor of decedent's estate. We remand this case to the Clare County Probate Court for further proceedings consistent with this order. The application for leave to appeal as cross-appellant is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Reported below: 267 Mich App 700.

CAVANAGH and WEAVER, JJ. We would grant leave to appeal.

WINKLER v CAREY, No. 130300. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reasons stated in Judge O'CONNELL's dissenting opinion, and remand to the Roscommon Circuit Court for further proceedings not inconsistent with this order. Court of Appeals No. 255193.

Reconsideration Denied April 26, 2006:

JAMES v AUTO LAB DIAGNOSTICS & TUNE UP CENTERS, No. 128355. Summary disposition entered at 474 Mich 1061. Court of Appeals No. 257993.

Leave to Appeal Denied April 26, 2006:

FROMM v MEEMIC INSURANCE COMPANY, No. 127659. The motion to file brief amicus curiae is granted. Reported below: 264 Mich App 302.

CAVANAGH and CORRIGAN, JJ. We would grant leave to appeal.

WILLIAMSON v FORD MOTOR COMPANY, No. 128287; Court of Appeals No. 250218.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

FOURNIER v WRIGHT, No. 129122; Court of Appeals No. 261503.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v HASKELL, No. 129303. The motion to appear and practice is denied as moot. Court of Appeals No. 251929.

In re DAVIS (PEOPLE v DEMARCUS DAVIS), No. 129437; Court of Appeals No. 254527.

CAVANAGH, KELLY, and MARKMAN, JJ. We would grant leave to appeal.

SAUKAS v WALKER STREET PHARMACY, INC, No. 129473. The motion for leave to file brief amicus curiae is granted. Court of Appeals No. 260560.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

SMITH v MONCZUNSKI, No. 129483; Court of Appeals No. 260581.

PEOPLE v MARY MOORE, No. 129488. The application for leave to appeal is denied as moot. Court of Appeals No. 264113.

PICKETT-HOLMES v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 129623; Court of Appeals No. 253058.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

TULL v WTF, INC, No. 129665; Court of Appeals No. 252683.

PERCH RESEARCH INTERNATIONAL, INC v WESTFIELD INSURANCE COMPANY, No. 129667. The motion for stay is denied as moot. Court of Appeals No. 252758.

WEAVER, CORRIGAN, and MARKMAN, JJ. We would grant leave to appeal for the reasons set forth in the Court of Appeals dissent.

MARLO BEAUTY SUPPLY, INC v FARMERS INSURANCE GROUP OF COMPANIES, No. 129751. The application for leave to appeal the May 26, 2005, judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The application for leave to appeal as cross-appellant is also considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the portion of the Court of Appeals judgment that reverses and remands this case to the Wayne Circuit Court for further proceedings, and reinstate the February 21, 2003, judgment of the Wayne Circuit Court. The Court of Appeals erred in remanding this case to the Wayne Circuit Court for an examination of the elements of a claim of forgery in light of the clear and convincing standard of proof, because plaintiffs did not have to prove forgery or fraud to prove coverage under the applicable insurance contract. Court of Appeals No. 247224.

YOUNG, J., did not participate.

PEOPLE v JOHN T WILLIAMS, JR, No. 129842; reported below: 268 Mich App 416.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PAOLINI v KMART CORPORATION, No. 129862; Court of Appeals No. 262461.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v GORDON BUSH, No. 129933; Court of Appeals No. 264936.

GHAFFARI v TURNER CONSTRUCTION COMPANY, No. 129958; reported below: 268 Mich App 460.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v DEANDREA FREEMAN, No. 130103; Court of Appeals No. 253553.

BURLESON v AUTO CLUB INSURANCE ASSOCIATION, No. 130131; Court of Appeals No. 263288.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

HENDERSON v HAMMER BUILDING AND RESTORATION, INC, No. 130299; Court of Appeals No. 255187.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

Order Granting Oral Argument in Cases Pending on Application for Leave to Appeal April 28, 2006:

ROHDE v ANN ARBOR PUBLIC SCHOOLS, No. 128768. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall address at oral argument only the issue of what constitutes an effective demand under MCL 129.61. They may file supplemental briefs, limited to this issue, within 28 days of the date of this order. Reported below: 265 Mich App 702.

Summary Disposition April 28, 2006:

PEOPLE v SESSIONS, No. 126514. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse and vacate the decision of the Court of Appeals. In petitioning for defendant's discharge from probation, defendant's probation officer stated on the Petition and Order for Discharge from Probation that defendant had "complied with teh [sic] terms and conditions of [his] probation." The prosecutor did not challenge the accuracy of this assertion by defendant's probation officer. By signing the Petition and Order for Discharge from Probation, the circuit judge adopted this assertion by defendant's probation officer and, thus, concluded as a matter of law that defendant had "successfully completed all conditions of probation" for the purposes of MCL 750.224f(1)(c). The prosecutor did not seek leave to appeal that order pursuant to MCR 7.203(B)(1) and (E), and MCL 770.12(2), and may not collaterally attack that order in this case. Reported below: 262 Mich App 80.

CAVANAGH, J. I concur with the result.

MARKMAN, J. (*concurring*). I join in the Court's order, but I am prompted to write separately by Justice KELLY's dissenting statement. It is not to "dodge" an argument for a court to rely on an alternative argument in resolving a case. I do not necessarily disagree with Justice KELLY's substantive analysis and this Court doubtlessly will have the opportunity to consider it in a future case. In the meantime, the Court of Appeals opinion to which Justice KELLY takes such objection has been *vacated*. As such, it has no precedential value and thus will serve as no barrier to the adoption of Justice KELLY's analysis in the proper case.

WEAVER, J. (*dissenting*). I dissent from the Court's order reversing and vacating the judgment of the Court of Appeals. I would grant leave to appeal to hear full argument on this question of major significance to the state's jurisprudence.

KELLY, J. (*dissenting*). Despite having considered this case for nearly a year, the Court is unable to resolve the issue raised by the parties. Hence, the majority has resorted to peremptorily reversing the Court of Appeals judgment on an issue of its own creation. The parties never raised this issue and have not been given the opportunity to address it.

The sole issue that the prosecutor presented to us is whether a felon has successfully completed all the conditions of probation by being

unconditionally discharged from probation. It is a question of statutory construction involving an ex-felon's right to possess a firearm under MCL 750.224f(1)(c).

The majority resolves the appeal on the basis of collateral attack. At the very least, this Court should grant leave to appeal to provide the parties an opportunity to respond to the collateral attack issue.

The background of this case is the following: The Court of Appeals held that a felon who once violates any condition of probation can never successfully complete probation even if the judge unconditionally discharges the felon from it. Defendant Mark Sessions once violated a term of his probation by using drugs. Eventually, there having been no repetitions of the violation, he was unconditionally discharged from probation. However, the Court of Appeals found that, seven years after his discharge, Sessions violated the felon-in-possession statute by possessing a shotgun. The finding is based on the language of the statute that forbids possession of a firearm by anyone who did not "successfully" complete all conditions of probation.

THE MEANING OF "SUCCESSFULLY COMPLETED ALL CONDITIONS"

The question raised by the prosecutor is the meaning of the phrase "[t]he person has successfully completed all conditions of probation" in MCL 750.224f(1)(c). Because it is a matter of statutory construction, we review it de novo. *People v Kimble*, 470 Mich 305, 308-309 (2004). Our goal is to give effect to the Legislature's intent. *People v Koonce*, 466 Mich 515, 518 (2002). To do so, we start with the language of the statute itself.

When, as here, a statute does not contain internal definitions of terms used in it, we give the terms their common, ordinary meaning. Under these circumstances, it can be helpful to consult dictionary definitions. *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 522 (2004).

The parties dispute the meaning of "successfully" in this statute. A Webster's dictionary defines the root word "success" as "the favorable or prosperous termination of attempts or endeavors." *Random House Webster's College Dictionary* (2001). Applying that definition, in order to be "successful," a defendant must achieve a favorable termination of all conditions of probation. This is the only means of satisfying MCL 750.224f(1)(c).

In this case, defendant did achieve a favorable termination. His probation conditions favorably terminated when the court unconditionally discharged him from probation. The judge left no lingering probation requirement for defendant to complete. He was free from court supervision without the obligation to report to a probation officer. Therefore, he successfully completed all conditions of probation.

It seems obvious to me that a person has "successfully completed" all conditions of probation when there are no more conditions left to complete. Where, as here, the trial judge ascertained that defendant has "complied with the terms and conditions of probation," there is nothing left for defendant to do. He has "successfully" complied with all of his

legal obligations because no conditions remain. Where once there were five conditions to satisfy, now there is none.

As well as being true to the meaning of the terms in MCL 750.224f(1), my interpretation is consistent with its structure. MCL 750.224f(1)(a)[1] and (1)(b)[2] both refer to specific, identifiable dates. MCL 750.224f(1)(a) describes the date when all fines have been paid. MCL 750.224f(1)(b) describes the date when all terms of imprisonment have been served. Thus, it would make sense for MCL 750.224f(1)(c) to be read as representing a similarly specific point in time: the date when a defendant is released from probation. The statute has a consistency of structure. This consistency suggests the interpretation that I have made.

"SUCCESSFULLY" IS NOT NECESSARILY "PERFECTLY"

The decision of the Court of Appeals essentially replaces the word "successfully" with "perfectly." The root word of perfectly, "perfect," can be defined as "conforming absolutely to the description or definition of an ideal type . . . ." *Random House Webster's College Dictionary* (2001). The Court of Appeals would require a person on probation, in order to again be entitled to possess a firearm, to conform in absolute terms to the conditions of probation.

But the Legislature chose to use "successfully," not "perfectly." Without good cause to conclude otherwise, we must assume that it chose the word purposely and intentionally. *Detroit v Redford Twp*, 253 Mich 453, 456 (1931). There is no reason to believe that the Legislature inadvertently used "successfully," intending another word. Therefore, "successfully" should not be read as "perfectly."

The Court of Appeals majority concluded that reading MCL 750.224f(1)(c) as I have read it renders meaningless the phrase "all conditions." Certainly, where possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory by a court's interpretation. *People v Warren*, 462 Mich 415, 429 n 24 (2000).

But, in fact, my interpretation leaves no word out. "All" conditions means "the whole number of" or "every one" of the conditions. *Random House Webster's College Dictionary* (2001). Hence, a probationer must complete every one of the conditions of probation before the three-year waiting period for the restoration of the right to possess a firearm can begin to run. MCL 750.224f(1).

By using this phrasing, the Legislature indicated that substantial completion of probation is insufficient to start the clock running toward restoration. For instance, if the court released a probationer from all the conditions of probation except one, that probationer would not have

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[1] MCL 750.224f(1)(a) requires that "[t]he person has paid all fines imposed for the violation."

[2] MCL 750.224f(1)(b) requires that "[t]he person has served all terms of imprisonment imposed for the violation."

satisfied the requirements of MCL 750.224f(1)(c). The probationer would satisfy that subsection only by fulfilling the final condition of probation. Then, as required by the Legislature, the probationer would have completed "all conditions of probation."

The Court of Appeals majority believed that its interpretation is correct because it comports with the Legislature's intent to keep guns out of the hands of those most likely to misuse them. *People v Sessions*, 262 Mich App 80, 86 (2004). But its logic is circular. It concluded that people who once violated a condition of probation pose a threat to public safety because they once violated a condition of probation. It attempted to support its position by stating its conclusion as a premise. This logical fallacy does not persuade me to depart from the common, ordinary understanding of the words chosen by the Legislature.

CONCLUSION

A felon successfully completes all conditions of probation for purposes of MCL 750.224f(1)(c) when the court discharges the felon from probation. This Court has not adopted the prosecutor's reading of the statute. As a consequence, there exists no judicial determination that a judge is authorized to include in an order discharging a probationer that the probation was unsuccessfully completed. It is a concept beyond the ken of MCL 750.224f(1)(c).

In this case, Mark Sessions was discharged from probation and, three years later, regained the right to possess a firearm under MCL 750.224f(1). He was accused of an act of domestic violence almost seven years after his discharge. Since, by then, he had satisfied the statutory conditions to possess a firearm, he could not be convicted of violating MCL 750.224f(1) on the grounds that he owned a shotgun.[3] Therefore, I would reverse the judgment of the Court of Appeals and reinstate the circuit court's affirmance of the district court's dismissal of the felon-in-possession charge.

I take exception to the majority's avoidance of this issue and its focus on an irrelevant issue not raised or addressed by the parties.

Leave to Appeal Denied April 28, 2006:

PEOPLE v BASAT, No. 128928; Court of Appeals No. 252518.

FREEDMAN v BUREAU OF HEALTH SERVICES, No. 129333; Court of Appeals No. 261640.

HOLWERDA BUILDERS, LLC v GRATTAN TOWNSHIP, No. 129361. The motion to dismiss is denied as moot. Court of Appeals No. 260711.

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[3] Defendant also claimed that the Court of Appeals interpretation of MCL 750.224f(1) made the statute unconstitutionally vague and ambiguous. Given that I conclude that the Court of Appeals incorrectly interpreted the statute, I need not reach this issue.

PEOPLE v BARTELL, No. 129595. The motion to expand argument is granted. Court of Appeals No. 263848.

PEOPLE v BRANAM, No. 129714; Court of Appeals No. 254522.

PEOPLE v BULMER, No. 129836. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261200.

PEOPLE v BIBLER, No. 129875. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260649.

PEOPLE v SHERMAN, No. 129881. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260939.

PEOPLE v JUSTLY JOHNSON, No. 129894. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motions for appointment of counsel and to remand are denied. Court of Appeals No. 261366.

PEOPLE v DONALD PARKER, No. 129901. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261078.

PEOPLE v DOCKETT, No. 129902. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260886.

PEOPLE v HENTSCHEL, No. 129932; Court of Appeals No. 255239.

PEOPLE v KURTZ, No. 129939; Court of Appeals No. 254028.

PEOPLE v DOMONECK HUNTER, No. 129941; Court of Appeals No. 265260.

PEOPLE v SIDNEY GORDON, No. 129942. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for miscellaneous relief is denied. Court of Appeals No. 255815.

PEOPLE v BURKETT, No. 129951; Court of Appeals No. 254996.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v COTTRELL, No. 129957; Court of Appeals No. 264336.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v LESANE, No. 129961; Court of Appeals No. 256493.

PEOPLE v FERQUERON, No. 129965. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motions to remand are denied. Court of Appeals No. 261742.

PEOPLE v DENSON, No. 129966; Court of Appeals No. 254241.

PEOPLE v ARDITO, No. 129968. The motion to adjourn the case is denied. Court of Appeals No. 261816.

PEOPLE v ROGALSKI, No. 129975. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). The motion to amend is denied. Court of Appeals No. 264011.

PEOPLE v JOHN STINSON, No. 129978. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262129.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v BOWEN, No. 129985; Court of Appeals No. 264116.

PEOPLE v CHARLES JONES, No. 129997; Court of Appeals No. 256613.

PEOPLE v RHASHI HARRIS, No. 130002; Court of Appeals No. 255424.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v MATLOCK, No. 130004; Court of Appeals No. 264344.

PEOPLE v PIERRE MCCALL, No. 130006. The motion to raise new issues is granted. Court of Appeals No. 252753.

PEOPLE v STEVENS, No. 130025; Court of Appeals No. 265029.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

DANTUMA v SPECTRUM HEALTH, No. 130028; Court of Appeals No. 262867.

PEOPLE v BEEMAN, No. 130036; Court of Appeals No. 265295.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v DEONTA BUTLER, No. 130037; Court of Appeals No. 265300.

PEOPLE v JIMANAROJ, No. 130042. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261753.

PEOPLE v WITCHER, No. 130048. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261622.

PEOPLE v STURGESS, No. 130051; Court of Appeals No. 263964.

KELLY, J. I would grant leave to appeal to consider adoption of a prison mailbox rule in Michigan.

PEOPLE v KOYAN SANDERS, No. 130067. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 263782.

PEOPLE v DONALD MARSHALL, No. 130072; Court of Appeals No. 255573.

PEOPLE v WILLIE MONROE, No. 130074; Court of Appeals No. 254008.

PEOPLE v CHRISTOPHER MOORE, No. 130080; Court of Appeals No. 256302.

PEOPLE v DESMOND WILLIAMS, No. 130084. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262021.

PEOPLE v GLENN, No. 130085; Court of Appeals No. 252732.

PEOPLE v HOLTON, No. 130086. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 264350.

PEOPLE v MOX, No. 130088. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is denied. Court of Appeals No. 261954.

KELLY, J., did not participate.

PEOPLE v EDWARD MARSHALL, JR, No. 130091. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261990.

PEOPLE v KENNY ALLEN, No. 130094. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262123.

PEOPLE v FROEBER, No. 130096; Court of Appeals No. 265708.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v SHISLER, No. 130098; Court of Appeals No. 256122.

PEOPLE v LISA MEYER, No. 130104; Court of Appeals No. 264851.

PEOPLE v JUMAREO JAMES, No. 130111; Court of Appeals No. 264456.

PEOPLE v LEROY NASH, No. 130112; Court of Appeals No. 265208.

PEOPLE v CHARLES HOLLOWAY, II, No. 130113; Court of Appeals No. 256436.

PEOPLE v AROCHA, No. 130117; Court of Appeals No. 256443.

PEOPLE v MCCRAY, No. 130118; Court of Appeals No. 265211.

PEOPLE v MICHAEL WILLIS, No. 130129. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261171.

PEOPLE v FRANKLIN, No. 130133; Court of Appeals No. 256067.

PEOPLE v TRAVIS, No. 130135. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand is denied. Court of Appeals No. 262235.

PEOPLE v WILEY, No. 130151; Court of Appeals No. 265771.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

MORPHIS v DUTKA, No. 130153; Court of Appeals No. 254316.

PINGLE v POWERS, No. 130156; Court of Appeals No. 263714.

PEOPLE v ERICK REED, No. 130160; Court of Appeals No. 256305.

PEOPLE v JEFFERIES, No. 130161; Court of Appeals No. 265347.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v KENNETH HART, No. 130162. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 263219.

CITIZENS INSURANCE COMPANY v SCHOLZ, Nos. 130163, 130165, 130167; reported below: 268 Mich App 659.

ELLINGER v ALLSTATE INSURANCE COMPANY, No. 130173; Court of Appeals No. 263270.

PEOPLE v JENDRZEJEWSKI, No. 130174. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 263878.

PEOPLE v NORTHINGTON, No. 130175. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 266115.

PEOPLE v BRUCKNER, No. 130178; Court of Appeals No. 257356.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v VANLEER, No. 130180; Court of Appeals No. 255084.

PEOPLE v GEORGE COLEMAN, JR, No. 130183; Court of Appeals No. 265583.

PEOPLE v JOHNIE WILLIAMS, No. 130184; Court of Appeals No. 256442.

DEPARTMENT OF TRANSPORTATION v FARMLAND MUTUAL INSURANCE COMPANY, No. 130189; Court of Appeals No. 261717.

NORMAN v WAYNE CIRCUIT JUDGE, No. 130193; Court of Appeals No. 265922.

PEOPLE v DOBBINS, No. 130205. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to compel discovery is denied. Court of Appeals No. 260995.

OCWEN FEDERAL BANK, FSB v INTERNATIONAL CHRISTIAN MUSIC MINISTRY, INC, No. 130217; Court of Appeals No. 249081 (on remand).

PEOPLE v DITTRICH, No. 130218; Court of Appeals No. 255536.

PEOPLE v DEANDRE KNIGHT, No. 130220; Court of Appeals No. 255259.

PEOPLE v SINGERSKI, No. 130221; Court of Appeals No. 263776.

PEOPLE v HARDY, No. 130222. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 266043.

PEOPLE v HAMER, No. 130231; Court of Appeals No. 262926.

PEOPLE v LAWRENCE, No. 130235; Court of Appeals No. 265584.

PEOPLE v DENNIS GLOVER, No. 130236; Court of Appeals No. 265737.

PEOPLE v ODOM, No. 130237. Defendant's motion for a competency hearing is also denied. Court of Appeals No. 266313.

CHANEY v WHYBARK, No. 130238; Court of Appeals No. 262526.

PEOPLE v ELDON WILLIAMS, No. 130240; Court of Appeals No. 265834.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE OF THE CITY OF ROCHESTER v FISHER, No. 130247; Court of Appeals No. 263985.

PEOPLE v HILER, No. 130250; Court of Appeals No. 264967.

FAWCETT v ESTATE OF MEYER, No. 130251. The motion to strike is denied. Court of Appeals No. 253819.

PEOPLE v MCCOY, No. 130256; Court of Appeals No. 266212.

PEOPLE v FOSTER, No. 130259; Court of Appeals No. 254860.

PEOPLE v MARCUS WILLIAMS, No. 130261; Court of Appeals No. 255876.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v FURGALA, No. 130262; Court of Appeals No. 256440.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v D'AVANZO, No. 130263; Court of Appeals No. 256438.

PEOPLE v MICHAEL ROBERTSON, No. 130265; Court of Appeals No. 255233.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v RYAN EMERY, No. 130276; Court of Appeals No. 264773.

PEOPLE v KEITH E SMITH, No. 130277; Court of Appeals No. 257026.

PEOPLE v HERRON, No. 130278. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 261891.

PEOPLE v LOGGINS, No. 130280; Court of Appeals No. 256741.

PEOPLE v BETHUNE, No. 130281; Court of Appeals No. 257079.

PEOPLE v SOUTHARD, No. 130285; Court of Appeals No. 266838.

PRODUCE PALACE INTERNATIONAL, INC v L J ROLLS REFRIGERATION COMPANY, No. 130288; Court of Appeals No. 256774.

DONKERS v LIVONIA POLICE DEPARTMENT, No. 130297; Court of Appeals No. 262348.

WAITE-TRAGO v HOWELL PUBLIC SCHOOLS, No. 130302; Court of Appeals No. 263340.

PEOPLE v RALSTON, No. 130303; Court of Appeals No. 253184.

PEOPLE v ROUSE, No. 130308; Court of Appeals No. 256494.

PEOPLE v MARR, No. 130311; Court of Appeals No. 265591.

PEOPLE v ALFRED COOPER, No. 130313. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 262269.

PEOPLE v BROADEN, No. 130316; Court of Appeals No. 256561.

PEOPLE v REGINALD MONTGOMERY, No. 130321; Court of Appeals No. 255689.

In re LAY, No. 130322; Court of Appeals No. 264895.

KOSMAL v AMERITECH, No. 130324; Court of Appeals No. 254144.

CLARK v HUCKLEBERRY, No. 130325; Court of Appeals No. 263044.

PEOPLE v FARNER, No. 130329; Court of Appeals No. 256179.

PEOPLE v SCHNELL, No. 130335; Court of Appeals No. 266067.

PEOPLE v DESHAWN BROWN, No. 130339; Court of Appeals No. 257660.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

KING OF THE WIND FARMS, INC v MICHIGAN COMMISSION OF AGRICULTURE, No. 130340; Court of Appeals No. 257097.

PEOPLE v DEARIC PAYNE, No. 130343; Court of Appeals No. 265078.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v ALVIN WILLIAMS, No. 130345; Court of Appeals No. 264997.

TROUPE v PROVIDENT CONSUMERS FINANCIAL, No. 130346; Court of Appeals No. 263285.

PEOPLE v LYLE, No. 130348. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 266915.

PEOPLE v O'NEILL, No. 130350; Court of Appeals No. 256016.

PEOPLE v LANDRUM, No. 130351; Court of Appeals No. 257441.

PEOPLE v DAMON PERRY, No. 130355. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 264843.

PEOPLE v AVERILL, No. 130357; Court of Appeals No. 266526.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v BURNETT, No. 130359; Court of Appeals No. 266836.

PEOPLE v SAM BROOKS, No. 130360; Court of Appeals No. 258259.

ANDERSON v MERIDIAN CHARTER TOWNSHIP, No. 130362; Court of Appeals No. 262168.

PEOPLE v CHRISTIAN, No. 130372; Court of Appeals No. 265953.

PEOPLE v JAMES BELL, No. 130375; Court of Appeals No. 266040.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

ATTORNEY GENERAL v FLINT CITY COUNCIL, No. 130384. The motion to withdraw application is granted, with the exception of the request for costs, which is denied. Reported below: 269 Mich App 209.

PEOPLE v CHRISTOPHER JAMES, No. 130391; Court of Appeals No. 257585.

TERRY v DAIMLERCHRYSLER CORPORATION, No. 130404. The motions to strike and for miscellaneous relief are denied. Court of Appeals No. 263339.

CITY OF EAST LANSING v DEPARTMENT OF STATE POLICE, No. 130423; reported below: 269 Mich App 333.

PEOPLE v ERIC LEE, No. 130427; Court of Appeals No. 257163.

DAIMLERCHRYSLER CORPORATION v CARSON, No. 130436; Court of Appeals No. 255435.

PEOPLE v RAYMOND CLARK, No. 130439; Court of Appeals No. 257106.

PEOPLE v RUBIN STONE, No. 130447; reported below: 269 Mich App 240.

PEOPLE v RUFF, No. 130457; Court of Appeals No. 266284.

COLLIER v PRUZINSKY, No. 130471; Court of Appeals No. 265894.

JEWELL v ELECTROLUX NORTH AMERICA, INC, No. 130480; Court of Appeals No. 264938.

In re CONTEMPT OF MURDOCK (AMERICAN AXLE & MANUFACTURING, INC v MURDOCK), No. 130559. The motion for immediate consideration is granted. The motion for stay is denied. Court of Appeals No. 262786.

ADAMS v BOARD OF STATE CANVASSERS, No. 130602. Because the Court of Appeals has issued its March 30, 2006, order in this case, the application for leave to appeal prior to decision by the Court of Appeals is treated as an application for leave to appeal from that decision. The application is considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 268616.

Reconsiderations Denied April 28, 2006:

PEOPLE v PATRICK LEWIS, No. 127261. Summary disposition entered at 474 Mich 1056. Court of Appeals No. 244589.

WEAVER, J. I would grant reconsideration.

CORRIGAN, J. I would grant reconsideration and, on reconsideration, would accord the parties the opportunity to file supplemental briefs before acting to reverse the judgment of the Court of Appeals.

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN v HALLER, No. 128841. Leave to appeal denied at 474 Mich 1057. Court of Appeals No. 250272.

MARKMAN, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

KIM v KIA MOTORS AMERICA, No. 128916. Leave to appeal denied at 474 Mich 1018. Court of Appeals No. 260071.

HOUSEHOLD BANK (NEVADA), NA v SMITH, No. 129126. Leave to appeal denied at 474 Mich 1024. Court of Appeals No. 259650.

NISWONGER v QUALITY DAIRY COMPANY, No. 129314. Leave to appeal denied at 474 Mich 1055. Court of Appeals No. 251885.

CAVANAGH, J. I would grant reconsideration.

KELLY, J. I would grant reconsideration and, on reconsideration, would reverse the judgment of the Court of Appeals and reinstate the Ingham Circuit Court's October 16, 2003, denial of defendant's motion for summary disposition for the reasons stated by the circuit court.

FOSTER v DOW CORNING CORPORATION, No. 129336. Leave to appeal denied at 474 Mich 1024. Court of Appeals No. 254539.

PEOPLE v GROVE, No. 129357. Leave to appeal denied at 474 Mich 989. Court of Appeals No. 255397.

CAVANAGH, J. I would grant reconsideration.

KELLY, J. I would grant reconsideration and, on reconsideration, would hold this case in abeyance for *Davis v Washington,* cert gtd ___ US ___; 126 S Ct 547; 163 L Ed 2d 458 (2005).

FARLEY v ADVANCED CARDIOVASCULAR HEALTH SPECIALISTS, PC, Nos. 129391, 129392, 129393. Leave to appeal denied at 474 Mich 1019. Reported below: 266 Mich App 566.

CAVANAGH and KELLY, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v EARLE, No. 129445. Leave to appeal denied at 474 Mich 1069. Court of Appeals No. 244245.

MEDALIST GOLF CLUB, LLC v BANK ONE OF MICHIGAN, No. 129608. Leave to appeal denied at 474 Mich 1025. Court of Appeals No. 257625.

RIVERS v MOORE, No. 129627. Leave to appeal denied at 474 Mich 1069. Court of Appeals No. 261547.

PEOPLE v JAMES MCQUEEN, No. 129686. Leave to appeal denied at 474 Mich 1026. Court of Appeals No. 252871.

PEOPLE v DAVID STEWART, No. 129703. Leave to appeal denied at 474 Mich 983. Court of Appeals No. 260618.

PEOPLE v DEAN JOHNSON, No. 129792. Leave to appeal denied at 474 Mich 1026. Court of Appeals No. 264292.

BURNETT v VASSAR, No. 129813. Leave to appeal denied at 474 Mich 1070. Court of Appeals No. 264132.

LAMAR v DEPARTMENT OF CORRECTIONS, No. 129953. Leave to appeal denied at 474 Mich 1071. Court of Appeals No. 262800.

PEOPLE v KEITH ROGERS, No. 129998. Leave to appeal denied at 474 Mich 1071. Court of Appeals No. 249496.

PEOPLE v LINDENSMITH, No. 130013. Leave to appeal denied at 474 Mich 1071. Court of Appeals No. 257259.

KELLY, J. I would grant reconsideration and, on reconsideration, would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

MURDOCK v WAYNE CIRCUIT JUDGE, No. 130107. Leave to appeal denied at 474 Mich 990. Court of Appeals No. 264482.

PEOPLE v MICHAEL WARD, No. 130255. Leave to appeal denied at 474 Mich 1072. Court of Appeals No. 265679.

PEOPLE v ACEVAL, No. 130784. Leave to appeal denied at 474 Mich 1109. Court of Appeals No. 269198.

Leave to Appeal Granted May 4, 2006:

HARTMAN & EICHHORN BUILDING COMPANY, INC v DAILEY, No. 129733. The motions for leave to file briefs amicus curiae are granted. The application for leave to appeal the May 26, 2005, judgment of the Court of Appeals is considered, and it is granted, limited to the questions involving the application of the Michigan Consumer Protection Act to residential

builders. We further order that this case be argued and submitted to the Court together with the case of *Liss v Lewiston-Richards, Inc* (Docket No. 130064), at such future session of the Court as both cases are ready for submission. Reported below: 266 Mich App 545.

THE GREATER BIBLE WAY TEMPLE OF JACKSON v CITY OF JACKSON, Nos. 130194, 130196. The motion to file amicus curiae brief is granted. The application for leave to appeal the November 10, 2005, judgment of the Court of Appeals is considered, and it is granted. We further order that this case be argued and submitted to the Court together with the case of *The Greater Bible Way Temple of Jackson v City of Jackson* (No. 130196), at such future session of the Court as both cases are ready for submission. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 268 Mich App 673.

AZZAR v CITY OF GRAND RAPIDS, No. 130310. The application for leave to appeal the September 22, 2005, judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether the Grand Rapids Building Maintenance Code is preempted by the Stille-DeRossett-Hale single state construction code act, MCL 125.1501 *et seq.*, as amended by 1999 PA 245. The Michigan Municipal League, the Michigan Townships Association, the Michigan Association of Counties, and the Public Corporation Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Court of Appeals No. 260438.

Interlocutory Appeal

Leave to Appeal Granted May 4, 2006:

LISS v LEWISTON-RICHARDS, INC, No. 130064. The application for leave to appeal before decision by the Court of Appeals is considered, and it is granted. We further order that this case be argued and submitted to the Court together with the case of *Hartman & Eichhorn Bldg Co v Dailey* (Docket No. 129733), at such future session of the Court as both cases are ready for submission. Court of Appeals No. 266326.

Summary Disposition May 4, 2006:

HARRINGTON v MICHIGAN MILLERS MUTUAL INSURANCE COMPANY, No. 129977. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 263564.

Leave to Appeal Denied May 4, 2006:

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES MICHIGAN COUNCIL 25 v CITY OF DETROIT, No. 129278; reported below: 267 Mich App 255.

SIEGEL v CITY OF MUSKEGON, No. 129406; Court of Appeals No. 254683.
WEAVER, J. I would grant leave to appeal.

STANTON v CANTON CHARTER TOWNSHIP, No. 129408. The application for leave to appeal the July 26, 2005, judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are considered, and they are denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 255716.
WEAVER, J. I would grant leave to appeal.

KOWALSKI v CITY OF LIVONIA, No. 129425; reported below: 267 Mich App 517.
WEAVER, J. I would grant leave to appeal.

VAN BAAK v CITY OF ST CLAIR SHORES, No. 129426; Court of Appeals No. 255388.
WEAVER, J. I would grant leave to appeal.

TEMPLE v CITY OF WESTLAND, No. 129427; Court of Appeals No. 255827.
WEAVER, J. I would grant leave to appeal.

MORGAN v CITY OF GRAND RAPIDS, No. 129428; reported below: 267 Mich App 513.
WEAVER, J. I would grant leave to appeal.

ENTERPRISE RENT A CAR v VALLERY, No. 129537; Court of Appeals No. 260617.
KELLY, J. I would grant leave to appeal.

ASSET ACCEPTANCE CORPORATION v HUGHES, No. 129709; reported below: 268 Mich App 57.

DOERSCHER v GARRETT, No. 129810; Court of Appeals No. 255808.

RISSMAN v GENERAL MOTORS CORPORATION, No. 130032; Court of Appeals No. 261392.

HASSETT v ARCHDIOCESE OF DETROIT, No. 130159; Court of Appeals No. 261483.
CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

ANTOS v DIOCESE OF LANSING, No. 130169; Court of Appeals No. 262137.
CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

DOE v DIOCESE OF LANSING, No. 130171; Court of Appeals No. 262274.
CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

Reconsideration Denied May 4, 2006:

HEIKKILA v NORTH STAR TRUCKING, INC, Nos. 127780, 127823, 127836. Summary disposition entered at 474 Mich 1080. Court of Appeals No. 246761.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal May 5, 2006:

APSEY v MEMORIAL HOSPITAL, No. 129134. The application for leave to appeal the June 9, 2005, judgment of the Court of Appeals, the application for leave to appeal as cross-appellant, and the motions for leave to file briefs amicus curiae are considered. The motions to file briefs amicus curiae are granted. We direct the clerk to schedule oral argument on whether to grant the applications or take other peremptory action. MCR 7.302(G)(1). The parties may file supplemental briefs within 28 days of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Reported below: 266 Mich App 666.

PERRY v GOLLING CHRYSLER PLYMOUTH JEEP, INC, No. 129943. The motion for extension of time to file reply brief and the motions for leave to file brief amicus curiae are granted. The application for leave to appeal the October 11, 2005, judgment of the Court of Appeals is considered. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument whether, under MCL 257.240 and 257.233(9), a dealer's ownership liability ceases upon completion and signing of an application for title by the applicant or, in contrast, when the application for title is placed in the mail to the Secretary of State by the dealership/titleholder. The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of the arguments made in their application papers. Court of Appeals No. 254121.

Summary Dispositions May 5, 2006:

CREECH v W A FOOTE MEMORIAL HOSPITAL, INC; PORTER v W A FOOTE MEMORIAL HOSPITAL, INC; WILLIAMS v W A FOOTE MEMORIAL HOSPITAL, INC; MOORE v W A FOOTE MEMORIAL HOSPITAL, INC; ANSON v W A FOOTE MEMORIAL HOSPITAL, INC, Nos. 130054-130063, 130065, 130066. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals order and remand this case to the Court of Appeals for determination of the question whether plaintiffs have presented valid tort claims. Contrary to the order of the Court of Appeals, consideration of that issue does not require a remand to the Jackson Circuit Court for findings. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals Nos. 237437-237446.

CORRIGAN, J. (*concurring*). I concur with the order vacating the Court of Appeals order and remanding to the Court of Appeals for reconsideration of whether plaintiffs have presented valid tort claims. I write separately because I agree with the dissenting Court of Appeals judge that under *Henry v Dow Chemical Co*, 473 Mich 63 (2005), plaintiffs have failed to state valid tort claims.

Plaintiffs underwent endoscopies at the defendant hospital in 2000. The hospital later informed plaintiffs that the endoscopes used in the procedure may not have been properly disinfected, potentially exposing them to disease. Plaintiffs filed suits alleging negligence and claims of emotional distress. The hospital moved for summary disposition, arguing, among other things, that plaintiffs had failed to state a claim because they had alleged only potential, rather than actual, exposure to disease. The trial court denied the hospital's motion, ruling that plaintiffs had made viable claims for emotional distress. The court determined that plaintiffs' allegations of nervousness caused by exposure to the unsterilized equipment were enough to state claims of physical injury, and plaintiffs could recover for other compensable injury, including continued medical monitoring.

In a split unpublished opinion issued June 8, 2004 (Docket Nos. 237437-237446), the Court of Appeals majority held that because the parties had not yet conducted discovery, it would not address whether summary disposition was appropriate where plaintiffs had allegedly failed to claim any injury other than emotional distress.[1] Judge MURRAY, in his partial concurrence/dissent, opined that the trial court should have ruled as a matter of law that plaintiffs cannot recover emotional distress or similar damages for fear that they may have been exposed to disease. He opined that the law does not allow for the recovery of such speculative damage claims.

Defendants applied for leave to appeal in this Court, and the case was held in abeyance for *Henry*. 695 NW2d 68 (2005). After *Henry* was decided, this Court remanded this case to the Court of Appeals for reconsideration of whether plaintiffs had presented valid tort claims. 474 Mich 863 (2005). On remand, the Court of Appeals majority, rather than reconsidering its decision, remanded to the trial court to develop the record and "for specific findings as to whether plaintiffs have presented valid tort claims in light of *Henry*, [*supra*]." Unpublished order of the Court of Appeals, entered October 28, 2005 (Docket Nos. 237437-237446). Judge MURRAY again dissented, repeating his view that "plaintiffs' claims, to the extent they were based upon the fear of future injury, should be dismissed as uncognizable as a matter of law." *Id.*

Judge MURRAY has correctly opined that plaintiffs' claims should be dismissed. In *Henry, supra* at 73, this Court held that "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." Plaintiffs allege that they suffered from emotional distress caused by the possibility of being exposed to infectious diseases from the improperly disinfected endoscopes. In other words, plaintiffs allege that they suffered injury because of their fear of infection. Plaintiffs do not allege that they actually contracted an infection from exposure to the endoscopes. Thus, plaintiffs' tort claims are based on a fear of possible

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[1] The panel also held that the record was insufficient to determine whether plaintiffs' negligence claims were based on medical malpractice or negligence.

future injury and are precluded as a matter of law. *Id.* Further, plaintiffs are precluded from claiming that by virtue of this potential exposure to infectious diseases, they have suffered an "injury" in the form of the pain and expense of medical monitoring. *Id.*

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE v SPRAGUE, No. 130136. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the August 31, 2005, order of the Genesee Circuit Court denying defendant's motion to withdraw plea, and remand this case to the Genesee Circuit Court for resentencing. If the circuit court chooses not to follow the prosecutor's sentence recommendation, defendant will be allowed to withdraw from the plea agreement. MCR 6.302(C)(3). We do not retain jurisdiction. Court of Appeals No. 265210.

YOUNG, J. (*concurring*). I concur in the order remanding this case to the Genesee Circuit Court for resentencing because the plain language of MCR 6.302(C)(3) compels it. However, I question the reasoning and analytical underpinnings of the court rule, which is a codification of *People v Killebrew*, 416 Mich 189 (1982).

In this case, defendant pleaded guilty in exchange for a prosecutorial sentencing recommendation. The prosecution fulfilled its end of the agreement, recommending a sentence of probation with drug counseling. However, because the sentencing judge did not follow the nonbinding recommendation, our court rules mandate that defendant be permitted to withdraw a voluntarily, knowingly, and willingly entered guilty plea.

I cannot understand why a guilty plea given in exchange for a prosecutorial sentencing recommendation is vitiated by the court's disinclination to follow the recommendation. More important, I do not understand the rationale of *Killebrew* that a defendant, having obtained the benefit of a bargain with the prosecutor, can withdraw his plea when a court refuses to follow the recommendation. *People v Cobbs*, 443 Mich 276 (1993), was decided after *Killebrew* and undermined the rationale underpinning *Killebrew.* The principles that make withdrawal possible under similar circumstances in a *Cobbs* plea, where the court is a party to the plea agreement, have no applicability in a *Killebrew* plea. I welcome the opportunity to address the reasoning and rationale of the *Killebrew* decision, and favor amending MCR 6.302(C)(3).

CORRIGAN, J. I join the statement of Justice YOUNG.

WEAVER, J. I would grant leave to appeal.

PEOPLE v QUINCY JOHNSON, No. 130195. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the July 21, 2005, opinion and order of the Macomb Circuit Court denying defendant's motion to withdraw his plea and/or for resentencing, and remand this case to the Macomb Circuit Court for resentencing. If the circuit court chooses not to follow the sentence recommendation agreed to by the prosecutor, defendant will be allowed to withdraw from the plea agreement. MCR 6.302(C)(3). We do not retain jurisdiction. Court of Appeals No. 264429.

YOUNG, J. (*concurring*). I concur in the order remanding this case to the Macomb Circuit Court for resentencing because the plain language of MCR 6.302(C)(3) compels it. However, I question the reasoning and

analytical underpinnings of the court rule, which is a codification of *People v Killebrew*, 416 Mich 189 (1982).

In this case, defendant pleaded guilty in exchange for a prosecutorial sentencing recommendation. Defendant understood the recommendation to be a mere suggestion and that the court retained full authority to impose defendant's sentence without reliance on the prosecutor's recommendation. The prosecution fulfilled its end of the agreement, recommending a sentence at the low end of the guidelines. However, because the sentencing judge did not follow the nonbinding recommendation, our court rules mandate that defendant be permitted to withdraw a voluntarily, knowingly, and willingly entered guilty plea.

I cannot understand why a guilty plea given in exchange for a prosecutorial sentencing recommendation is vitiated by the court's disinclination to follow the recommendation. More important, I do not understand the rationale of *Killebrew* that a defendant, having obtained the benefit of a bargain with the prosecutor, can withdraw his plea when a court refuses to follow the recommendation. *People v Cobbs*, 443 Mich 276 (1993), was decided after *Killebrew* and undermined the rationale underpinning *Killebrew.* The principles that make withdrawal possible under similar circumstances in a *Cobbs* plea, where the court is a party to the plea agreement, have no applicability in a *Killebrew* plea. I welcome the opportunity to address the reasoning and rationale of the *Killebrew* decision, and favor amending MCR 6.302(C)(3).

CORRIGAN, J. I join the statement of Justice YOUNG.

WEAVER, J. I would grant leave to appeal.

Leave Denied May 5, 2006:

PEOPLE v DAVID WRIGHT, No. 128424; Court of Appeals No. 259880.

KELLY, J. (*dissenting*). I would grant leave to appeal for the reasons stated in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

MARKMAN, J. (*dissenting*). I dissent from the majority's decision to deny leave to appeal. MCL 768.7a(2) provides that the term of imprisonment for a person convicted of a felony committed while the person was on parole from a sentence for a previous offense "shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense." Because there is no indication here that the Department of Corrections (DOC) added an additional period of incarceration for the previous offense, I believe that defendant is likely entitled to 419 days of jail credit for time served. I would grant defendant's application for leave to appeal in order to review the process by which the DOC calculates jail credit in this type of situation.

Defendant broke into a garage attached to a home in Oakland County, stole a car, and was arrested in Wayne County. He was convicted after a bench trial of receiving and concealing stolen property (RCSP) over $20,000, MCL 750.535, and sentenced on October 30, 2002, to 16 months to 10 years in prison, consecutive to the sentence for which he was on parole at the time of the offense (a separate breaking and entering offense). Over a year later, he pleaded guilty to home invasion, MCL

750.110a, for breaking into the aforementioned attached garage and was sentenced in Oakland County on December 22, 2003, to 78 months to 20 years in prison, concurrent to the sentence for RCSP but consecutive to any sentence for a parole violation that may have resulted. The sentencing judge stated on the record that he did not object to defendant receiving credit for the 419 days between the two sentencing proceedings if the DOC did not proceed on a parole violation. The judgment of sentence, however, did not reflect this statement and was silent about jail credit. Defendant then moved in the trial court to amend his judgment of sentence to reflect the judge's statement on the record, but the trial court denied the motion. The Court of Appeals denied defendant's delayed application for lack of merit.

MCL 768.7a(2) provides:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense *shall begin to run at the expiration of the remaining portion* of the term of imprisonment imposed for the previous offense. [Emphasis added.]

Defendant argues that as of October 30, 2002, his sentence began to run on the RCSP charge, so there could be no "remaining portion" of the prior offense, i.e., he received no formal addition of time to his prior sentence for violating parole. As such, the sentence for the later home invasion conviction (which arose from the same events as the RCSP conviction) should have begun to run on that date.

Defendant was neither entitled to statutory jail credit nor automatically precluded from having the time between sentences count toward his new sentence. It is within the discretion of the DOC to determine how much time defendant must spend on which sentence in fashioning a new parole eligibility date. However, it appears that there is no existing legal remedy for a defendant to obtain this determination, because the DOC has not been exercising its discretion in this regard. Rather, as here, whether a defendant receives "credit" is arbitrarily determined by how long it takes the defendant to proceed to sentencing on the new offense, because it appears the DOC simply runs the new sentence from the date of sentencing, applying credit only if the trial court grants it. In other words, because of the DOC's inaction with regard to parole violations, the time spent incarcerated before sentencing on the new offense becomes the de facto additional "remaining portion" of the sentence imposed for the parole violation on the prior offense. However, defendant is effectively in a Catch-22 situation because the judge expressed a willingness to grant defendant credit if the DOC did not proceed on a parole violation, i.e., he deferred to the DOC to make the determination, but the DOC simply deferred to the trial judge's judgment of sentence.

Because the DOC has an apparent practice of simply starting a new sentence as of the date of sentencing—regardless of how long the defendant has been incarcerated on the charge before sentencing—without actually making a determination of a fixed additional period of

time to be served for the parole violation, there is a potential for substantial unfairness in cases such as the instant one. Here, a defendant is serving presentence jail time that is neither formally imposed for a violation of parole, nor credited to the sentence that is eventually imposed for the later crime. Because the length of that indefinite interim period of incarceration is not dependent on an official determination of how much time should be served for a violation, but rather is solely dependent on the fortuity of how long it takes the criminal justice system to proceed to a defendant's final sentencing, the DOC's practice in this regard leads to a result that seems wholly arbitrary. Similarly situated defendants might serve widely disparate interim periods of incarceration on the basis of such factors as how efficient or backlogged the prosecutor is in a given county, whether the defendant chooses to pursue an appeal, or even whether the date of sentencing has to be postponed because the judge calls in sick.

While defendant is not entitled to statutory jail credit under MCL 769.11b, as he was not serving time because he was denied or unable to post bond, he *is* entitled, as are equally situated defendants, see e.g., *People v Conway*, 474 Mich 1140 (2006), to a decision regarding how much, if any, additional time must be served for the parole violation. However, this is a decision that seems never to be made by the DOC.

Because the current process for determining periods of incarceration may be incompatible with a consistent rule of law, I believe that it requires this Court's review. I would grant defendant's application for leave to appeal.

CAVANAGH, J. I concur in the statement of Justice MARKMAN.

PEOPLE v CONWAY, No. 129431; Court of Appeals No. 252852.

KELLY, J. (*dissenting*). Defendant was convicted by a jury of first-degree criminal sexual conduct and assault with intent to commit criminal sexual conduct. On appeal, the Court of Appeals reversed the first-degree criminal sexual conduct conviction and remanded the case for defendant to be resentenced. At resentencing, defendant argued that he was entitled to 26 months of sentencing credit. The trial court denied the request, and the Court of Appeals affirmed. Unpublished opinion per curiam issued August 2, 2005 (Docket No. 252852).

It has become apparent that the sentencing credit problems here arise from practices of the state Department of Corrections (DOC). I would grant leave in this case to explore the issues presented by the DOC's handling of sentencing credit in this and in many similar cases.

There is reason to believe that the DOC is committing a real injustice against prisoners who seek credit for time spent in jail awaiting trial and appeal. The problem involves those who were on parole when they committed a felony and then were arrested and jailed pending trial and appeal.

The problem, not one that this Court has addressed before, is that the DOC arbitrarily treats similarly situated individuals differently. The DOC has apparently adopted an across-the-board practice. It treats the time those individuals were jailed as equal to the time not completed on the conviction for which they were on parole when the second offense

occurred. At first blush, this may appear to be evenhanded and fair to all. But, on closer inspection, it becomes clear that similarly situated individuals are being treated very differently. The difference in treatment is not reasoned, but arbitrary.

By way of illustration, assume *A* and *B* are both convicted of assault with intent to do great bodily harm less than murder. They are sentenced to five to ten years in prison. Both serve five years and are paroled. While on parole, both *A* and *B* commit an assault and are again charged with assault with intent to do great bodily harm less than murder. After 30 days in jail awaiting trial, *A* pleads guilty of felonious assault and is sentenced to two to four years in prison. The DOC, following its current policy, considers *A*'s new sentence to have begun on the day he was sentenced, without credit for the 30 days. Hence, *A* starts immediately serving his new sentence for the second assault, and the DOC effectively counts the 30 days in jail as the time remaining on *A*'s first sentence.

But *B* decides to go to trial and is convicted by a jury of felonious assault. He appeals and his conviction is overturned on appeal. *B* is retried and found guilty. He receives the same sentence as *A*, two to four years in prison. By then he has spent 26 months in jail or prison awaiting trial and appeal. Again, applying its current practice, the DOC perfunctorily considers *B*'s new sentence to have begun on the day he was sentenced without credit for the 26 months. Effectively it credits *B* with the 26 months on his old sentence and starts him on his new sentence immediately. Now assume further that *A* and *B* both serve two years for their second assault conviction and are released. *B* will have been incarcerated 25 months longer than *A* without individualized consideration and without regard to *B*'s worthiness for parole relative to *A*.

Equally or more serious than the injustice of arbitrarily treating similarly situated inmates differently is this problem: The less paroleworthy individual could serve less time. Returning to my hypothetical case, assume *A* had a longer or more severe prior record, committed a more heinous offense, or was otherwise less suitable for parole. *A* could serve *less* time than *B* if *A* pleaded guilty rather than going to trial and pursuing an appeal. The reality is that defendants who plead guilty are incarcerated for a shorter time than defendants tried before a jury. *B* might serve less time even if *A* got a longer sentence for the second offense. This would occur if the time it took to get through trial or appeal was longer than the extra time *A* got on the new sentence. The dangerous defendants who plead guilty could get out earlier than they should, whereas the less dangerous who choose trial and any resulting appeal could stay longer.

I believe that these are important issues that have arisen because of the DOC's handling of sentencing credit accrued by prisoners who were on parole when they committed a felony. This Court should grant leave to appeal in this case to explore these issues.

MARKMAN, J. (*dissenting*). For the reasons set forth in my dissenting statement in *People v Wright*, 474 Mich 1138 (2006), I also dissent from the majority's decision to deny leave to appeal in this case.

As I noted in *Wright*, it appears that whenever a parolee-defendant is sentenced on a new offense, the Department of Corrections (DOC) fails to

make a formal determination regarding the amount, if any, of additional time a defendant is required to serve for the parole violation on the prior sentence. Instead, the DOC simply counts whatever time the parolee spent incarcerated between arrest and sentencing as the "remaining portion" of the earlier sentence for purposes of MCL 768.7a(2) and begins the new offense sentence on the date of sentencing. In other words, an essentially arbitrary period of time becomes a de facto sentence imposed for violating parole.

Here, defendant successfully challenged one of his convictions on appeal, and the Court of Appeals remanded the remaining conviction for correction of errors in scoring offense and prior record variables. Unpublished opinion per curiam issued August 2, 2005 (Docket No. 252852). Defendant was then resentenced on that conviction, some 26 months after the original (preappeal) sentencing. However, it appears that the DOC considers the start date for defendant's sentence on that conviction to be the postappeal, rather than the original, sentencing date. Had defendant not appealed the instant convictions, his sentence for those convictions would have begun to run on the date of his original sentencing.

Given the DOC's practice, set forth more fully in *Wright*, the intervening 26 months was not credited toward defendant's sentence, but was simply "tacked on" to the prior, paroled sentence. If the additional time had been calculated as of defendant's *original* sentencing date—which it would have been under the DOC's practice had defendant not appealed—rather than as of his postappeal *resentencing* date 26 months later, he would have begun serving his new sentence on that date. The result is that defendant received an additional 26 months imprisonment for exercising his right to appeal. In such a case, a consistent rule of law would seem to require that defendant be given credit for this time.

Because the current process for determining periods of incarceration appears to be arbitrary, I believe that it requires this Court's review. I would grant defendant's application for leave to appeal.

CAVANAGH, J. I concur in the statement of Justice MARKMAN.

PEOPLE v WALLS, No. 128774; reported below: 265 Mich App 642.

CORRIGAN, J. (*concurring*). I concur in the denial of leave to appeal. The Court of Appeals majority correctly held that felonious assault, MCL 750.82, is not a necessarily included lesser offense of assault with intent to rob while armed, MCL 750.89. As the majority explained, felonious assault requires the possession of a dangerous weapon, whereas assault with intent to rob while armed allows conviction where the offender merely has "any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon . . . ." MCL 750.89.

The Court of Appeals majority thus concluded that the offense of felonious assault contains an element that is not contained in the offense of assault with intent to rob while armed. Therefore, because the elements of felonious assault are not completely subsumed in the greater

offense, felonious assault is a cognate offense and no instruction was permitted under *People v Cornell*, 466 Mich 335 (2002).[1]

I respectfully disagree with some of the views expressed in the concurring judge's opinion in the Court of Appeals. Specifically, the concurrence seemed to suggest that a court must analyze the facts of a particular case to determine whether an offense is necessarily included. Because defendant here did possess a weapon, the concurrence opined that felonious assault was a necessarily included lesser offense *in this case*.

I believe the assumption underlying the concurring judge's analysis is incorrect. The question whether a lesser offense is necessarily included is resolved solely by reference to the elements of the offenses. See *People v Mendoza*, 468 Mich 527, 532 n 3 (2003) ("Necessarily included lesser offenses are offenses in which the *elements* of the lesser offense are completely subsumed in the greater offense."). (Emphasis added.) The facts of a specific case are not considered until after the determination whether an offense is necessarily included is made, and then only for the purpose of determining whether the lesser offense instruction is warranted in that case. See *Cornell*, *supra*, 466 Mich 358 n 13; *Mendoza*, *supra*.

Therefore, a court should endeavor to avoid conflating two separate analytical steps: (1) the court must first determine whether an offense is necessarily included, which requires a comparison of the elements of the offenses, and (2) once it is established that the offense is necessarily

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[1] I respectfully disagree with our dissenting colleague's analysis. She invents an "alternative elements" rationale to support her assertion that the elements of felonious assault and assault with intent to rob while armed are the same. She notes that assault with intent to rob while armed may be proven where the defendant was armed with either a dangerous weapon or "any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon . . . ." MCL 750.89.

The dissent's analysis fails to rebut the conclusion that felonious assault is a cognate offense of assault with intent to rob while armed. While it is certainly *possible* to prove assault with intent to rob while armed by adducing evidence that the defendant was armed with a dangerous weapon, it is *also* possible to prove that offense where the defendant was *not* armed with a dangerous weapon. By contrast, the plain text of the felonious assault statute *requires* proof that the defendant was armed with a dangerous weapon. Thus, the elements of felonious assault are *not* completely subsumed in the greater offense, and it *is* possible to commit the greater offense without having first committed the lesser. Thus, under our decisions in *Cornell*, *supra* at 356, and *People v Mendoza,* 468 Mich 527, 532 n 3 (2003), felonious assault is a cognate offense of assault with intent to rob while armed, and no instruction on felonious assault was permitted.

included, the court must then determine whether an instruction is warranted on the facts of a particular case, by examining whether "the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Cornell*, *supra*, 466 Mich 357.

Because the Court of Appeals majority correctly analyzed this issue, I concur in the denial of leave to appeal.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. (*dissenting*). I write to indicate why I would grant leave to appeal. Also, I respond to the concurring statement of my colleague that misconstrues the elements of assault with intent to rob and steal while armed. MCL 750.89. The effect of the concurrence could confuse the bench and bar when similar questions arise in the future. Lastly, I point out that both the concurrence and the order provide no rationale for their decision to deny leave to appeal. I find the decision inexplicable.

MCL 750.89 provides:

> Assault with intent to rob and steal being armed—Any person, *being armed with a dangerous weapon, or* any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, who shall assault another with intent to rob and steal shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years. [Emphasis added.]

This statute is unusual because it provides alternative elements: The accused must either (1) have possessed a dangerous weapon or (2) have been in possession of an article used or fashioned in a manner to lead a person reasonably to believe it was a dangerous weapon. MCL 750.89.[1] Appellant asks us to decide the effect on this statute of the holdings in *People v Cornell*[2] and *People v Mendoza*.[3] Given that this Court has never addressed the question, it would be helpful to do so now.

The concurrence pays no attention to the fact that the crime in question has alternative elements. Instead, it reads "*being armed with a dangerous weapon, or*" completely out of the statute. It is well accepted that courts should not render a part of a statute nugatory. Wherever possible, every word should be given meaning. *People v Warren*, 462 Mich 415, 429 n 24 (2000). The concurrence violates this rule of statutory construction without explanation.

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[1] The concurrence accuses me of inventing the rationale that there are alternative elements. I have merely read the statute as written. By its use of this language, the Legislature created alternative elements to this crime. The concurrence and the majority fail to recognize this and, in doing so, they fail to give effect to the Legislature's intent.

[2] 466 Mich 335 (2002).

[3] 468 Mich 527 (2003).

Once it is clear that the concurrence is not properly reading the statute, its criticisms of the Court of Appeals concurrence disintegrate. Judge DONOFRIO appropriately recognized that the statute contains alternative elements. His subsequent analysis is based on that fact. Because his reading of it raises interesting and important issues under *Cornell*, the Court should grant leave to appeal in order to resolve them.

In the case of an alleged assault with intent to rob and steal while armed, the prosecution may attempt to prove that a dangerous weapon was used. Then, the elements of that crime and the crime of felonious assault are the same. But in a case that involves an article that the accused is alleged to have pretended was a dangerous weapon, the elements of the two crimes are not the same.[4] It is the former situation that the Court is called on to address in this case. And it is this concern that Judge DONOFRIO discussed in his opinion.

Therefore, I dissent from the majority's refusal to grant leave to appeal and from the concurrence's undue criticism of Judge DONOFRIO's opinion. The Court should address his well-stated concerns.

COOLSAET v MANS, No. 129823; Court of Appeals No. 260210.

WEAVER, J. I would deny leave to appeal without prejudice to plaintiffs' right to assert that they have suffered the special damages required to confer standing on them to abate a nuisance per se pursuant to MCL 125.587 if they succeed in establishing on remand that defendant reconstructed a nonconforming use in violation of the zoning ordinance and if the city refuses to enforce its zoning nonconforming use ordinance.

KELLY, J. I join the statement of Justice WEAVER.

DETROIT/WAYNE COUNTY STADIUM AUTHORITY v DRINKWATER, TAYLOR AND MERRILL, INC; DETROIT/WAYNE COUNTY STADIUM AUTHORITY v TOOVALIAN; DETROIT/WAYNE COUNTY STADIUM AUTHORITY v BIMINI PROPERTIES, INC, Nos. 129946-129949; reported below: 267 Mich App 625.

CORRIGAN, J. (*concurring*). I concur in the order denying leave to appeal. I write separately to clarify that nothing in the published Court of Appeals decision should be taken as affecting our decision in *Wayne Co*

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[4] In the majority of cases, the prosecution will prove assault with intent to rob and steal while armed by demonstrating that the defendant used a dangerous weapon. Nothing in *Cornell* precludes most defendants from obtaining a jury instruction on felonious assault simply because there are cases where the prosecution need not prove the use of a dangerous weapon. I see no reason why this minority of cases should rob the majority of cases in which the elements will be completely subsumed of the necessary lesser included offense instruction. *Cornell* offers these protections in all other cases where the elements are completely subsumed. Instead of avoiding the unusual issue presented by these alternative elements to the crime, this Court should pay respect to the language chosen by the Legislature. It should decide the effects of that language under *Cornell*.

v Hathcock, 471 Mich 445 (2004). Moreover, the issue presented here is of diminished jurisprudential significance in a post-*Hathcock* world.

In these cases, plaintiff Detroit/Wayne County Stadium Authority initiated condemnation proceedings to acquire and assemble various parcels of property for use in constructing stadiums for the Detroit Lions (Ford Field) and the Detroit Tigers (Comerica Park). The parties here never asserted that the government lacked authority to condemn the properties in question, but only disputed the proper amount of "just compensation" for the taking of those properties. Thus, this case involves different issues than those presented in *Hathcock*.

I nevertheless write to state that the government's use of eminent domain powers to seize and assemble parcels of property from private owners for ultimate transfer to another private entity should not occur in a post-*Hathcock* environment. Our holding in *Hathcock* clearly prohibits the condemnation of private property for delivery to another private entity as it does not constitute a "public use" as contemplated by Const 1963, art 10, § 2. *Hathcock, supra* at 477-483. In any event, this case presents an issue of diminished jurisprudential significance in light of *Hathcock*. Moreover, as stated above, defendants did not contest the government's authority to condemn the properties in question. I thus concur in the order denying leave to appeal.

CAVANAGH, J. I would grant leave to appeal.

WEAVER, J. I would hear argument on the application for leave to appeal.

PEOPLE v FAZI, No. 130081; Court of Appeals No. 265552.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons stated in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v MARVIN JORDAN, No. 130146; Court of Appeals No. 265766.

KELLY, J. I would grant leave to appeal for the reasons stated in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v JAMES PITTMAN, No. 130257; Court of Appeals No. 266622.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons stated in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

PEOPLE v MACK WILLIAMS, No. 130292; Court of Appeals No. 265733.

CAVANAGH, J. I would grant leave to appeal.

KELLY, J. I would grant leave to appeal for the reasons stated in my dissenting statement in *People v Conway*, 474 Mich 1140 (2006).

In re TARBOX (DEPARTMENT OF HUMAN SERVICES v TARBOX), No. 130935; Court of Appeals No. 264808.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the court (other than grants and denials of leave to appeal from the Court of Appeals) of general interest to the bench and bar of the state.

Leave to Appeal From Attorney Discipline Board Denied August 26, 2005:

GRIEVANCE ADMINISTRATOR v DORSEY, No. 129177.

Rehearings Denied September 14, 2005:

WOODARD v CUSTER, Nos. 124994, 124995. Reported at 473 Mich 1.

CAVANAGH and KELLY, JJ. We would grant rehearing.

GLASS v GOECKEL, No. 126409. Reported at 473 Mich 667.

YOUNG, JR., and MARKMAN, JJ. We would grant rehearing.

AYAR v FOODLAND DISTRIBUTORS, No. 126870. Reported at 472 Mich 713.

Rehearings Denied September 23, 2005:

PEOPLE v BELL, No. 125375. Reported at 473 Mich 275.

On order of the Court, the motion for rehearing is considered and, in lieu of granting rehearing, the opinion of the Court is amended as follows:

The first sentence in Part I (slip opinion page 3) is amended to read: "On July 29, 1999, defendant was involved in the robbery and shooting deaths of Chanel Roberts and Amanda Hodges."

The second full sentence on slip opinion page 27 is amended to read: "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."

In all other respects, the motion for rehearing is denied.

CAVANAGH, J. I would grant rehearing.

KELLY, J., dissents and states as follows:

I would grant defendant's motion for rehearing.

While the majority is willing to concede that it made minor errors in its recitation of the facts, it ignores the issue underlying defendant's motion: whether the trial court erred by failing to follow the well-established procedures set forth in *Batson v Kentucky*, 476 US 79 (1986).

I continue to believe that the trial court misapplied *Batson*. Because *Batson* errors are structural in nature, they are not amenable to harmless error review and require automatic reversal. *Arizona v Fulminante*, 499 US 279, 309-310 (1991), see also *United States v McFerron*, 163 F3d 952, 955-956 (CA 6, 1998).

Regrettably, given that a structural error occurred in this case, defendant should have a new trial.

MCCLEMENTS v FORD MOTOR COMPANY, No. 126276. Reported at 473 Mich 373.

On order of the Court, the motion for rehearing is considered and, in lieu of granting rehearing, the opinion of the Court is amended in the following respects:

At slip opinion pages 2, 14, 17, 20 and 22 and in footnote 10 the phrase "the terms, conditions or privileges" is amended to read: "a term, condition, or privilege."

In the third sentence of footnote 14 the phrase "alter the terms and conditions of employment" is amended to read: "affect an individual's employment."

In all other respects, the motion for rehearing is denied.

CAVANAGH and WEAVER, JJ. We would grant rehearing.

KELLY, J., dissents and states as follows:

I would grant rehearing and remand the case to allow plaintiff to proceed on both her claim under the Civil Rights Act (CRA), MCL 37.2101 *et seq*., and her negligent retention claim.

By switching its reference from "the terms, conditions, or privileges of employment" to "a term, condition, or privilege of employment," the majority has significantly undermined the reasoning of its opinion. Much of the majority's analysis rests on an analogy to § 202 of the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1202. But, the PWDCRA does not use the phrase "a term." It uses the phrase "the terms." This majority has repeatedly stressed that it perceives a difference between "the" and "a" when used by the Legislature. See *Robinson v Detroit*, 462 Mich 439, 458-459 (2000). Under the majority's logic, since one contains "a" and the other contains "the," the PWDCRA and the CRA must have different meanings. The CRA must be construed more broadly than the PWDCRA. However, the majority instead reads both acts the same way, narrowly. It fails to recognize its inconsistency.

If defendant Ford adversely affected a single term or condition of plaintiff's employment, it should be held liable under the CRA. Plaintiff alleged that Ford did adversely affect a term or condition of her employment through its employee Bennett when Bennett created a hostile work environment. She also asserted that Ford had notice and did not adequately respond to Bennett's harassment. I believe that plaintiff stated a claim under the CRA.

In addition, I would allow her to amend her claim of negligent retention. Claims of negligent retention can be based on assault and battery. Given that the majority held that plaintiff's claim cannot be based on sexual harassment, as plaintiff alleged, plaintiff should be allowed to amend her complaint.

Summary Disposition November 2, 2005:

GRIEVANCE ADMINISTRATOR v REID, No. 128832. Pursuant to MCR 9.122(E), in lieu of granting leave to appeal, we remand this case to the Attorney Discipline Board for reconsideration. The board shall take into

consideration the hearing panel's finding that respondent made false statements to the Attorney Grievance Commission in his answer to the request for investigation.

Order Entered January 12, 2006:

In re FORTINBERRY, No. 128666. On order of the Court, the Judicial Tenure Commission has issued a Decision and Recommendation for Discipline, and the Honorable Dana Fortinberry has consented to the commission's findings of fact, conclusions of law and recommendation of public censure.

As we conduct our de novo review of this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000):

> [E]verything else being equal:
>
> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.
>
> The JTC should consider these and other appropriate standards that it may develop in its expertise, when it offers its recommendations.

In this case those standards are being applied to the following findings and conclusions of the Judicial Tenure Commission, which we adopt as our own:

1. Respondent has been a judge of the 52nd District Court, 2nd Division, since January 1, 2003.

2. Kelley Kostin (née Ott), an attorney and former magistrate in the 52nd District Court, is married to Robert Kostin, a local attorney. Mr. Kostin was previously married to Judith Kostin.

3. Judith Kostin died on September 17, 1989, while still married to Robert Kostin.

4. Following a postmortem examination on September 18, 1989, the Oakland County Medical Examiner, Dr. Bill Brooks, specifically determined the cause of death to be carbon monoxide intoxication, and the manner of death to be suicide. Dr. Brooks wrote in his report, which was incorporated into the White Lake Township police report:

> We believe that Judith Kostin, a 46-year-old white female, died as the direct result of carbon monoxide intoxication and that this event was self-inflicted. Scene circumstance investigation was entirely consistent with such an act with a note consisting of a series of entries implying suicidal intent. Apparently, this individual was involved in domestic problems. There was no evidence of trauma or of assault upon the body inconsistent with the terminal event. The deceased appeared to be in otherwise good health. Toxicologic examination of body fluids reserved at the time of the autopsy are separately appended. No additional autopsy or postmortem investigation is anticipated by this office at this time.

5. Kelley Kostin was a candidate for an open seat on the 52nd District Court in the 2004 primary election.

6. Colleen Murphy, who at that time was a magistrate in the 52nd District Court, was a candidate for the same seat as Kelley Kostin.

7. Respondent supported Colleen Murphy for the position of judge of the 52-2 District Court.

8. On July 20, 2004, respondent sent a five-page letter to Dave Curtis, Vice President of the Oakland County Deputy Sheriff's Association.

9. The letter concerned the association's endorsement of Kelley Kostin in the judicial primary for the 52nd District Court.

10. In that letter, respondent made the following statements:

> There is another factor that your members should know about in evaluating the legitimacy of the endorsement recommended by [Deputies] Hubanks and McClure. I know they could not have informed your members of this issue, because I am certain that the [Oakland County Deputy Sheriff's Association] would not have endorsed as it did if the facts had been fully explained. These are the facts:

> In 1989, Kelley Ott was a law clerk at Oakland County Circuit Court, and she had a sexual affair with attorney Bob Kostin, who was at that time living in White Lake with his third wife [Judith Kostin]. The previous Mrs. Kostin [Judith Kostin] found out about the affair, and shortly thereafter was found dead at their home. Due to the circumstances of the death, a police investigation was launched, albeit quietly because the then-and-current White Lake Township Police Chief, Ron Stephens, was a neighbor and friend of Bob Kostin. The investigation was inconclusive, and the case was closed as a suicide. Chief Stephens sealed the records of the investigation and they remain sealed to this day. According to another neighbor, Kelley Ott moved into Bob Kostin's home less than a month after Mrs. Kostin's death. Kelley Ott and Bob Kostin married in the mid-1990's.
>
> The questions raised by these facts are obvious, but the most important question is what such facts say about the moral fiber of Mr. and Mrs. Kostin. Is this the type of person your members want as a judge? I chose not to publicize the above incident during the 2002 campaign because I wanted to win on my own merits. Colleen Murphy has chosen not to bring it up for the same reason. As law enforcement officers, however, you deserve to know the truth.

11. Respondent asserted as "fact":

a. Kelley Ott (while a law clerk in Oakland County Circuit Court) had a sexual affair with Robert Kostin in 1989, when he was married to another woman (Judith Kostin);

b. Judith Kostin found out about the affair shortly before she was found dead in her home;

c. The circumstances of the death launched a police investigation, which was conducted "quietly" as the White Lake Township Police Chief, Ron Stephens, was a neighbor and friend of Grievant;

d. The police investigation was inconclusive and the case was closed as a suicide. Chief Stephens sealed the records regarding the investigation and they remained sealed to the day Respondent issued the letter; and

e. A neighbor stated that Kelley Ott had moved into Bob Kostin's house less than a month after his wife's death.

12. If a hearing were held, White Lake Township Police Chief Ronald Stephens would testify that the police investigation regarding the death of Judith Kostin was not done "quietly," and in fact was conducted as a standard investigation by the White Lake Township Police Department.

13. If a hearing were held, White Lake Township Police Chief Ronald Stephens would testify that he and Robert Kostin were not friends or neighbors at the time of the investigation.

14. If a hearing were held, White Lake Township Police Chief Ronald Stephens would testify that no aspect of the police investigation was "sealed" by the White Lake Township Police Department or Chief Stephens.

15. The police investigation into the death of Judy Kostin was not "inconclusive," as there was an official determination that her death resulted from self-inflicted carbon monoxide intoxication.

16. Respondent had no first-hand knowledge of the truth or falsity of the facts stated in paragraphs 12, 13, 14, and 15, above, or of the representations described in subparagraphs 11(c) and 11(d), above.

17. Respondent did not undertake to independently verify the truth or falsity of the representations made in her July 20, 2004, letter.

18. Respondent intended the representations in her July 20, 2004, letter to raise questions regarding the moral fiber of both Robert Kostin and Kelley Ott Kostin.

19. Respondent admits that her conduct was imprudent, and she deeply regrets any resulting embarrassment she may have brought to the judiciary.

These standards set forth in *Brown* are also being applied to the conclusion of the Judicial Tenure Commission, which we adopt as our own:

Respondent's conduct as admitted and described above constitutes:

(a) Failure to personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Code of Judicial Conduct, Canon 1;

(b) failure to avoid all impropriety and appearances of impropriety to ensure that public confidence in the judiciary was not eroded, contrary to the Code of Judicial Conduct, Canon 2(A); and

(c) failure to conduct oneself at all times in a manner which would promote the public confidence in the integrity and impartiality of the judiciary, contrary to the Code of Judicial Conduct, Canon 2(B).

After reviewing the recommendation of the Judicial Tenure Commission, the respondent's consent, the standards set forth in *Brown*, and the above findings and conclusions, we order that the Honorable Dana Fortinberry be publicly censured. This order stands as our public censure.

Orders Entered January 31, 2006:

PROPOSED ADOPTION OF MICHIGAN CHILD SUPPORT FORMULA AS JUVENILE COURT REIMBURSEMENT GUIDELINE.

On order of the Court, this is to advise that the Court is considering a proposal to adopt the Michigan Child Support Formula to replace the July 30, 1990, Schedule of Payments in the Guideline for Court Ordered Reimbursement. MCL 712A.18(6) allows trial courts to enter reimbursement orders in juvenile cases and to use a guideline developed by the State Court Administrative Office for that purpose. The current guideline was adopted in 1990 and many trial courts report that they are using more current alternative guidelines, including the Michigan Child Support Formula, to enter reimbursement orders.

The current 2004 Michigan Child Support Formula Manual is posted at

the following address: http://courts.michigan.gov/scao/resources/publications/manuals/focb/2004MCSFmanual.pdf. The supplemental monthly-payment schedules of the 2004 Michigan Child Support Formula are available for your access and review online at the following address: http://courts.michigan.gov/scao/resources/publications/manuals/focb/2004MCSFsupplement.pdf. The Schedule of Payments of the Guideline for Court Ordered Reimbursement is posted at the following address: http://courts.michigan.gov/supremecourt/Resources/Administrative/schedule.pdf.

Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal, or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted 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.

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 May 1, 2006, at P.O. Box 30052, Lansing, Ml 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-44. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF MCR 3.973. On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.973 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal, or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 3.973. DISPOSITIONAL HEARING.
(A)-(E) [Unchanged.]
(F) Dispositional Orders
(1)-(4) [Unchanged.]

(5) Child Support. The court may include an order requiring one or both of the child's parents to pay child support. All child support orders entered under this subrule must comply with MCL 552.605 and MCR 3.211(D).

(G)-(H) [Unchanged.]

Staff Comment: The proposed amendment provides that the court may enter a child support order at the dispositional hearing and that it must use the Michigan Child Support Formula as required by statute and the Uniform Support Order required by court rule in establishing the child support order.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2006, at P.O. Box 30052, Lansing, Ml 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-44. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered February 23, 2006:

PROPOSED ADMINISTRATIVE ORDER REGARDING ASBESTOS-RELATED DISEASE LITIGATION. On order of the Court, upon consideration of the petition of certain interested parties in asbestos-related disease litigation, this is to advise that the Court is considering adopting a proposed administrative order regarding asbestos-related disease litigation (see Alternatives A and B below). Before determining whether either 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 these alternative proposals 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.

ALTERNATIVE A

1. This order applies to all asbestos-related disease personal injury actions pending or to be filed in Michigan courts. For purposes of this order, "asbestos-related disease personal injury actions" include all cases in which it is alleged that a party has suffered personal injury caused by exposure to asbestos, regardless of the theory of recovery. Until the transfer of the action under paragraph 2 of this order, the parties to such an action shall include the words "Asbestos Case" on the top right-hand corner of the first page of any papers subsequently filed in the action.

2. Each court in which an asbestos-related disease personal injury action is pending shall enter an order changing venue of the action to the Third Judicial Circuit within 14 days of the date of this order. Upon the filing of a new asbestos-related disease personal injury action, the court shall enter an order changing venue to the Third Judicial Circuit within 14 days after the action is filed. The court shall send a copy of the order to the State Court Administrator. A party who objects to the transfer of an action under this paragraph may raise the objection by filing a motion in the Third Judicial Circuit. Such a motion must be filed within 14 days after the transfer of the action.

3. Proceedings in each action transferred under this order shall be conducted in accordance with orders as may be entered by the Third Judicial Circuit. Orders entered by the court in which the action was originally filed that are inconsistent with orders entered by the Third Judicial Circuit are superseded. The Third Judicial Circuit shall cooperate with the State Court Administrator in monitoring the proceedings in the actions.

4. If discovery proceedings have been conducted in an action before a transfer under this order, those discovery materials remain part of the record in the action in which they were produced, and may be used in further proceedings where otherwise appropriate notwithstanding the transfer under this rule.

5. All cases transferred to or filed in the Third Judicial Circuit shall be placed either on the active or inactive docket. A case shall be placed on the active docket only if one of the following occurs:

(a) The plaintiff files an affidavit of a physician stating that the person whose alleged injury forms the basis for the action, including a decedent in a wrongful death action, has been diagnosed with mesothelioma, lung cancer, or some other malignancy as a result of exposure to asbestos; or

(b) The plaintiff files materials satisfying the American Bar Association standard for nonmalignant asbestos-related disease claims (February 2003) as follows:

I. The filing of any civil action alleging personal injury for asbestos-related nonmalignant disease must be accompanied by a detailed narrative Medical Report and Diagnosis signed by the diagnosing doctor, that:

1. Verifies that the doctor or a medical professional employed by and under the direct supervision and control of the diagnosing doctor has taken:

a. A detailed occupational and exposure history from the person (claimant) whose alleged injury forms the basis for the action or, if that person is deceased, from the person most knowledgeable about the exposures that form the basis for the action. The history shall include all the principal employments and exposures of the claimant involving exposures to airborne contaminants. It should indicate whether each employment involved exposure to airborne contaminants (including, but not limited to, asbestos fibers, and other disease causing dusts) that can cause pulmonary impairment and the nature, duration, and level of any such exposure; and

b. A detailed medical and smoking history that includes a thorough review of the claimant's past and present medical problems, and their most probable cause.

2. Sets out the details of the occupational, medical, and smoking history, and verifies that at least 15 years have elapsed between the claimant's first exposure to asbestos and the time of diagnosis.

3. Verifies that the claimant has:

a. A quality 1 chest x-ray taken in accordance with all applicable state and federal regulatory standards (in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available), and that the x-ray has been read by a certified B-reader according to the International Labor Office (ILO) system of classification as showing bilateral small irregular opacities (s, t, or u) graded 1/0 or higher or bilateral diffuse pleural thickening graded b2 or higher including blunting of the costophrenic angle; or

b. Pathological asbestosis graded 1(B) or higher under the criteria published in the *Asbestos-Associated Diseases*, Special Issue of the Archives of Pathology and Laboratory Medicine, Volume 106, Number 11, Appendix 3 (October 8, 1982).

4. Verifies that the claimant has asbestos-related pulmonary impairment as demonstrated by Pulmonary Function Testing, performed using equipment, methods of calibration and technique that meet the criteria incorporated in the American Medical Association Guides to the Evaluation of Permanent Impairment (5th ed) and reported as set forth in 20 CFR 404, Subpt P, App 1, Part (A) § 3.00 (E) and (F), and the interpretative standards set forth in the Official Statement of the American Thoracic Society entitled "Lung Function Testing: Selection of Reference Values And Interpretative Strategies" as published in Am Rev Resp Dis 1991:144:1202-1218 that shows:

a. Forced Vital Capacity below the lower limit of normal and FEV1/FVC ratio (using actual values) at or above the lower limit of normal; or

b. Total Lung Capacity, by plethysmography or timed gas dilution, below the lower limit of normal.

c. Where the Pulmonary Function Test results do not meet the requirements of (a) or (b), above, a claimant may submit an additional report, by a board-certified pulmonologist, internist, or occupational physician that states:

1) That the doctor has a doctor-patient relationship with the claimant; and

2) That the claimant has a quality 1 chest x-ray taken in accordance with all applicable state and federal regulatory standards (in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available), and that the x-ray has been read by a certified B—reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) graded 2/1 or higher; and

3) That the claimant has restrictive impairment from asbestosis and sets forth in detail the specific pulmonary function test findings that the doctor relies upon to establish that the claimant has restrictive impairment; and

4) That the physician shall submit the reports and readouts from all pulmonary function, lung volume, diffusing capacity, or other testing relied upon for the report's conclusions. Such tests must comply with the equipment, quality, and reporting standards set forth herein.

5. Verifies that the doctor has concluded that the claimant's medical findings and impairment were not more probably the result of other causes revealed by claimant's employment and medical history.

II. Copies of the B-reading, the pulmonary function tests (including printouts of the flow volume loops and all other elements required to demonstrate compliance with the equipment, quality, interpretation, and reporting standards set forth herein) and the diagnosing physician's detailed narrative Medical Report and Diagnosis shall be filed with the court and served on all other parties. Failure to do so, or demonstration by any party that the reports do not satisfy the standards set forth herein, shall result in the case being placed on or transferred to the inactive docket.

6. For cases on the inactive docket, no further proceedings shall occur and no discovery shall be ordered, although the parties may voluntarily engage in discovery. A case shall remain on the inactive docket until one of the following occurs:

(a) The case is transferred to the active docket upon motion of a party and satisfaction of the requirements of paragraph 5;

(b) The case is dismissed by stipulation of the parties; or

(c) The case is dismissed by order on the court's own motion, or on motion of a party, after notice to all parties and an opportunity to be heard.

7. For cases on the active docket, after the close of discovery, the Third Judicial Circuit shall conduct a settlement conference or conferences. If settlement is not reached as to all claims, the Third Judicial Circuit shall enter an order changing venue to the court in which the action was originally filed, or if appropriate to some other court, for further proceedings. A copy of the order shall be sent to the State Court Administrator. Cases on the active docket shall not be joined with cases from the inactive docket for settlement or any other purpose.

8. MCR 2.222, MCR 2.223, and MCR 2.224 do not apply to changes of venue pursuant to this order.

Staff Comment: The proposed Administrative Order provides for consolidation of all asbestos-related disease personal injury actions in the Third Judicial Circuit. It further provides for active and inactive dockets, based on the severity of the alleged injury, as measured in part by the February 2003 American Bar Association standard for nonmalignant asbestos-related disease claims.

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

ALTERNATIVE B

1. This order applies to all asbestos-related disease personal injury actions pending or to be filed in Michigan courts. For purposes of this order, "asbestos-related disease personal injury actions" include all cases in which it is alleged that a party has suffered personal injury caused by exposure to asbestos, regardless of the theory of recovery. Until the transfer of the action under paragraph 2 of this order, the parties to such an action shall include the words "Asbestos Case" on the top right-hand corner of the first page of any papers subsequently filed in the action.

2. Each court in which an asbestos-related disease personal injury action is pending shall enter an order changing venue of the action to the Third Judicial Circuit within 14 days of the date of this order. Upon the filing of a new asbestos-related disease personal injury action, the court shall enter an order changing venue to the Third Judicial Circuit within 14 days after the action is filed. The court shall send a copy of the order to the State Court Administrator. A party who objects to the transfer of an action under this paragraph may raise the objection by filing a motion in the Third Judicial Circuit. Such a motion must be filed within 14 days after the transfer of the action.

3. Proceedings in each action transferred under this order shall be conducted in accordance with orders as may be entered by the Third Judicial Circuit. Orders entered by the court in which the action was originally filed that are inconsistent with orders entered by the Third Judicial Circuit are superseded. The Third Judicial Circuit shall cooperate with the State Court Administrator in monitoring the proceedings in the actions.

4. If discovery proceedings have been conducted in an action before a transfer under this order, those discovery materials remain part of the record in the action in which they were produced, and may be used in further proceedings where otherwise appropriate notwithstanding the transfer under this rule.

5. All cases transferred to or filed in the Third Judicial Circuit shall be classified as either Tier I or Tier II cases. A case shall be classified as Tier I only if one of the following occurs:

(a) The plaintiff files a medical report or affidavit of a physician stating that the person whose alleged injury forms the basis for the action, including a decedent in a wrongful death action, has been diagnosed with mesothelioma, lung cancer, or some other malignancy as a result of exposure to asbestos; or

(b) The plaintiff files materials satisfying the American Bar Association standard for nonmalignant asbestos-related disease claims (February 2003) as follows:

I. The filing of any civil action alleging personal injury for asbestos-related nonmalignant disease must be accompanied by a detailed narrative Medical Report and Diagnosis signed by the diagnosing doctor, that:

1. Verifies that the doctor or a medical professional employed by and under the direct supervision and control of the diagnosing doctor has taken:

a. A detailed occupational and exposure history from the person (claimant) whose alleged injury forms the basis for the action or, if that person is deceased, from the person most knowledgeable about the exposures that form the basis for the action. The history shall include all of the principal employments and exposures of the claimant involving exposures to airborne contaminants. It should indicate whether each employment involved exposure to airborne contaminants (including, but not limited to, asbestos fibers, and other disease causing dusts) that can cause pulmonary impairment and the nature, duration, and level of any such exposure; and

b. A detailed medical and smoking history that includes a thorough review of the claimant's past and present medical problems, and their most probable cause.

2. Sets out the details of the occupational, medical, and smoking history, and verifies that at least 15 years have elapsed between the claimant's first exposure to asbestos and the time of diagnosis.

3. Verifies that the claimant has:

a. A quality 1 chest x-ray taken in accordance with all applicable state and federal regulatory standards (in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available), and that the x-ray has been read by a certified B-reader according to the International Labor Office (ILO) system of classification as showing bilateral small irregular opacities (s, t, or u) graded 1/0 or higher or bilateral diffuse pleural thickening graded b2 or higher including blunting of the costophrenic angle; or

b. Pathological asbestosis graded 1(B) or higher under the criteria published in the *Asbestos-Associated Diseases*, Special Issue of the Archives of Pathology and Laboratory Medicine, Volume 106, Number 11, Appendix 3 (October 8, 1982).

4. Verifies that the claimant has asbestos-related pulmonary impairment as demonstrated by Pulmonary Function Testing, performed using equipment, methods of calibration and techniques that meet the criteria incorporated in the American Medical Association Guides to the Evaluation of Permanent Impairment (5th ed) and reported as set forth in 20 CFR 404, Subpt P, App 1, Part (A) § 3.00 (E) and (F), and the interpretative standards set forth in the Official Statement of the American Thoracic Society entitled "Lung Function Testing: Selection of Reference Values And Interpretative Strategies" as published in Am Rev Resp Dis 1991:144:1202-1218 that shows:

a. Forced Vital Capacity below the lower limit of normal and FEV1/FVC ratio (using actual values) at or above the lower limit of normal; or

b. Total Lung Capacity, by plethysmography or timed gas dilution, below the lower limit of normal.

c. Where the Pulmonary Function Test results do not meet the requirements of (a) or (b), above, a claimant may submit an additional report, by a board-certified pulmonologist, internist, or occupational physician that states:

1) That the doctor has a doctor-patient relationship with the claimant; and

2) That the claimant has a quality 1 chest x-ray taken in accordance with all applicable state and federal regulatory standards (in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available), and that the x-ray has been read by a certified B—reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) graded 2/1 or higher; and

3) That the claimant has restrictive impairment from asbestosis and sets forth in detail the specific pulmonary function test findings that the doctor relies upon to establish that the claimant has restrictive impairment; and

4) That the physician shall submit the reports and readouts from all pulmonary function, lung volume, diffusing capacity, or other testing relied upon for the report's conclusions. Such tests must comply with the equipment, quality, and reporting standards set forth herein.

5. Verifies that the doctor has concluded that the claimant's medical findings and impairment were not more probably the result of other causes revealed by claimant's employment and medical history.

II. Copies of the B-reading, the pulmonary function tests (including printouts of the flow volume loops and all other elements required to demonstrate compliance with the equipment, quality, interpretation, and reporting standards set forth herein) and the diagnosing physician's detailed narrative Medical Report and Diagnosis shall be filed with the court and served on all other parties. Failure to do so, or demonstration by any party that the reports do not satisfy the standards set forth herein, shall result in the case being classified as a Tier II case.

6. All Tier I cases shall be resolved independently, either by judgment or dispositive order, before any Tier II case may be docketed for further proceedings, although the parties in a Tier II case voluntarily may engage in discovery.

7. A plaintiff in a Tier II case may voluntarily place his or her case on an inactive docket. For cases on the inactive docket, no further proceedings shall occur and no discovery shall be ordered, although the parties may voluntarily engage in discovery. A case shall remain on the inactive docket until one of the following occurs:

(a) The case is transferred to the active docket upon motion of a party;

(b) The case is dismissed by stipulation of the parties; or

(c) The case is dismissed by order on the court's own motion, or on motion of a party, after notice to all parties and an opportunity to be heard.

8. For cases on the active docket, after the close of discovery, the Third Judicial Circuit shall conduct a settlement conference or conferences. If settlement is not reached as to all claims, the Third Judicial Circuit shall enter an order changing venue to the court in which the action was originally filed, or if appropriate to some other court, for further proceedings. A copy of the order shall be sent to the State Court Administrator. Cases on the active docket shall not be joined with cases from the inactive docket for settlement or any other purpose.

9. MCR 2.222, MCR 2.223, and MCR 2.224 do not apply to changes of venue pursuant to this order.

Staff Comment: The proposed Administrative Order provides for consolidation of all asbestos-related disease personal injury actions in the Third Judicial Circuit. It further provides for active and voluntary inactive dockets, based on the severity of the alleged injury, as measured in part by the February 2003 American Bar Association standard for nonmalignant asbestos-related disease claims.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by June 1, 2006, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2003-47. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Orders Entered March 7, 2006:

PROPOSED AMENDMENT OF RULE 8.110 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.110 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 8.110. CHIEF JUDGE RULE.

(A) [Unchanged.]

(B) Chief Judge, Chief Judge Pro Tempore, and Presiding Judges of Divisions.

(1) The Supreme Court shall select a judge of each trial court to serve as chief judge. No later than ~~October~~ September 1 of each odd-numbered year, each trial court with two or more judges may submit the names of no fewer than two judges whom the judges of that court recommend for selection as chief judge.

(2)-(4) [Unchanged.]

(C)-(D)[Unchanged.]

Staff Comment: The proposed amendment of MCR 8.110(B)(1) would change the requirement that recommendations for chief judge be submitted no later than October 1 of each odd-numbered year to September 1.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2006, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-26. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULES 3.977 AND 7.210 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rules 3.977 and 7.210 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(H) [Unchanged.]

(I) Respondent's Rights Following Termination.

(1) Advice. Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:

(a) [Unchanged.]

(b) If the respondent is financially unable to provide an attorney to perfect an appeal, the court will appoint an attorney and furnish the attorney with the~~portions of the~~ transcript<u>s</u> and record ~~the attorney requires to appeal~~ <u>necessary for the appeal.</u>

(c)-(d) [Unchanged.]

(2)-(3) [Unchanged.]

(J) [Unchanged.]

RULE 7.210. RECORD ON APPEAL.

(A) [Unchanged.]

(B) Transcript.

(1) Appellant's Duties; Orders; Stipulations.

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Except in cases governed by MCR 3.977(I)(3) or MCR 6.425(F)(2), or as otherwise provided by Court of Appeals order or the remainder of this subrule, the appellant shall order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court or tribunal. Once an appeal is filed in the Court of Appeals, a party must serve a copy of any request for transcript preparation on opposing counsel and file a copy with the Court of Appeals.

(b)-(e) [Unchanged.]

(2)-(3) [Unchanged.]

(C)-(I) [Unchanged.]

Staff Comment: The amendment of MCR 3.977 would allow an attorney to order only those transcripts necessary for an appeal from orders terminating parental rights. The amendment of MCR 7.210 would exempt appeals from orders terminating parental rights from the general requirement that the appellant order the full transcript of trial court testimony and other proceedings.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2006, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-44. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered March 21, 2006:

PROPOSED AMENDMENT OF RULES 5.104, 5.402, AND 5.403 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rules 5.104, 5.402, and 5.403 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 5.104. PROOF OF SERVICE; WAIVER AND CONSENT; UNOPPOSED PETITION.

(A) Proof of Service.

(1) Whenever service is required by statute or court rule, a proof of service must be filed promptly. The proof of service must be filed before a hearing on a matter ~~and at the latest before a hearing~~ to which the paper relates or at the time the paper is required to be filed with the court if the paper does not relate to a hearing. Whenever relief is granted ex parte, a proof of service for the petition and order must be filed as soon as possible after the court hears the request for relief and at the latest 10 days after the date of service or before a subsequent hearing on the matter, whichever period is shorter. The proof of service must include a description of the papers served, the date of service, the manner and method of service, and the person or persons served.

(2)-(4) [Unchanged.]

(B)-(C) [Unchanged.]

RULE 5.402. COMMON PROVISIONS.

(A)-(B) [Unchanged.]

(C) Responsibility for Giving Notice; Manner of Service. The petitioner is responsible for giving notice of hearing. Regardless of statutory provisions, an interested person may be served by mail, by personal service, or by publication when necessary; however, if the parent of a minor can be located, or if a person who is the subject of the petition is 14 years of age or older, notice of the initial hearing must be served on the parent or person personally unless another method of service is specifically permitted in the circumstances.

(D) [Unchanged.]

RULE 5.403. PROCEEDINGS ON TEMPORARY GUARDIANSHIP.

(A) [Unchanged.]

(B) Notice of Hearing, Minor. For good cause, the court may shorten the period for notice of hearing. ~~or may dispense with notice of a hearing for the appointment of a temporary guardian of a minor, except that the minor shall always receive notice if the minor is 14 years of age or older.~~In an emergency, or at the request of law enforcement, the state agency charged with the protection of minors, or that agency's designated agents, the court may proceed without notice of a hearing for the appointment of a temporary guardian of a minor, except that the minor shall always receive notice if the minor is 14 years of age or older. If the notice period is shortened or eliminated, the court shall state on the record and indicate on the order what circumstances justify shortening or eliminating notice. Unless the parents of the minor appear at the hearing, any order granting a temporary ex parte guardianship after a notice of hearing was shortened or eliminated shall state clearly and prominently (1) that the order is a temporary, ex parte order, and (2) the date and place for a hearing on the matter to be held within 56 days after the order was issued. The petitioner shall serve the temporary, ex parte order, notice of hearing, and initial petition for guardianship on each parent by personal service pursuant to MCR 5.105(B)(1). If the parents cannot be located, service may be by first-class mail to each parent's last known address, or by publication as provided in MCR 5.105(A)(3) and 5.106, or by such means as directed by the court under MCR 5.105(A)(4).

(C)-(D) [Unchanged.]

Staff Comment: The proposed amendment of MCR 5.104(A)(1) would establish a time frame within which the proof of service must be filed when the court issues an ex parte order. The proposed amendment of MCR 5.402(C) would add the requirement of how service is to be made on a parent of a minor who is the subject of a petition when the whereabouts of the parent are known. The proposed amendment of MCR 5.403(B) would add the requirement of a subsequent hearing within 56 days if a temporary guardian is appointed for a minor by ex parte order and the parents of the minor are not present at the ex parte 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 July 1, 2006, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-12. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered April 13, 2006:

PROPOSED AMENDMENTS OF RULES 3.915, 3.963, 3.965, 3.966, 3.972, 3.973, 3.974, 3.975, 3.976, and 3.978 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rules 3.915, 3.963, 3.965, 3.966, 3.972, 3.973, 3.974, 3.975, 3.976, and 3.978 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted on the Court's website at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below.]

RULE 3.915. ASSISTANCE OF ATTORNEY.

(A) [Unchanged.]

(B) Child Protective Proceedings.

(1) [Unchanged.]

(2) Child.

(a) The court must appoint a lawyer-guardian ad litem to represent the child at every hearing, including the preliminary hearing. The child may not waive the assistance of a lawyer-guardian ad litem. The duties of the lawyer-guardian ad litem are as provided by MCL 712A.17d. At each

hearing, the court shall inquire whether the lawyer-guardian ad litem has met or had contact with the child, as required by the court or MCL 712A.17d(1)(d) and if the ~~attorney~~ lawyer-guardian ad litem has not met or had contact with the child, the court shall require the lawyer-guardian ad litem to state, on the record, ~~his or her~~ the reasons for failing to do so.

(b) [Unchanged.]

(C)-(E)[Unchanged.]

RULE 3.963. PROTECTIVE CUSTODY OF CHILD.

(A) [Unchanged.]

(B) Court-Ordered Custody.

(1) The court may issue a written order authorizing a child protective services worker or designee ~~an officer or other person~~ to immediately take a child into protective custody when, ~~after~~ upon presentment of proofs as required ~~to~~ by the court ~~of a petition~~, ~~a~~ the judge or referee has reasonable grounds to believe that conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child. When appropriate, the court shall make a judicial determination that reasonable efforts to prevent removal of the child have been made. The court may also include in such an order authorization to enter specified premises to remove the child.

(2) The written order must indicate that the judge or referee has determined that continuation in the home is contrary to the welfare of the child and must state the basis for that determination.

(3) [Unchanged.]

(C) [Unchanged.]

RULE 3.965. PRELIMINARY HEARING.

(A) [Unchanged.]

(B) Procedure.

(1)-(10) [Unchanged.]

(11) Unless the preliminary hearing is adjourned, the court must decide whether to authorize the filing of the petition and, if authorized, whether the child should remain in the home, be returned home, or be placed in foster care ~~the placement of the child~~ pending trial. The court may authorize the filing of the petition upon a showing of probable cause, unless waived, that one or more of the allegations in the petition are true and fall within MCL 712A.2(b). The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent that such privileges are abrogated by MCL 722.631.

(12)-(13) [Unchanged.]

(C) Pretrial Placement; Contrary to the Welfare Determination.

(1)-(2) [Unchanged.]

(3) Findings. If placement is ordered, the court must make a statement of findings, in writing or on the record, explicitly including the finding that it is contrary to the welfare of the child to remain at home and the reasons supporting that finding. If the "contrary to the welfare of the child" finding is placed on the record and not in a written statement of findings, it must be capable of being transcribed. The

findings may be made on the basis of hearsay evidence that possesses adequate indicia of trustworthiness.

(4)-(7)[Unchanged.]

(D) Pretrial Placement; Reasonable Efforts Determination. In making the reasonable efforts determination under this subrule, the child's health and safety must be of paramount concern to the court.

(1) When the court has placed a child with someone other than the custodial parent, guardian, or legal custodian, the court must determine whether the agency has made reasonable efforts to prevent the removal of the child or that reasonable efforts to prevent removal are not required. The court must make this determination at the earliest possible time, but no later than 60 days from the date of removal, and must state the factual basis for the determination in the court order. Nunc pro tunc orders or affidavits are not acceptable.

(2) Reasonable efforts to prevent a child's removal from the home are not required if a court of competent jurisdiction has determined that

(a) the parent has subjected the child to aggravated circumstances as listed in sections 18(1) and (2) of the Child Protection Law, MCL 722.638(1) and (2) ~~712A.19b(3)(k)~~; or

(b) the parent has been convicted of 1 or more of the following:

(i) murder of another child of the parent,

(ii) voluntary manslaughter of another child of the parent,

(iii) aiding or abetting, or attempting, conspiring, or soliciting to commit ~~such~~ a murder, or aiding and abetting the commission of ~~such~~ a voluntary manslaughter, of another child of the parent, or

(iv) a felony assault that results in serious bodily injury to the child or another child of the parent; or

(c) parental rights of the parent with respect to a sibling have been terminated involuntarily.

(E) [Unchanged.]

RULE 3.966. OTHER PLACEMENT REVIEW PROCEEDINGS.

(A) Review of Placement Order and Initial Service Plan.

(1) On motion of a party, the court must review the ~~custody order,~~ placement order~~;~~ or the initial service plan, and may modify the ~~those~~ order~~s~~ and plan if it is in the best interest of the child and, if removal from the parent, guardian, or legal custodian is requested, determine whether the conditions in MCR 3.965(C)(2) exist.

(2) If the child is removed from the home and disposition is not completed, the progress of the child must be reviewed no later than 182 days from the date the child was removed from the home.

(B)-(C) [Unchanged.]

RULE 3.972. TRIAL.

(A) Time. If the child is not in placement, the trial must be held within 6 months after the filing of the petition unless adjourned for good cause under MCR 3.923(G). If the child is in placement, the trial must commence as soon as possible, but not later than 63 days after the child is ~~placed by the court~~ removed from the home unless the trial is postponed:

(1) on stipulation of the parties for good cause;

(2) because process cannot be completed; or

(3) because the court finds that the testimony of a presently unavailable witness is needed.

When trial is postponed pursuant to subrule (2) or (3), the court shall release the child to the parent, guardian, or legal custodian unless the court finds that releasing the child to the custody of the parent, guardian, or legal custodian will likely result in physical harm or serious emotional damage to the child.

If the child has been removed from the home, a review hearing must be held within 182 days of the date of the child's removal from the home, even if the trial has not been completed before the expiration of that 182-day period.

(B)-(E) [Unchanged.]

RULE 3.973. DISPOSITIONAL HEARING.

(A)-(B)[Unchanged.]

(C) Time. The interval, if any, between the trial and the dispositional hearing is within the discretion of the court. When the child is in placement, the interval may not be more than ~~35~~ 28 days, except for good cause.

(D)–(H) [Unchanged.]

RULE 3.974. POST-DISPOSITIONAL PROCEDURES: CHILD AT HOME.

~~(A)~~Review of Child's Progress.

(1) General. The court shall periodically review the progress of a child not in foster care over whom it has retained jurisdiction. ~~A progress review does not require a hearing.~~

(2) Time. If the child was never removed from the home, ~~T~~the progress of the child must be reviewed no later than 182 days from the date the petition was filed and no later than every 91 days after that for the first year that the child is subject to the jurisdiction of the court. After that first year, a review hearing shall be held no later than 182 days from the immediately preceding review hearing before the end of the first year and no later than every 182 days from each preceding hearing until the court dismisses its jurisdiction. ~~after entry of the original order of disposition if the child remained at home following the initial dispositional hearing.~~ The review shall occur no later than 182 days after the child returns home when the child is no longer in foster care. If the child was removed from the home and subsequently returned to the home, review hearings shall be held in accordance with MCR 3.975.

(3) ~~Change of Placement.~~Subsequent Removal. The court may not order a child removed from his or her home solely on the basis of a review hearing. If it appears from evidence presented at a review hearing that a child may be at risk, the court may order that the child be taken into protective custody in accordance with MCR 3.963, and a supplemental petition must be filed and a preliminary hearing held in accordance with MCR 3.965. ~~Except as provided in subrule (B), the court may not order a change in the placement of a child solely on the basis of a progress review. If the child over whom the court has retained jurisdiction remains at home following the initial dispositional hearing or has otherwise~~

~~returned home from foster care, the court must conduct a hearing before it may order the placement of the child. Such a hearing must be conducted in the manner provided in MCR 3.975(E).~~

(B) Emergency Removal

(1) General. If the child, over whom the court has retained jurisdiction, remains at home following the initial dispositional hearing or has otherwise returned home from foster care, the court may order temporary removal of the child to protect the health, safety, or welfare of the child, pending an emergency removal hearing.

(2) Notice. The court shall ensure that the parties are given notice of the hearing as provided in MCR 3.920 and MCR 3.921.

(3) Emergency Removal Hearing. If the court orders removal of the child from the parent, guardian, or legal custodian to protect the child's health, safety, or welfare, the court must conduct an emergency removal hearing no later than 24 hours after the child has been taken into custody, excluding Sundays and holidays as defined in MCR 8.110(D)(2). Unless the child is returned to the parent pending the dispositional review, the court must make a written determination that the criteria for placement listed in MCR 3.965(C)(2) are satisfied.

(a) At the emergency removal hearing, the respondent parent, guardian, or legal custodian from whom the child is removed must receive a written statement of the reasons for removal and be advised of the following rights:

(i) to be represented by an attorney at the dispositional review hearing;

(ii) to contest the continuing placement at the dispositional review hearing within 14 days; and

(iii) to use compulsory process to obtain witnesses for the dispositional review hearing.

(b) At an emergency removal hearing, the parent, guardian, or legal custodian from whom the child was removed must be given an opportunity to state why the child should not be removed from, or should be returned to, the custody of the parent, guardian, or legal custodian.

(C) Dispositional Review Hearing; Procedure. If the child is in placement pursuant to subrule (B), the dispositional review hearing must commence no later than 14 days after the child is placed by the court, except for good cause shown. The hearing must be conducted in accordance with the procedures and rules of evidence applicable to a dispositional hearing.

RULE 3.975. POST-DISPOSITIONAL PROCEDURES: CHILD IN FOSTER CARE.

(A)-(B) [Unchanged.]

(C) Time. The court must conduct dispositional review hearings at intervals as follows, as long as the child remains in foster care:

(1) not more than 182 days after the child's removal from his or her home and no later than every 91 days ~~following entry of the original order of disposition~~ after that for the first year that the child is subject to the jurisdiction of the court. After the first year that the child has been removed from his or her home and is subject to the jurisdiction of the court, a review hearing shall be held not more than 182 days from the

immediately preceding review hearing before the end of that first year and no later than every 182 days from each preceding review hearing thereafter until the case is dismissed; or

(2) if a child is under the care and supervision of the agency and is either placed with a relative and the placement is intended to be permanent or is in a permanent foster family agreement, not more no later than ~~every~~ 182 days after the child has been removed from his or her home and no later than 182 days after that as long as the child is subject to the jurisdiction of the court, the Michigan Children's Institute, or other agency~~first permanency planning hearing if the child is subject to a permanent foster family agreement or in a relative placement that is intended to be permanent~~ as provided in MCR 3.976(E)(3).

A review hearing under this subrule shall not be canceled or delayed beyond the number of days required in this subrule, regardless of whether a petition to terminate parental rights or another matter is pending.

(D)-(F) [Unchanged.]

(G) Dispositional Review Orders. The court, following a dispositional review hearing, may:

(1) order the return of the child home,

~~(2) order placement of the child if removal from the parent, guardian, or legal custodian would be appropriate for the welfare of the child,~~

(2~~3~~) change the placement of the child,

(3~~4~~) modify the dispositional order,

(4~~5~~) modify any part of the case service plan,

(5~~6~~) enter a new dispositional order, or

(6~~7~~) continue the prior dispositional order.

~~(H) Returning Child Home Without Dispositional Review Hearing. Unless notice is waived, if not less than 7 days written notice is given to all parties before the return of a child to the home, and if no party requests a hearing within the 7 days, the court may issue an order without a hearing permitting the agency to return the child home.~~

RULE 3.976. PERMANENCY PLANNING HEARINGS.

(A) [Unchanged.]

(B) Time.

(1) An initial permanency planning hearing must be held within 28 days after a judicial determination that reasonable efforts to reunite the family or to prevent removal are not required on the basis of one of the following circumstances: ~~petition has been adjudicated and both of the following occur~~:

(a) There has been a judicial determination that the child's parent, guardian, custodian, or nonparent adult has subjected the child to aggravated circumstances as listed in sections 18(1) and (2) of the Child Protection Law, 1975 PA 238, MCL 722.638, or ~~A court of competent jurisdiction has determined that~~

(i) a parent is found to have abused the child, or a sibling of the child, and the abuse included one or more of the circumstances in MCL 712A.19a(2), or

(ii) the parent's rights to another child were terminated involuntarily, and

(b) the court has determined that reasonable efforts are not required to reunify the child and the family.

(b) the parent has been convicted of one or more of the following:

(i) murder of another child of the parent;

(ii) voluntary manslaughter of another child of the parent;

(iii) aiding or abetting, or attempting, conspiring, or soliciting to commit the murder of another child of the parent, or aiding and abetting the voluntary manslaughter of another child of the parent, or the attempted murder of the child or another child of the parent; or

(iv) a felony assault that results in serious bodily injury to the child or another child of the parent.

(c) the parent has had rights to one of the child's siblings involuntarily terminated.

(2) If subrule (1) does not apply, the court must conduct an initial permanency planning hearing no later than ~~one year~~ 12 months after the child's removal from the home, regardless of whether any supplemental petitions are pending in the case. ~~an original petition has been filed. The hearing must not be extended or delayed for reasons such as a change or transfer of staff or workers at the supervising agency.~~

(3) Requirement of Annual Permanency Planning Hearings. During the continuation of foster care, the court must hold permanency planning hearings beginning no later than ~~one year~~ 12 months after the initial permanency planning hearing. The interval between permanency planning hearings is within the discretion of the court as appropriate to the circumstances of the case, but must not exceed 12 months. The court may combine the permanency planning hearing with a ~~dispositional~~review hearing.

(4) The judicial determination to finalize the court-approved permanency plan must be made within the prescribed time limits.

(C) Notice. The parties entitled to participate in a permanency planning hearing include the parents of the child, if the parent's parental rights have not been terminated, the child, if the child is of an appropriate age to participate, foster parents, pre-adoptive parents, and relative caregivers. Written notice of a permanency planning hearing must be given as provided in MCR 3.920 and MCR 3.921(B)(2). The notice must include a brief statement of the purpose of the hearing, and must include a notice that the hearing may result in further proceedings to terminate parental rights. The notice must inform the parties of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian ad litem for the child, or an attorney for one of the parties.

(D) [Unchanged.]

(E) Determinations; Permanency Options.

(1)-(2)[Unchanged.]

(3) Other Permanency~~Placement~~ Plans. If the court does not return the child to the parent, guardian, or legal custodian, and if the agency

demonstrates that termination of parental rights is not in the best interest of the child, the court ~~must~~ may ~~either~~

(a) continue the placement of the child in foster care for a limited period to be set by the court while the agency continues to make reasonable efforts to finalize the court-approved permanency plan for the child, ~~if the court determines that other permanent placement is not possible,~~ or

(b) place the child with a fit and willing relative, or ~~in foster care on a long-term basis if the court determines that it is in the child's best interests.~~

(c) upon a showing of compelling reasons, place the child in an alternative planned permanent living arrangement.

The court must articulate the factual basis for its determination in the court order adopting the permanency plan.

RULE 3.978. POST-TERMINATION REVIEW HEARINGS.

(A) Review Hearing Requirement. ~~Unless the child has been placed in a permanent foster family agreement or is placed with a relative and the placement is intended to be permanent, i~~If a child remains in foster care following the termination of parental rights to the child, the court must conduct a hearing not more than 91 days after the termination of parental rights and ~~at least~~ not later than every 91 days after that hearing for the first year following termination of parental rights to the child. At the post-termination review hearing, the court shall ~~to~~ review the child's placement in foster care and the progress toward the child's adoption or other permanent placement, as long as the child is subject to the jurisdiction, control, or supervision of the court, or of the Michigan Children's Institute or other agency. If the child is residing in another permanent planned living arrangement or is placed with a fit and willing relative and the child's placement is intended to be permanent, the court must conduct a hearing not more than 182 days from the preceding review hearing.

(B)-(D) [Unchanged.]

Staff Comment: The proposed amendment of Michigan Court Rule 3.915 corresponds with the January 3, 2005 amendments of MCL 712A.17d enacted in 2004 PA 475. Other changes in MCR 3.915 are stylistic changes of the rule's language.

The proposed amendment of MCR 3.963(B)(1) would reflect the reality that family division judges or referees are not always presented with a petition when a request is made to remove a child from the home. In emergency circumstances, a police officer or social worker may seek the court's permission to remove a child from a home, but will not have an opportunity to draft a petition before seeking the child's removal.

The proposed amendment of MCR 3.965(B)(11) would more accurately reflect the decisions made at the preliminary hearing in family division courts.

The proposed amendments of MCR 3.965(C)(3) would require not only that the findings be made, but that the reasons supporting the findings be explicitly set forth.

The proposed amendments of MCR 3.965(D)(2) would conform the rule language to that of the recent amendments of the "reasonable efforts" language in MCL 712A.19a, as amended by 2004 PA 473 and would make its language consistent with the proposed "reasonable efforts" language in MCR 3.976(B)(1).

The proposed amendments of MCR 3.966 would delete the term "custody order," and add the requirement from 2004 PA 477 that a review hearing occur within 182 days of a child's removal from the home.

The proposed amendments of MCR 3.972 would conform the rule language to the requirements of the Adoption and Safe Families Act and would foster compliance with the timing requirements of that act, thereby ensuring that children in foster care will receive federal funding.

The proposed amendment of MCR 3.973(C), reducing the time for holding a dispositional hearing from 35 to 28 days, would conform the time for resolving an abuse and neglect case to the mandatory federal time lines for ensuring that a child removed from the home receives federal foster care funding.

The proposed amendment of MCR 3.974(A)(2) would conform the review hearing time lines to recent statutory amendments of MCL 712A.19 as implemented by 2004 PA 477. The proposed amendment of subrule B would clarify that removal of a child who remained at home following disposition must be conducted pursuant to MCR 3.963 and MCR 3.965.

The proposed amendment of MCR 3.975 would conform the review hearing time lines to statutory amendments of MCL 712A.19 as implemented by 2004 PA 477.

The proposed amendments of MCR 3.976(B)(1) would track amendments of MCL 712A.19a of the Juvenile Code as adopted by 2004 PA 473. The change of the phrase "one year" to "12 months" in subrules B(2) and (3) would conform the rule's language to that used in the Juvenile Code and to the other family division rules that generally mention time limits in terms of months rather than years. The additional language in subrule 2 and new subrule 4 would ensure that the permanency planning hearing is completed within the time limitations required by the Adoption and Safe Families Act (ASFA), 42 USC 675(5)(C). Compliance with ASFA is necessary for a child placed in foster care to receive federal funds. 42 USC 672. Proposed amendments of MCR 3.975(C) would clarify, in compliance with federal regulations, which specific parties are entitled to participate in permanency planning hearings. Proposed amendments of MCR 3.976(E)(1) would clarify the kinds of placement decisions courts must make in order to comply with the Children's Bureau's interpretation of the ASFA regarding qualifying placements for federal foster care funds.

The proposed amendment of MCR 3.978(A) would clarify a misconception created by the existing language of the subrule. Because the current language appears to create an exception for relative placements and permanent foster care arrangements, courts often failed to hold the requisite post-termination review hearings in such situations. The proposed amendment would make it clear to family division courts that they are required to hold post-termination review hearings even where the

child is placed with a relative or in a long-term foster care setting. The phrase "permanent planned living arrangement" replaces the reference to "permanent foster family agreement." The substituted phrase comports with the Children's Bureau's interpretation of the ASFA regarding qualifying permanent placements for receipt of federal foster care funds.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2006, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-04. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/Resources/Administrative/index.htm.

Certified Question Declined April 14, 2006:

In re CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (VELIZ V CINTAS CORPORATION), No. 130190. On order of the Court, the question certified by the United States Court of Appeals for the Ninth Circuit is considered, and the Court respectfully declines the request to answer the certified question.

YOUNG, J. (*concurring*). I concur in the Court's decision to decline the request of the United States Court of Appeals for the Ninth Circuit to answer its question concerning our Minimum Wage Law, MCL 408.381 *et seq*.

I have previously expostulated at length concerning why I believe that this Court lacks the constitutional authority to provide such "advisory opinions" to the federal courts. See *In re Certified Question* (*Melson* v *Prime Ins Syndicate*, *Inc*), 472 Mich 1225 (2005) (YOUNG, J., concurring). While I rely on all the reasons I have laboriously, but thus far unpersuasively, stated previously on the question of our lack of authority, I write here to note, not only does this Court lack constitutional authority to provide an "advisory lesson on Michigan law" for the Ninth Circuit, but that the parties who sought certification by the Ninth Circuit have failed even to bother to comply with the requirements of MCR 7.305(B). That rule outlines procedures by which a federal court may seek such gratuitous advice from this Court. The parties apparently have so little regard for *our* procedures that they failed to follow (or ignored) the obligation of our rule to file conforming briefs and a joint appendix with this Court (MCR 7.305[B][3]).

Admittedly, these are "mere" procedures that impede the march to provide a federal court a didactic exegesis on our law. However, failure to abide by the controlling rules of the state court concerning certified questions has been a sufficient basis for other state courts to decline a federal court's request to answer a certified question. See *Diamond Club v Ins Co of North America*, 984 F2d 746, 747-748, (CA 6, 1993) (The Ohio Supreme Court refused to answer a certified question because the Sixth Circuit Court of Appeals failed to comply with Ohio's rules.).

We hold parties over whom we actually do have jurisdiction to meticulous compliance with our rules. I see no reason why we should accord parties over which we have no authority to a lesser standard of compliance. This alone is a sufficient reason for me to decline to answer the Ninth Circuit's certified question in this case.

Finally, I appreciate my dissenting colleague's concerns that federal courts should not misconstrue Michigan law or disrespect our state's judicial system.[1] However laudatory these prudential considerations may be, I do not believe they are a legitimate basis for exceeding our constitutionally limited "judicial power." As I have stated elsewhere, the limit on our judicial power precludes this Court from issuing nonbinding advisory opinions. *In re Certified Question, supra* at 1225. Hence, this Court has not "default[ed] on its responsibility" by adhering to the constitutional constraints imposed by the people of this state. Rather, we have honored our responsibility.

KELLY, J. I would answer the certified question.

MARKMAN, J. (*dissenting*). For the reasons set forth in my statement in *In re Certified Questions* (*Melson v Prime Insurance Syndicate, Inc*), 472 Mich 1225 (2005)—in particular out of a sense of comity with the certifying court and in order to maintain the integrity of Michigan law—I would hold hearings and promptly answer the certified question submitted by the Ninth Circuit Court of Appeals. By choosing not to do so, this Court defaults on its responsibility to exercise its judicial powers in support of Michigan's sovereignty within our Constitution's system of federalism.

Having already deterred the Sixth Circuit Court of Appeals from seeking the guidance of this Court concerning the meaning of Michigan law—guidance routinely offered by nearly every other supreme court in the Union—it is apparently now this Court's determination to deter all other federal courts in a similar fashion.

The confusion of one of my colleagues is reflected in a concurring statement that seems to chastise the Ninth Circuit for its impositions upon this Court in certifying a question. Instead of recognizing that the Ninth Circuit has sought to accord respect to the complementary roles of the federal and state judiciaries within our constitutional system, and to defer to this state in its understanding of its own laws, the concurring justice is troubled that the Ninth Circuit would seek "gratuitous advice" from this Court, rather than just plowing ahead with its own interpretation of Michigan law and ignoring the judicial process established by the people of this state for giving meaning to their laws.

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[1] I note that this Court is obliged to construe federal law without the assistance of a certification process. That we lack such a vehicle in no way undermines our obligation to apply federal law faithfully in our cases. I see no basis for concluding that federal courts will be less dedicated to their task than we are to ours. Therefore, it is not apparent to me why our decision not to answer the certified question is detrimental and deleterious to our federal structure.

Order Entered April 26, 2006:

In re REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2005 PA 71. The request by the House of Representatives for an advisory opinion on the constitutionality of the photo identification requirements contained in 2005 PA 71 is considered, and it is granted. The clerk is directed to schedule oral argument and submission as a calendar case. The question submitted is: Do the photo identification requirements of § 523 of 2005 PA 71, MCL 168.523, on their face, violate either the Michigan Constitution or the United States Constitution?

The Attorney General is respectfully requested to, within 84 days of the date of this order, submit separate briefs arguing that the photo identification requirements of 2005 PA 71 are, and are not, constitutional. The Michigan Department of State Bureau of Elections, the Michigan Democratic Party, and the Michigan Republican Party are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the question presented in this matter may move the Court for permission to file briefs amicus curiae on either or both sides of the submitted question.

CAVANAGH, J. I would decline to issue an advisory opinion.

KELLY, J. (*dissenting*). It is my belief that the Court should not grant the request for an advisory opinion. I have two reasons. First, the subject matter of the request is overly broad. Traditionally, the Court has refused to grant advisory opinions in response to broad questions. Second, the question that the Court has agreed to address is not the question asked. It is not certain that this Court has the authority to issue an advisory opinion on a question not presented to it under art 3, § 8 of the Michigan Constitution.

With respect to my first concern, I note that, in the case of *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 587 n 57 (2005), this Court stated that "our only constitutional authorization to issue advisory opinions is found in [art 3, § 8 of the Michigan Constitution]." This provision states, "Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." Const 1963, art 3, § 8.

This Court has consistently interpreted § 8 to require the party making the request to address specific questions of law on which the party wishes the Court to speak. *In re Request for Advisory Opinion on Constitutionality of 1975 PA 227*, 395 Mich 148, 149-150 (1975). Following that interpretation, typically, this Court has denied requests for advisory opinions where the requesting party has not raised specific questions regarding the constitutionality of an act. *Id.* at 149. Normally, a request has been denied if it was stated too broadly. *Advisory Opinion re Constitutionality of 1974 PA 272,* 393 Mich 916 (1975).

In this case, the House of Representatives submitted a very general question: "Do the photo identification requirements contained in 2005 PA 71 violate either the Michigan Constitution or the United States Constitution?" What constitutional provisions does the House fear may be offended? It appears that the House wants to know whether, in general, the photo requirements of the act violate any constitutional

provisions at all. Next, what factual situations does the House fear might offend the constitutions? It appears that any advisory opinion on the question " 'would depend for resolution on whatever particular factual situations the Court would be forced to hypothesize.' " *Request for Advisory Opinion on the Constitutionality of 1979 PA 57*, 407 Mich 60 (1979), quoting *Advisory Opinion re Constitutionality of 1974 PA 272, supra* at 910. As this Court has consistently done in the past, we should deny the House's request on the basis that the question presented is too broad.

With respect to my second concern, the Court has modified the question submitted. The modification is not merely semantic. It changes the question to read, "Do the photo identification requirements of Section 523 of 2005 PA 71, MCL 168.523, *on their face,* violate either the Michigan Constitution or the United States Constitution?" The question submitted was whether the photo requirements of the act violate either constitution. The question has been changed to ask whether the photo requirements of the act *facially* violate either constitution. I question whether the Court has the authority so to alter a question presented under art 3, § 8 of the Michigan Constitution.

My concern is based on the fact that § 8 vests the power to request an advisory opinion solely in the Legislature and the Governor. By modifying the question, this Court effectively usurps the authority of the House to pose the question. Alternatively, the Court is acting, with no case or controversy before it, to create an issue that it chooses to address. *Federated Publications, Inc v City of Lansing,* 467 Mich 98, 112 (2002). Either way the Court unwisely ventures onto infirm constitutional terrain.

For these two reasons, I prefer to deny this request for an advisory opinion. At the very least, I would entertain oral argument and additional briefing before acting on the request. These would assist the Court in determining, if the request for an advisory opinion is granted at all, (1) whether it must not be limited to the facial constitutionality of 2005 PA 71 and (2) what constitutional provisions and factual situations the House of Representatives wishes the Court to consider in rendering its opinion.

Leave to Appeal From Attorney Discipline Board Denied April 28, 2006:

GRIEVANCE ADMINISTRATOR v MATHENY, No. 129778.

Index-Digest

INDEX–DIGEST

AGREEMENTS TO ARBITRATE—*See*

ARBITRATION 3

ARBITRATION

COMMON LAW

1. Common-law arbitration is not preempted in Michigan by the Michigan arbitration act; common-law arbitration agreements in Michigan are unilaterally revocable before an arbitration award is made (MCL 600.5001 *et seq*.). *Wold Architects & Engineers v Strat*, 474 Mich 223.

DOMESTIC RELATIONS

2. The domestic relations arbitration act does not require that the formality of a hearing in arbitration proceedings approximate that of a hearing in court; the appropriate structure for an arbitration hearing is best decided by the parties and the arbitrator (MCL 600.5070 *et seq*.). *Miller v Miller*, 474 Mich 27.

3. No written agreement beyond an order for binding arbitration is required under the domestic relations arbitration act where the parties stipulate the entry of the order and the order meets the criteria of MCL 600.5071 and MCL 600.5072(1)(e) and where the parties satisfy the requirements of MCL 600.5072(1)(a) to (d) on the record. *Miller v Miller*, 474 Mich 27.

STATUTORY ARBITRATION

4. Parties wishing to conform their agreements to arbitrate future disputes to the requirements of MCL 600.5001(2) for statutory arbitration must put their agreements in writing and require that a circuit court may enforce them; otherwise, such agreements will be

treated as agreements for common-law arbitration. *Wold Architects & Engineers v Strat*, 474 Mich 223.

CHARITABLE INSTITUTIONS—*See*

TAXATION 1, 2

CHARITY—*See*

TAXATION 3

COMMON-LAW ARBITRATION—*See*

ARBITRATION 4

COMPREHENSIVE TRANSPORTATION—*See*

CONSTITUTIONAL LAW 1

CONSTITUTIONAL LAW

TAXATION

1. Const 1963, art 9, § 9 is unambiguous and it does not dedicate any specific amount of general sales tax revenues to be used for comprehensive transportation purposes; the general sales tax revenues described in art 9, § 9 are not constitutionally dedicated funds and may be diverted to the state general fund by executive order of the Governor (Const 1963, art 5, § 20). *Co Rd Ass'n of Michigan v Governor*, 474 Mich 11.

CRIMINAL LAW

FAILURE TO PAY COURT-ORDERED SUPPORT

1. The crime of nonsupport of a former or current spouse or of a child is complete at the time that an individual fails to pay support in the amount ordered at the time ordered; a violation of the statute does not constitute an offense that continues until an individual's monetary support obligation is fully discharged (MCL 750.165[1]). *People v Monaco*, 474 Mich 48.

JURY INSTRUCTIONS

2. A preserved claim of nonconstitutional error involving a trial court's failure to instruct on the defense of accident in a murder trial where accident was a central issue in the case is subject to "harmless error" analysis; the defendant has the burden to demonstrate that the claimed error resulted in a miscarriage of justice; reversal is not required unless, after an examination of the entire cause, it shall affirmatively appear that it is more

probable than not that the claimed error was outcome determinative by undermining the reliability of the verdict. *People v Hawthorne*, 474 Mich 174.

LIMITATION OF ACTIONS

3. A charge of felony nonsupport of a former or current spouse or of a child is subject to a six-year period of limitations (MCL 750.165[1], 767.24[5]). *People v Monaco*, 474 Mich 48.

CRIMINAL SEXUAL PENETRATION—*See*

SENTENCES 3

EMPLOYEE RETIREMENT INCOME SECURITY ACT—*See*

INSURANCE 1

EXEMPTIONS—*See*

TAXATION 1, 2, 3

FAILURE TO INSTRUCT—*See*

CRIMINAL LAW 2

FAILURE TO PAY COURT-ORDERED SUPPORT—*See*

CRIMINAL LAW 3

FIRST-DEGREE CRIMINAL SEXUAL CONDUCT—*See*

SENTENCES 3

GENERAL SALES TAX—*See*

CONSTITUTIONAL LAW 1

GOVERNMENTAL IMMUNITY

HIGHWAY EXCEPTION

1. A plaintiff seeking to hold a governmental agency that is responsible for the repair and maintenance of a road liable for bodily injury or property damage caused by a defect in the roadbed must establish that the agency knew or should have known about the defect and had notice that the defect made the road not reasonably safe and convenient for public travel but failed to repair the defect within a reasonable time (MCL 691.1402, 691.1403). *Wilson v Alpena Co Rd Comm*, 474 Mich 161.

HARMLESS ERROR—*See*

CRIMINAL LAW 2

HEARINGS—*See*

ARBITRATION 2

HOMICIDE

FELONY MURDER

1. The term "perpetration" in the felony-murder statute references acts by the defendant that occur outside the definitional elements of the predicate felony and includes acts that occur during the unbroken chain of events surrounding the predicate felony; a murder committed during the attempt to escape the scene of the predicate felony is committed in the perpetration of that felony (MCL 750.316[1][b]). *People v Gillis*, 474 Mich 105.
2. The factors that a jury should consider in determining whether a defendant was still "in the perpetration of" the predicate felony when the defendant committed a murder include the length of time between the commission of the predicate felony and the murder, the distance between the scene of the predicate felony and the scene of the murder, whether there is a causal connection between the murder and the predicate felony, and whether there is a continuity of action between the predicate felony and the murder (MCL 750.316[1][b]). *People v Gillis*, 474 Mich 105.

INACCURATE INFORMATION—*See*

SENTENCES 2

INSURANCE

LIFE INSURANCE

1. The administrator of a life insurance plan covered by the Employee Retirement Income Security Act must pay benefits to the named beneficiary as required by the act; however, once the proceeds are distributed, the named beneficiary can then be found to have waived the right to retain those proceeds under a contract with the decedent (29 USC 1001 *et seq*.). *Sweebe v Sweebe*, 474 Mich 151.

LIBEL AND SLANDER

DEFAMATION

1. A defamation claim accrues when the wrong upon which

the claim is based is done, regardless of when damage results; a defamation claim first accrues when the alleged defamatory statement is made and the applicable one-year period of limitations begins to run from that date and is not extended on the basis of the republication of the statement, regardless of whether the republication was intended by the speaker (MCL 600.5805[1], [9]). *Mitan v Campbell*, 474 Mich 21.

LIMITATION OF ACTIONS

See, also, LIBEL AND SLANDER 1

ARCHITECTS, ENGINEERS, AND CONTRACTORS

1. The period of limitations applicable to an action against a state-licensed architect based on an improvement to real property is six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement (MCL 600.5805[14], 600.5839[1]). *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36.
2. The provisions in MCL 600.5839(1) regarding the time within which to bring an action against a state-licensed architect based on an improvement to real property provide both a statute of repose and a statute of limitations. *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36.

MEDICAL MALPRACTICE

3. The prohibition in MCL 600.2912b(6) against the "tacking" of additional or successive 182-day tolling periods prevents a plaintiff in a medical malpractice action from enjoying the benefit of multiple tolling periods; the prohibition in § 2912b(6) does not prevent a plaintiff, who filed a first notice of intent to sue sufficiently early in the limitations period so that no tolling was initiated under MCL 600.5856(d), from sending a second notice of intent to sue with fewer than 182 days remaining in the limitations period and relying on that second notice to initiate tolling under § 5856(d). *Mayberry v General Orthopedics, PC*, 474 Mich 1.

MOTOR VEHICLES—*See*

CONSTITUTIONAL LAW 1

NEGOTIABLE INSTRUMENTS

ACCORD AND SATISFACTION

1. An accord and satisfaction involving a negotiable instru-

ment is governed by § 3311 of the Uniform Commercial Code in derogation of the common law (MCL 440.3311). *Hoerstman General Contracting, Inc v Hahn*, 474 Mich 66.

NOTICE OF DEFECT—*See*

GOVERNMENTAL IMMUNITY 1

NOTICES OF INTENT TO SUE—*See*

LIMITATION OF ACTIONS 3

OFFENSE VARIABLES—*See*

SENTENCES 3

PATTERN—*See*

SENTENCES 1

PERPETRATION—*See*

HOMICIDE 1

SENTENCES

OFFENSE VARIABLES

1. Offense Variable 13 mandates that 25 points be scored where the sentencing offense is part of a pattern of felonious criminal activity involving three or more felonies against a person; and a "pattern" is defined as three or more crimes committed within a five-year period, including the sentencing offense. To constitute part of this pattern, a sentencing offense must be within the same five-year period as the other crimes constituting the pattern; a five-year period that does not include the sentencing offense may not be considered (MCL 777.43). *People v Francisco*, 474 Mich 82.

SENTENCING GUIDELINES

2. A defendant is entitled to be sentenced by a trial court on the basis of accurate information; even where a minimum sentence is within the appropriate guidelines sentence range, a defendant is entitled to be resentenced if there was a scoring error or if inaccurate information was relied upon in determining the defendant's sentence. *People v Francisco*, 474 Mich 82.
3. Where an offender is convicted of two counts of third-degree criminal sexual conduct for two penetrations of one victim on two different dates and there is no evidence that

the penetrations resulted or sprang from each other or that there is more than an incidental connection between the two penetrations, points for offense variable 11, criminal sexual penetration, may not be scored (MCL 777.41). *People v Johnson*, 474 Mich 96.

TAXATION

AD VALOREM PROPERTY TAXES

1. Three factors are properly assessed in determining whether a claimant is entitled to a tax exemption as a charitable institution: first, the real estate must be owned and occupied by the exemption claimant, second, the exemption claimant must be a nonprofit charitable institution, and third, the exemption exists only when the buildings and other property thereon are occupied by the claimant solely for the purposes for which it was incorporated (MCL 211.7o, 211.9[a]). *Wexford Medical Group v City of Cadillac*, 474 Mich 192.
2. An institution's activities as a whole must be examined in determining whether the institution is entitled to a tax exemption as a charitable institution; it is the overall nature of the institution, as opposed to its specific activities, that must be evaluated; to qualify, the institution must offer its charitable deeds to benefit people who need the type of charity being offered; each case is unique and should be examined separately (MCL 211.7o; 211.9[a]). *Wexford Medical Group v City of Cadillac*, 474 Mich 192.
3. Factors considered when determining whether an institution is a "charitable institution" that is entitled to a tax exemption include: (1) a "charitable institution" must be a nonprofit institution; (b) a "charitable institution" is one that is organized chiefly, if not solely, for charity; (c) a "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the service; rather, a "charitable institution" serves any person who needs the type of charity being offered; (d) a "charitable institution" brings people's minds or hearts under the influence of education or religion, relieves people's bodies from disease, suffering, or constraint, assists people to establish themselves for life, erects or maintains public buildings or works, or otherwise lessens the burdens of government; (e) a "charitable insti-

tution" can charge for its services as long as the charges are not more than what is needed for its successful maintenance; and (f) a "charitable institution" need not meet any monetary threshold of charity to merit the charitable institution exception; rather, if the overall nature of the institution is charitable, it is a "charitable institution" regardless of how much money it devotes to charitable activities in a particular year (MCL 211.7o, 211.9[a]). *Wexford Medical Group v City of Cadillac*, 474 Mich 192.

THIRD-DEGREE CRIMINAL SEXUAL CONDUCT—*See*

SENTENCES 3

UNIFORM COMMERCIAL CODE—*See*

NEGOTIABLE INSTRUMENTS 1

UNILATERAL REVOCATION—*See*

ARBITRATION 1

WAIVER—*See*

INSURANCE 1

WORDS AND PHRASES

HOMICIDE 1

SENTENCES 1

TAXATION 3