MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

April 2, 2010 to July 23, 2010

CORBIN R. DAVIS
CLERK OF THE SUPREME COURT

VOL. 486
FIRST EDITION

WEST®
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2012

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
MARILYN KELLY	2013
Justices	
MICHAEL F. CAVANAGH	2015
ELIZABETH A. WEAVER	2011
MAURA D. CORRIGAN	2015
ROBERT P. YOUNG, Jr.	2011
STEPHEN J. MARKMAN	2013
DIANE M. HATHAWAY	2017

Commissioners

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

TIMOTHY J. RAUBINGER	DANIEL C. BRUBAKER
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ANNE E. ALBERS

State Court Administrator: CARL L. GROMEK

Clerk: CORBIN R. DAVIS
Crier: DAVID G. PALAZZOLO

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
HENRY WILLIAM SAAD	2015
Chief Judge Pro Tem	
CHRISTOPHER M. MURRAY	2015
Judges	
DAVID H. SAWYER	2011
WILLIAM B. MURPHY	2013
MARK J. CAVANAGH	2009
KATHLEEN JANSEN	2013
E. THOMAS FITZGERALD	2015
RICHARD A. BANDSTRA	2015
JOEL P. HOEKSTRA	2011
JANE E. MARKEY	2015
PETER D. O'CONNELL	2013
WILLIAM C. WHITBECK	2011
MICHAEL J. TALBOT	2015
KURTIS T. WILDER	2011
BRIAN K. ZAHRA	2013
PATRICK M. METER	2015
DONALD S. OWENS	2011
KIRSTEN FRANK KELLY	2013
PAT M. DONOFRIO	2011
KAREN FORT HOOD	2015
STEPHEN L. BORRELLO	2013
ALTON T. DAVIS	2015
DEBORAH A. SERVITTO	2013
JANE M. BECKERING	2013
ELIZABETH L. GLEICHER	2013
CYNTHIA DIANE STEPHENS	2011
DOUGLAS B. SHAPIRO	2013[1]

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

[1] From February 2, 2009.

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ADMINISTRATIVE ORDER 2010-4

IMPLEMENT E-FILING PILOT PROJECT
IN THE 13TH JUDICIAL CIRCUIT COURT

Entered April 27, 2010 (File No. 2002-37)—REPORTER.

On order of the Court, the 13th Circuit Court is authorized to implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin July 1, 2010, or as soon thereafter as is possible, and shall remain in effect until July 1, 2015, or further order of this Court. The 13th Circuit Court is aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the 13th Circuit Court Electronic Document Filing Pilot Project, the 13th Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules.

The 13th Circuit Court will track the participation and effectiveness of this pilot program and shall report to and provide information as requested by the State Court Administrative Office.

1. Construction

The purpose of the pilot program is to study the effectiveness of electronically filing court documents in

connection with the just, speedy, and economical determination of the actions involved in the pilot program. The 13th Circuit Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing documents during the pilot program, the Michigan Rules of Court govern all other aspects of the cases involved in the pilot.

2. Definitions

(a) "Clerk" means the Antrim, Grand Traverse and Leelanau County Clerks.

(b) "E-filing" means any court pleading, motion, brief, response, list, order, judgment, notice, or other document filed electronically pursuant to the pilot program.

(c) "LAO" means all local administrative orders governing the 13th Judicial Circuit Court.

(d) "MCR" means the Michigan Court Rules.

(e) "Pilot program" means the initiative by the 13th Judicial Circuit Court, the 13th Circuits' Clerks and the Grand Traverse Information Technology Department in conjunction with OnBase Software, and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents. All state courts in Michigan are envisioned as eventually permitting e-filing (with appropriate modifications and improvements). The 13th Circuit pilot program will begin testing with "C" or "N" type civil cases in Grand Traverse County. The Court plans to expand the pilot program to Antrim and Leelanau Counties. The pilot program is expected to last approximately five (5) years, beginning on July 1, 2010.

(f) "Technical malfunction" means any hardware, software, or other malfunction that prevents a user from timely filing a complete e-filing or sending or receiving service of an e-filing.

3. Participation in the Pilot Program

(a) Participation in the pilot program shall be mandatory in all pending "C" or "N" type cases. Participation shall be assigned following the filing and service of the initial complaint or other initial filing. At the discretion of the judge, participation may also include postdisposition proceedings in qualifying case types.

(b) This is a mandatory e-filing project. It is presumed that all documents will be filed electronically. However, the Court recognizes that circumstances may arise that will prevent one from e-filing. To ensure that all parties retain access to the courts, parties that demonstrate good cause will be permitted to file their documents with the clerk, who will then file the documents electronically. Among the factors that the 13th Circuit Court will consider in determining whether good cause exists to excuse a party from mandatory e-filing are a party's access to the Internet and indigency. A self-represented party is not excused from the project merely because the individual does not have counsel.

4. E-filings Submission, Acceptance and Time of Service with the Court; Signature

(a) In an effort to facilitate uniform service within the scope of this project, the 13th Circuit Court strongly recommends electronic service.

(b) Program participants must submit e-filings pursuant to these rules and the pilot program's technical requirements. The clerk may, in accordance with MCR 8.119(C) reject documents submitted for filing that do

not comply with MCR 2.113(C)(1), are not accompanied by the proper fees, clearly violate Administrative Order No. 2006-2, do not conform to the technical requirements of this pilot project, or are otherwise submitted in violation of a statute, an MCR, an LAO, or the program rules.

(c) E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the clerk's office during the normal business hours of 8 a.m. to 5 p.m. E-filings submitted after business hours shall be deemed filed on the business day the e-filing is accepted (usually the next business day). The clerk shall process electronic submissions on a first-in, first-out basis.

(d) E-filings shall be treated as if they were hand-delivered to the court for all purposes under statute, the MCR, and the LAO.

(e) A pleading, document, or instrument e-filed or electronically served under this rule shall be deemed to have been signed by the judge, court clerk, attorney, party or declarant.

(i) Signatures submitted electronically shall use the following form: /*s*/ *John L. Smith*.

(ii) A document that requires a signature under the penalty of perjury is deemed signed by the declarant if, before filing, the declarant has signed a printed form of the document.

(iii) An e-filed document that requires a signature of a notary public is deemed signed by the notary public if, before filing, the notary public has signed a printed form of the document.

(f) The original of a sworn or verified document that is an e-filing (e.g., a verified pleading) or part of an e-filing (e.g. an affidavit, notarization, or bill of costs)

must be maintained by the filing attorney and made available upon reasonable request of the court, the signatory, or opposing party.

(g) Proposed orders shall be submitted to the court in accordance with the provisions of the pilot program. The court and the clerk shall exchange the documents for review and signature pursuant to MCR 2.602(B).

(h) By electronically filing the document, the electronic filer affirms compliance with these rules.

5. Time for Service and Filing of Pleadings, Documents, and Motions; Judge's Copies, Hearings on Motions; Fees

(a) All times for filing and serving e-filings shall be governed by the applicable statute, the MCR and the LAO as if the e-filings were hand delivered.

(b) The electronic submission of a motion and brief through this pilot program satisfies the requirements of filing a judge's copy under MCR 2.119(A)(2). Upon request by the court, the filing party shall promptly provide a traditional judge's copy to chambers.

(c) Applicable fees, including e-filing fees and service fees, shall be paid electronically through procedures established by the clerk's office at the same time and in the same amount as required by statute, court rule, or administrative order.

(i) Each e-filing is subject to the following e-filing fees.

Type of Filing	**Fee**
EFO (e-filing only)	$5
EFS (e-filing with service)	$8
SO (service only)	$5

(ii) Users who use credit cards for payment are also responsible for a 3% user fee.

6. Service

(a) All parties shall provide the court and opposing parties with one e-mail address with the functionality required for the pilot program. All service shall originate from and be perfected upon this e-mail address.

(b) Unless otherwise agreed to by the court and the parties, all e-filings must be served electronically to the e-mail addresses of all parties. The subject matter line for the transmittal of document served by e-mail shall state: "Service of e-filing in case [insert caption of case]."

(c) The parties and the court may agree that, instead of e-mail service, e-filings may be served to the parties (but not the court) by facsimile or by traditional means. For those choosing to accept facsimile service:

(i) the parties shall provide the court and the opposing parties with one facsimile number with appropriate functionality,

(ii) the facsimile number shall serve as the number to which service may be made,

(iii) the sender of the facsimile should obtain a confirmation delivery, and

(iv) parties shall comply with the requirements of MCR 2.406 on the use of facsimile communication equipment.

(d) Proof of Service shall be submitted to the 13th Circuit Court according to MCR 2.104 and these rules.

7. Format and Form of E-filing Service

(a) A party may only e-file documents for one case in each transaction.

(b) All e-filings shall comply with MCR 1.109 and the technical requirements of the court's vendor.

(c) Any exhibit or attachment that is part of an e-filing must be clearly designated and identified as an exhibit or attachment.

(d) All e-filings, subject to subsection 6(c) above, shall be served on the parties in the same format and form as submitted to the court.

8. Pleadings, Motions and Documents not to be E-filed

The following documents shall not be e-filed during the pilot program and must be filed by the traditional methods provided in the MCR and the LAO:

(a) documents to be filed under seal (pursuant to court order),

(b) initiating documents, and

(c) documents for case evaluation proceedings.

9. Official Court Record; Certified Copies

(a) For purposes of this pilot program, e-filings are the official court record. An appellate record shall be certified in accordance with MCR 7.210(A)(1).

(b) Certified copies or true copies of e-filed documents shall be issued in the conventional manner by the clerk's office in compliance with the Michigan Trial Court Case File Management Standards.

(c) At the conclusion of the pilot program, if the program does not continue as a pilot project or in some other format, the clerk shall convert all e-filings to paper format, the clerk shall convert all e-filings to paper form in accordance with MCR 8.119(D)(1)(d). Participating attorneys shall provide reasonable assistance in constructing the paper record.

(d) At the conclusion of the pilot program, if the program continues as a pilot project or in another format, the clerk shall provide for record retention and

public access in a manner consistent with the instructions of the court and the court rules.

10. Court Notices, Orders, and Judgments

At the court's discretion, the court may issue, file, and serve orders, judgments and notices as e-filings. Pursuant to a stipulation and order, the parties may agree to accept service from the court via facsimile pursuant to the procedures set forth in Rule 6(c).

11. Technical Malfunctions

(a) A party experiencing a technical malfunction with the party's equipment (such as Portable Document Format [PDF] conversion problems or inability to access the pilot sites), another party's equipment (such as an inoperable e-mail address), or an apparent technical malfunction of the court's pilot equipment, software, or server shall use reasonable efforts to timely file or receive service by traditional methods and shall provide prompt notice to the court and the parties of any such malfunction.

(b) If a technical malfunction has prevented a party from timely filing, responding to, or otherwise perfecting or receiving service of an e-filing, the affected party may petition the 13th Circuit Court for relief. Such petition shall contain an adequate proof of the technical malfunction and set forth good cause for failure to use nonelectronic means to timely file or serve a document. The Court shall liberally consider proof of the technical malfunction and use its discretion in determining whether such relief is warranted.

12. Privacy Considerations

(a) With respect to any e-filing, the following requirements for personal information shall apply:

(i) Social Security Numbers. Pursuant to Administrative Order No. 2006-2, full social security numbers

shall not be included in e-filings. If an individual's social security number must be referenced in an e-filing, only the last four digits of that number may be used and the number specified in substantially the following format: XXX-XX-1234.

(ii) Names of Minor Children. Unless named as a party, the identity of minor children shall not be included in e-filings. If a nonparty minor child must be mentioned, only the initials of that child's name may be used.

(iii) Dates of Birth. An individual's full birthdate shall not be included in e-filings. If an individual's date of birth must be referenced in an e-filing, only the year may be used and the date specified in substantially the following format: XX/XX/1998.

(iv) Financial Account Numbers. Full financial account numbers shall not be included in e-filings unless required by statute, court rule, or other authority. If a financial account number must be referenced in an e-filing, only the last four digits of these numbers may be used and the number specified in substantially the following format: XXXXX1234.

(v) Driver's License Numbers and State-Issued Personal Identification Card Numbers. A person's full driver's license number and state-issued personal identification number shall not be included in e-filings. If an individual's driver's license number or state-issued personal identification card number must be referenced in e-filing, only the last four digits of that number should be used and the number specified in substantially the following format X-XX-XXX-XX1-234.

(vi) Home Addresses. With the exception of a self-represented party, full home addresses shall not be included in e-filings. If an individual's home address must be referenced in an e-filing, only the city and state should be used.

(b) Parties wishing to file a complete personal data identifier listed above may:

(i) Pursuant to and in accordance with the MCR and the LAO, file a motion to file a traditional paper version of the document under seal. The court, in granting the motion to file the document under seal, may still require that an e-filing that does not reveal the complete personal data identifier be filed for the public files.

or

(ii) Pursuant to and in accordance with the applicable MCR and LAO, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data identifiers and the redacted identifiers used in the e-filing. All references in the case to the redacted identifiers included in the reference list shall be construed to refer to the corresponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

(c) Parties should exercise caution when filing papers that contain private or confidential information, including, but not limited to, the information covered above and listed below:

(i) Medical records, treatment and diagnosis;

(ii) Employment history;

(iii) Individual financial information;

(iv) Insurance information

(v) Proprietary or trade secret information;

(vi) Information regarding an individual's cooperation with the government; and

(vii) Personal information regarding the victim of any criminal activity.

13. Records and Reports: Further, the 13th Circuit Court shall file an annual report with the Supreme

Court covering the project to date by January 1 of each year (or more frequently or on another date as specified by the Court) that outlines the following:

(a) Detailed financial data that show the total amount of money collected in fees for documents filed or served under the pilot project to date, the original projections for collections of fees, and whether the projections have been met or exceeded.

(b) Detailed financial information regarding the distribution or retention of collected fees, including the amount paid to each vendor per document and in total for the subject period, the amount retained by the Court per document and in total for the period, and whether the monies retained by the Court are in a separate account or commingled with other monies.

(c) A detailed itemization of all costs attributed to the project to date and a statement of whether and when each cost will recur.

(d) A detailed itemization of all cost savings to the Court whether by reduced personnel or otherwise and a statement of whether any cost savings to the Court are reflected in the fee structure charged to the parties.

(e) Information regarding how the filing and service fees were calculated and whether it is anticipated that those fees will be necessary and continued after the conclusion of the pilot program.

(f) A statement of projections regarding anticipated e-filing and service-fee collections and expenditures for the upcoming periods.

14. Amendment

These rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the State Court Administrator.

15. Expiration

Unless otherwise directed by the Michigan Supreme Court, this pilot program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until July 1, 2015.

ADMINISTRATIVE ORDER 2010-5

29TH JUDICIAL CIRCUIT COURT PILOT PROJECT NO. 1
(FAMILY DIVISION INFORMAL DOCKET FOR LOW CONFLICT DOMESTIC RELATIONS CASES)

Entered July 13, 2010 (File No. 2006-25)—REPORTER.

On order of the Court, the 29th Judicial Circuit Court is authorized to implement a domestic relations pilot project to test the effectiveness of an informal docket for selected domestic relations cases.

The pilot project shall begin September 1, 2010, or as soon as an evaluator has been selected to evaluate the project, and shall continue for three years, or until further order of this Court.

If this Court adopts generally applicable Michigan Court Rules for informal dockets during the pendency of the pilot project, the 29th Judicial Circuit Court must, within 60 days of the effective date of the adopted rules, modify its procedures to comply with those new rules.

The 29th Judicial Circuit Court must collect and provide statistics and other information to the State Court Administrative Office and its retained evaluator to assist in evaluating the effectiveness of the project.

1. Purpose of the Pilot Project

The purpose of the pilot project is to study the effectiveness of alternative, less formal procedures de-

signed to help *pro se* domestic relations litigants use the judicial system more effectively, foster a cooperative ongoing relationship between the parties, and improve the court's processing of domestic relations cases.

2. Participation

(a) The 29th Judicial Circuit Court shall issue a local administrative order that specifies one of the following criteria for creating a pool of pilot project cases and a separate pool of comparison group cases: (i) selection based on *case filing dates*, (ii) selection of a *specific number of filed cases* that satisfy all the other project criteria, or (iii) selection by the *presiding judge*.

(b) The court shall select cases for participation as soon as possible after the filing and service of each complaint.

(c) This is a voluntary project. The court will not require parties to participate, but will offer the opportunity to all those who qualify.

3. Friend of the Court Settlement Conference

After service of the complaint, the answer to complaint, and the summons, the court will refer *pro se* parties to the Friend of the Court Office for a settlement conference and the subsequent preparation of a recommended order for custody, parenting time, and child support. During the conference, an FOC staff person will provide information about the pilot project and verify that the case meets all the selection criteria. Eligible parties who agree to participate must sign a consent form.

4. Hearings With the Assigned Family Division Judge

After the assignment clerk receives copies of both parties' consent forms, the clerk will schedule the parties for an initial hearing with the presiding judge

within 30 days. If either party objects to the FOC settlement conference recommended order, the objection will be heard at the initial hearing, provided that the objecting party has filed a written statement of those reasons and sent copies to the other party, the judge's assignment clerk, the judge's office, and the Friend of the Court. During the initial hearing, the judge and the parties must discuss the following issues, as applicable to each case:

- Unresolved disputes.
- Possible evidence.
- Possible witnesses.
- The schedule for subsequent hearings.[1]
- Any property settlement agreements. If the parties have not yet agreed on the division of all the marital property, the court may grant an extension.
- The procedure for preparing and entering a judgment of divorce, including which party will prepare the judgment.

The Assigned Family Division Judge will explain the conference-style hearing to both parties at the initial hearing. Both parties must agree in court on the record to the use of the conference-style hearing. If the parties do not agree to use conference-style hearing, the parties may still participate in the informal docket project and use informal evidentiary rules and procedures.

For pilot project cases, conference-style hearings will be conducted. Both parties and all witnesses will be sworn in. The hearings will be recorded. Either party may present evidence. Either party or the judge may ask questions.

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[1] At the initial settlement conference with the Friend of the Court, parties will receive motion forms, including a form to request removal of the domestic relations case from the project, and a judgment of divorce form.

If there is more than one unresolved issue, the judge will instruct the parties to discuss each issue individually and then facilitate the parties' discussions. Although parties will have an opportunity to question each other, the parties may ask only issue-clarifying questions. The judge may allow or reject each question.

All witnesses must testify in a similar manner. They may provide narrative testimony. The parties and the judge may question the witnesses. The judge may allow conversations between the parties and the witnesses.

If the court determines the case should be removed from the pilot project for any reason, the court will state the reasons on the record.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted May 18, 2010, effective September 1, 2010 (File No. 2008-25) —REPORTER.

[Additions are indicated by underlining, and deletions are indicated by by strikethrough.]

RULE 6.433. DOCUMENTS FOR POSTCONVICTION PROCEEDINGS; INDIGENT DEFENDANT.

(A)-(B) [Unchanged.]

(C) Other Postconviction Proceedings. An indigent defendant who is not eligible to file an appeal of right or an application for leave to appeal may obtain records and documents as provided in this subrule.

(1) The defendant must make a written request to the sentencing court for specific court documents or transcripts indicating that the materials are required to pursue postconviction remedies in a state or federal court and are not otherwise available to the defendant.

(2) If the documents or transcripts have been filed with the court and not provided previously to the defendant, the clerk must provide the defendant with copies of such materials without cost to the defendant. If the requested materials have been provided previously to the defendant, on defendant's showing of good cause to the court, the clerk must provide the defendant with another copy.

(3)-(4) [Unchanged.]

Staff Comment: This amendment inserts a "good cause" provision into MCR 6.433(C) to require a defendant in postconviction proceedings to show good cause to obtain a second set of court documents. This amendment mirrors the good-cause provision in MCR 6.433(B)(2) for appeals by leave.

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

Entered May 18, 2010, effective September 1, 2010 (File No. 2009-26) —REPORTER.

By order dated February 2, 2010, this Court amended Rules 5.105, 5.125, 5.201, 5.501, 5.801, and 5.802 of the Michigan Court Rules, and adopted Rule 5.208, of the Michigan Court Rules, effective April 1, 2010. 485 Mich cclvi (2010). The Court also indicated that following the normal three-month public comment period, the Court would consider at a future public hearing whether to retain the amendments. Notice and an opportunity for comment at a public hearing having been provided, the amendments are retained.

Adopted May 18, 2010, effective September 1, 2010 (File No. 2009-18) —REPORTER.

[Additions are indicated by underlining, and deletions are indicated by by strikethrough.]

RULE 7.211. MOTIONS IN COURT OF APPEALS.

(A)-(B) [Unchanged.]

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

(1)-(8) [Unchanged.]

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

(a)-(b) [Unchanged.]

(c) Except as otherwise provided by statute or court rule, the procedure for sealing a Court of Appeals file is governed by MCR 8.119(F). Materials that are subject to a motion to seal a Court of Appeals file in whole or in part shall be held under seal pending the court's disposition of the motion.

(d)-(f) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 7.313. MOTIONS IN SUPREME COURT.

(A)-(C) [Unchanged.]

(D) Motion to Seal File. Except as otherwise provided by statute or court rule, the procedure for sealing a Supreme Court file is governed by MCR 8.119(F). Materials that are subject to a motion to seal a file in whole or in part shall be held under seal pending the court's disposition of the motion.

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

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

(A)-(E) [Unchanged.]

(F) Sealed Records.

(1)-(3) [Unchanged.]

(4) For purposes of this rule, "court records" includes all documents and records of any nature that are filed with the clerk in connection with the action. Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C). Materials that are subject to a motion to seal a record in whole or in part shall be held under seal pending the court's disposition of the motion.

(5)-(7) [Unchanged.]

(G) [Unchanged.]

Staff Comment: These amendments of MCR 7.211, 7.313, and 8.119 clarify that materials filed with a trial court, with the Court of Appeals, or with the Supreme Court that relate to a motion to seal a record are nonpublic until the court disposes of the motion.

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

Adopted July 1, 2010, effective immediately (File No. 2008-39)—REPORTER.

[The present language is amended as indicated below: additions are indicated by underline, and deletions by strikethrough.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A) [Unchanged.]

(B) Presentence Report; Disclosure Before Sentencing. The court must provide copies of the presentence report to the prosecutor, and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days, before the day of sentencing. ~~When providing the presentence report to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, the court shall inform them that the presentence report is confidential, and shall instruct them that they are prohibited from making a copy or otherwise creating an image of the report, and must return their single copy of the report to the court before or at the time of sentencing.~~ If the presentence report is not made available to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the

defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment of the day of sentencing to enable the moving party to review the presentence report and to prepare any necessary corrections, additions, or deletions to present to the court. The presentence report shall not include the following information about any victim or witness: home address, home telephone number, work address, or work telephone number, unless an address is used to identify the place of the crime. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review.

(C)-(G) [Unchanged.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(E) [Unchanged.]

(F) Sentencing.

(1) For sentencing, the court shall:

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

(b) provide copies of the presentence report (if a presentence report was prepared) to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days before the day of sentencing. ~~When providing the presentence report to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, the court shall inform them that the presentence report is confidential, and shall instruct them that they are prohibited from making a copy or otherwise creating an image of the report, and must return their single copy of the report to the court before or at the time of sentencing.~~ If the presentence report is not made available to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment to enable the moving party to review the presentence report and to prepare any necessary corrections, additions or deletions to present to the court, or otherwise advise the court of circumstances the prosecutor or defendant believes should be considered in imposing sentence. The presentence report shall not include the following information about any victim or witness: home address, home telephone number, work address, work telephone number, or any other information prohibited from disclosure pursuant to MCL 780.751 *et seq.*, unless an address is used to identify the place of the crime.

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

(2)-(3) [Unchanged.]

(G)-(H) [Unchanged.]

Upon further order of the Court, if the Legislature does not amend MCL 791.229 (or another act) to clarify the specific circumstances under which parties and other entities may have access to presentence investigation reports, and the scope of their access, and if any such action by the Legislature is not enacted into law, the following amendments will become effective January 1, 2011.

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A) [Unchanged.]

(B) Presentence Report; Disclosure Before Sentencing. The court must provide copies of the presentence report to the prosecutor, and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days, before the day of sentencing. The prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain their copies for their records. If the presentence report is not made available to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment of the day of sentencing to enable the moving party to review the presentence report and to prepare any necessary corrections, additions, or deletions to present to the court. The presentence report shall not include the following information about any victim or witness: home address, home telephone number, work address, or work telephone number, unless an address is used to identify the place of the crime. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of

rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review.

(C)-(G) [Unchanged.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(E) [Unchanged.]

(F) Sentencing.

(1) For sentencing, the court shall:

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

(b) provide copies of the presentence report (if a presentence report was prepared) to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days before the day of sentencing. The prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain their copies for their records. If the presentence report is not made available to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, shall be

entitled, on oral motion, to an adjournment to enable the moving party to review the presentence report and to prepare any necessary corrections, additions or deletions to present to the court, or otherwise advise the court of circumstances the prosecutor or defendant believes should be considered in imposing sentence. The presentence report shall not include the following information about any victim or witness: home address, home telephone number, work address, work telephone number, or any other information prohibited from disclosure pursuant to MCL 780.751 *et seq.*, unless an address is used to identify the place of the crime.

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

(2)-(3) [Unchanged.]

(G)-(H) [Unchanged.]

Staff comment: By order dated February 5, 2010, the Court adopted various amendments of MCR 6.425 and MCR 6.610 to require prosecutors and defendants to have access to the presentence investigation report at least two days before sentencing and allow adjournment if the parties do not receive the report in that time, to ensure the confidentiality of the PSI report, and to limit the victim or witness information that may be included in a PSI report. Following entry of the February order and shortly after its May 1, 2010, effective date, the Court considered the matter further, specifically with regard to mandatory confidentiality provisions that not only represented a significant change in current practice, but, also, underscored a fundamental tension between the explicit provisions of MCL 791.229, which describes who may have a copy of the report and for what purposes, and subsequent caselaw, which has expanded access of PSI reports in certain circumstances. In light of this tension, the Court has invited interested associations that oppose the language as adopted by the Court to approach the Legislature to resolve the conflict. However, if legislation on this subject is not enacted and effective by the end of this calendar year, an amendment to allow prosecutors, defense counsel, and defendants to retain a copy of the presentence investigation report will automatically go into effect on January 1, 2011.

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

CORRIGAN, J. (*dissenting*). I oppose the contingency aspect of the Court's order, which will amend MCR

6.425 and 6.610 by judicial fiat beginning January 1, 2011, if the Legislature fails to amend MCL 791.229 or enact other legislation clarifying the circumstances under which parties may retain copies of presentence reports in the interim. Not only is the contingency provision adopted by this Court unprecedented and illogical, but it also amounts to improper ultimatum to the Legislature. Accordingly, I object to its inclusion in the order.

On February 5, 2010, the Court entered an order adopting amendments of MCR 6.425 and 6.610, which became effective on May 1, 2010. After the order entered, the Prosecuting Attorneys Association of Michigan (PAAM) submitted a letter, opposing the identical confidentiality provisions that appear in MCR 6.425(B) and 6.610(F)(1)(b). PAAM requested that the Court delay the effective date of the adopted amendments and republish the language for public comment. In light of PAAM's letter, Justice MARKMAN requested that the Court reconsider its previous action at an upcoming administrative conference. During the June 3, 2010 administrative conference, the Court considered the concerns expressed by PAAM and others about the confidentiality provisions. Rather than delaying the effective date of the amendments and republishing the language for public comment consistent with PAAM's request, however, the Court struck the offending provisions effective immediately. The Court also adopted an additional contingency, stating that "if the Legislature does not amend MCL 791.229 (or another act) to clarify the specific circumstances under which parties and other entities may have access to presentence investigation reports, and the scope of their access, and if any such action by the Legislature is not enacted into law, the following amendments will become effective January 1, 2011." The language that the contingency aspect

of the order would automatically incorporate in both MCR 6.425(B) and 6.610(F)(1)(b) effective January 1, 2011, states "[t]he prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain their [presentence report] copies for their records."

I strenuously object to the contingency aspect of the Court's order. Although the Court acknowledges the "fundamental tension" between the existing statutes governing confidentiality, see e.g., MCL 791.229, and the apparent practice of prosecutors and defense attorneys, the Court would resolve that tension by urging the Legislature to enact clarifying legislation by January 1, 2011. If the Legislature does not act by that date, the Court will intervene and enact its own preferred solution sua sponte. In so doing, the Court would automatically enact rule amendments that arguably conflict with existing statutory provisions merely because the Legislature failed to enact satisfactory "clarifying" legislation in the circumscribed period decreed by a bare majority of this Court. I question whether the Court has the authority to resolve the identified tension in this manner. Indeed, I cannot recall any administrative file in which this Court imposed, by ultimatum, a similar contingency on a separate but coequal branch of government through an administrative order.

The lack of precedent notwithstanding, today the Court prods the Legislature to enact an undisputedly legislative solution by the end of the calendar year or risk the Court imposing its own legislative solution by judicial fiat. Threatening to invade the province of the Legislature in this manner demonstrates a troubling lack of regard for the separation of powers. Additionally, insofar as the Court adopted the contingency provision to give PAAM and similar organizations sufficient time

to seek relief from the Legislature, I emphasize that the stated rationale is wholly illogical. PAAM and similar organizations have no incentive to seek a legislative fix when their preferred solution remains inevitable so long as the Legislature does not act. Further, I am concerned that the Court is especially ill-suited to adopt this contingency when we have neither consulted victims' rights groups or other groups potentially impacted by the contingency aspect of the order nor have we carefully deliberated about the possible repercussions of permitting criminal defendants to retain copies of presentence reports.

Consequently, I respectfully object to the inclusion of the contingency aspect in the Court's order.

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

AMENDMENTS OF MICHIGAN RULES OF PROFESSIONAL CONDUCT

Adopted June 8, 2010, effective September 1, 2010 (File No. 2009-06) —REPORTER.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

RULE 5.4. PROFESSIONAL INDEPENDENCE OF A LAWYER.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate, or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price ~~pursuant to the provisions of Rule 1.17~~; ~~and~~

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof, or one who occupies a position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives consent).

~~*A lawyer does not violate this rule by affiliating with or being employed by an organization such as a union-sponsored prepaid legal services plan, provided the structure of the organization permits the lawyer independently to exercise professional judgment on behalf of a client.*~~

Staff Comment: The primary amendment of MRPC 5.4 adds proposed paragraph (a)(4), which specifically allows a lawyer to "share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter."

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

SUPREME COURT CASES

ROBINSON v CITY OF LANSING

Docket No. 138669. Decided April 8, 2010.

Barbara A. Robinson brought an action in the Ingham Circuit Court against the city of Lansing, seeking damages for injuries sustained when she tripped and fell on a sidewalk adjacent to Michigan Avenue, a state highway in the city. Plaintiff alleged that defendant had breached its duty under MCL 691.1402(1) to maintain the sidewalk in reasonable repair and in a condition reasonably safe and fit for travel. In its answer, defendant asserted as an affirmative defense the two-inch rule of MCL 691.1402a(2), which provides that a discontinuity defect of less than 2 inches in a sidewalk creates a rebuttable inference that the municipality maintained the sidewalk in reasonable repair. Defendant subsequently sought summary disposition, arguing that plaintiff had not rebutted the inference. Plaintiff moved to strike the affirmative defense, arguing that the two-inch rule applies only to sidewalks adjacent to county highways. The court, Thomas L. Brown, J., granted plaintiff's motion and denied defendant's. The Court of Appeals, WHITBECK, P.J., and O'CONNELL and OWENS, JJ., reversed, concluding that because subsection (2) of MCL 691.1402a contains no reference to county highways, unlike subsections (1) and (3) of the statute, the application of MCL 691.1402a(2) is not limited to county highways and the statute applied to the sidewalk in this case. The Court of Appeals remanded the case for the trial court to rule on the remaining issues and noted that defendant could refile its summary disposition motion. 282 Mich App 610 (2009). The Supreme Court ordered and heard oral argument on whether to grant plaintiff's application for leave to appeal or take other peremptory action. 483 Mich 1134 (2009).

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

The two-inch rule of MCL 691.1402a(2) applies only to sidewalks adjacent to county highways.

1. While MCL 691.1402(1) exempts state and county road commissions from liability for injuries resulting from defective

sidewalks, municipalities have a duty to maintain sidewalks under their jurisdiction in reasonable repair.

2. MCL 691.1402a(1), however, limits a municipality's duty to repair or maintain portions of a county highway outside the improved portion of the highway designed for vehicular travel. The statute provides that a municipality is liable for injuries arising from a defective sidewalk adjacent to a county highway if (1) the municipality knew or should have known of the existence of the defect at least 30 days before the injury occurred and (2) the defect was a proximate cause of the injury.

3. From the language and structure of the subsections of MCL 691.1402a and the statute's relationship to other sections of the governmental tort liability act concerned with the highway exception to governmental immunity, it is clear that the rebuttable inference of reasonable repair when a discontinuity defect of less than 2 inches exists applies only if the defective sidewalk is adjacent to a county highway. It does not apply to the sidewalk at issue in this case, which was adjacent to a state highway.

Justice YOUNG, concurring, noted that the majority opinion offered a sensible construction of MCL 691.1402a, but also wrote separately to set forth a plausible alternative interpretation of the statute that the Legislative could have intended, and to urge the Legislature to clarify its intent with regard to the two-inch rule if the Supreme Court reasonably yet mistakenly limited the scope of the rule.

Justice WEAVER, concurring, concurred in the result of the majority opinion because she believed that plaintiff has a more persuasive position in this close case. She further agreed with Justice YOUNG that MCL 691.1402a should be regarded as a seamless whole whose separate provisions apply to county highways. She also agreed with Justice YOUNG that the Legislature should clarify its intent with regard to the scope of the two-inch rule if the majority opinion adopted an incorrect interpretation of the statute.

Reversed; trial court's orders reinstated and case remanded for further proceedings.

GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — MUNICIPAL CORPORATIONS — COUNTY HIGHWAYS — SIDEWALKS — REASONABLE REPAIR — DISCONTINUITY DEFECTS — REBUTTABLE INFERENCES OF REASONABLE REPAIR.

MCL 691.1402a(2), which provides that a discontinuity defect of less than 2 inches in a sidewalk creates a rebuttable inference that the municipality having jurisdiction over a sidewalk maintained it in reasonable repair, applies only to sidewalks adjacent to county highways.

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *Michael E. Larkin* and *Steven A. Hicks*), for plaintiff.

Plunkett Cooney (by *Christine D. Oldani* and *David K. Otis*) for defendant.

Amici Curiae:

Garan Lucow Miller, P.C. (by *Rosalind Rochkind*), for the Michigan Municipal League and the Michigan Municipal League and Property Pool.

MARKMAN, J. At issue here is whether the two-inch rule of MCL 691.1402a(2), which provides that a discontinuity defect of less than two inches in a sidewalk creates a rebuttable inference that the municipality maintained the sidewalk in reasonable repair, applies to sidewalks adjacent to state highways, as with the sidewalk at issue here, or only to sidewalks adjacent to county highways. The trial court concluded that the rule only applies to sidewalks adjacent to county highways and, thus, granted plaintiff's motion to strike the rule as an affirmative defense and denied defendant's motion for summary disposition. However, the Court of Appeals reversed, holding that the rule is not limited to sidewalks that are adjacent to county highways, and remanded for further proceedings. Because we agree with the trial court that the rule only applies to sidewalks adjacent to county highways, we reverse the judgment of the Court of Appeals, reinstate the trial court's orders, and remand to the trial court for further proceedings.

I. FACTS AND HISTORY

On December 4, 2005, plaintiff, Barbara Robinson, was walking on the brick sidewalk that is adjacent to Michigan Avenue, a state highway in Lansing, in front of the

Lansing Center. She stepped into a depressed area of the sidewalk, lost her balance, tripped on a raised and uneven area of bricks next to the depression, and fell forward. As a result, she fractured her wrist, necessitating two surgeries. It is undisputed that the raised portion of the sidewalk was less than two inches and that defendant, the city of Lansing, maintained this sidewalk.

Plaintiff sued defendant under the highway exception to governmental immunity, alleging that defendant had breached its duty under MCL 691.1402(1) to maintain the sidewalk in reasonable repair. Defendant answered, raising as an affirmative defense the two-inch rule of MCL 691.1402a(2). Before the close of discovery, defendant moved for summary disposition under MCR 2.116(C)(7) (governmental immunity), claiming that it was entitled to judgment as a matter of law because plaintiff had not rebutted the inference created by the rule that defendant had maintained the sidewalk in reasonable repair. Plaintiff responded and moved to strike the rule as an affirmative defense by arguing that the rule applies only to sidewalks adjacent to county highways and, as a result, was inapplicable. The trial court agreed with plaintiff and thus granted plaintiff's motion to strike and denied defendant's motion for summary disposition.

Defendant appealed by right, arguing that nothing in MCL 691.1402a(2) limits its application to county highways. The Court of Appeals reversed and held that, in contrast to subsections (1) and (3), subsection (2) of MCL 691.1402a contains no language limiting its application to county highways. *Robinson v City of Lansing*, 282 Mich App 610, 616-618; 765 NW2d 25 (2009). It then remanded the case to the trial court to rule on the remaining issues and noted that defendant could refile its summary disposition motion.

Plaintiff has sought leave to appeal, claiming that the Court of Appeals erred in its interpretation of MCL 691.1402a(2). This Court directed that oral argument be heard on the application for leave to appeal, 483 Mich 1134 (2009), and argument was heard on December 9, 2009.

II. STANDARD OF REVIEW

Whether the two-inch rule of MCL 691.1402a(2) applies to sidewalks adjacent to state highways or only to sidewalks adjacent to county highways is a question of law that this Court reviews de novo. *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 40; 709 NW2d (2006). A trial court's decision to deny a motion for summary disposition is also reviewed de novo. *Id.*

III. ANALYSIS

A. GOVERNMENTAL IMMUNITY AND HIGHWAY EXCEPTION

In Michigan, governmental immunity was originally a common-law doctrine that protected all levels of government. However, in 1961, this Court abolished common-law governmental immunity with respect to municipalities. *Williams v Detroit,* 364 Mich 231; 111 NW2d 1 (1961); *McDowell v State Hwy Comm'r*, 365 Mich 268; 112 NW2d 491 (1961). In 1965, the Legislature reacted to *Williams* and *McDowell* by enacting the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., restoring immunity for municipalities and preserving this protection for the state and its agencies. The GTLA provides: "Except as otherwise provided in this act, a governmental agency[1] is immune from tort

[1] "Governmental agency" is defined as "the state or a political subdivision." MCL 691.1401(d). The "state" includes "the state of Michigan and its agencies, departments [and] commissions," MCL 691.1401(c), and

liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). This grant of immunity is currently subject to six statutory exceptions.[2]

At issue in this case is the highway exception, MCL 691.1402(1), which provides, in relevant part:

> Except as otherwise provided in [MCL 691.1402a], 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] 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. . . . The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.

"Highway" is defined as "a public highway, road, or street that is open for public travel and includes bridges, *side-*

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a "political subdivision" includes "a municipal corporation, county, [and] county road commission," MCL 691.1401(b). Finally, a "municipal corporation" includes a "city, village, [and] township . . . ." MCL 691.1401(a).

[2] The six statutory exceptions are (1) the highway exception, MCL 691.1402; (2) the motor-vehicle exception, MCL 691.1405; (3) the public-building exception, MCL 691.1406; (4) the proprietary-function exception, MCL 691.1413; (5) the governmental-hospital exception, MCL 691.1407(4); and (6) the sewage-disposal-system exception, MCL 691.1417.

[3] Const 1963, art 7, § 29 provides that "the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government." As the Court of Appeals noted, "the city does not dispute that it has jurisdiction over the sidewalk adjacent to Michigan Avenue." *Robinson*, 282 Mich App at 612-613.

walks, trailways, crosswalks, and culverts on the highway." MCL 691.1401(e) (emphasis added).

From these statutory provisions, we know that all governmental agencies, including the state, counties, and municipalities, have a duty to maintain highways under their jurisdiction in reasonable repair. However, we also know that the duty of state and county road commissions is limited to the "improved portion of the highway designed for vehicular travel," which specifically "does not include sidewalks . . . ." MCL 691.1402(1). A municipality's duty, on the other hand, is not similarly limited; rather, a municipality has a duty to maintain highways in reasonable repair and "highway" is specifically defined to include "sidewalks." MCL 691.1402(1); MCL 691.1401(e). Thus, while MCL 691.1402(1) exempts state and county road commissions from liability for injuries resulting from defective sidewalks, municipalities are not exempt; municipalities do have a duty to maintain sidewalks in reasonable repair. *Haliw v Sterling Hts*, 464 Mich 297, 303; 627 NW2d 581 (2001) ("Pursuant to [MCL 691.1402(1)], the duty to maintain public sidewalks in 'reasonable repair' falls on local governments, including cities, villages, and townships."); *Glancy v City of Roseville*, 457 Mich 580, 584; 577 NW2d 897 (1998) ("[MCL 691.1402(1)] requires municipalities to maintain sidewalks in 'reasonable repair.' "); *Listanski v Canton Twp*, 452 Mich 678, 690; 551 NW2d 98 (1996) ("[T]ownships are liable for injuries occurring on sidewalks that abut state or county roads as a result of their negligent failure to maintain their sidewalks in reasonable repair."), citing *Mason v Wayne Co Bd of Comm'rs*, 447 Mich 130, 136 n 6; 523 NW2d 791 (1994) ("[T]he purpose of [the limiting sentence of MCL 691.1402(1)], which applies only to counties and the state, is to allocate responsibility for sidewalks and crosswalks to local governments, includ-

ing townships, cities, and villages."); *Jones v City of Ypsilanti*, 26 Mich App 574, 581; 182 NW2d 795 (1970) (holding that cities are liable for injuries occurring on sidewalks that abut state highways as a result of their negligent failure to maintain their sidewalks in reasonable repair). In other words, when MCL 691.1402(1) and MCL 691.1401(e) are read together,[4] it is clear that all governmental agencies except the state and county road commissions have a duty to maintain sidewalks in reasonable repair. Indeed, in the instant case, defendant does not argue that it does not have a duty to maintain the sidewalk at issue in reasonable repair,[5] but only argues that because the sidewalk's discontinuity defect was less than 2 inches, MCL 691.1402a(2) creates a rebuttable inference that the municipality maintained the sidewalk in reasonable repair and that plaintiff has not rebutted this inference. Therefore, as the Court of Appeals recognized, the "salient question . . . is whether the city is entitled to assert as a defense the two-inch rule set forth in MCL 691.1402a(2)." *Robinson*, 282 Mich App at 615.

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[4] "It is elementary that statutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and that courts will regard all statutes upon the same general subject matter as part of 1 system." *Dearborn Twp Clerk v Jones*, 335 Mich 658, 662; 57 NW2d 40 (1953). In this case, both MCL 691.1401 and MCL 691.1402 are in the GTLA, MCL 691.1401 immediately precedes MCL 691.1402, and MCL 691.1401 expressly states, "As used in this act: . . . 'Highway' . . . includes . . . sidewalks . . . ." Therefore, "highway" as used in MCL 691.1402 clearly includes "sidewalks."

[5] As noted by the Court of Appeals, "there is no dispute that the city has jurisdiction over the sidewalk adjacent to Michigan Avenue and therefore must keep it 'in reasonable repair so that it is reasonably safe and convenient for public travel.' " *Robinson*, 282 Mich App at 615, quoting MCL 691.1402(1). See also defendant's answer to the complaint, ¶ 9, p 2, in which defendant admitted that it "had a duty to maintain the sidewalk in reasonable repair so that it was reasonably safe and convenient for public travel."

B. TWO-INCH RULE

As with governmental immunity itself, the two-inch rule was originally a common-law rule.[6] In *Harris v Detroit*, 367 Mich 526, 528; 117 NW2d 32 (1962), the

[6] Justice BLACK, in his concurring statement in *Harris v Detroit*, 367 Mich 526, 537; 117 NW2d 32 (1962) (BLACK, J., concurring), referred to the two-inch rule as a culmination of "cases construing an unamended statute; not a case or line of cases announcing a rule of the common law." However, given that the statute referred to by Justice BLACK did not refer to a discontinuity of less than two inches, we respectfully disagree. The statute referred to by Justice BLACK at that time stated:

> Any person or persons sustaining bodily injury upon any of the public highways or streets in this state, by reason of neglect to keep such public highways or streets, and all bridges, sidewalks, crosswalks and culverts on the same in reasonable repair, and in condition reasonably safe and fit for travel by the township, village, city or corporation whose corporate authority extends over such public highway, street, bridge, sidewalk, crosswalk or culvert, and whose duty it is to keep the same in reasonable repair, such township, village, city or corporation shall be liable to and shall pay to the person or persons so injured or disabled, and to any person suffering damages by reason of such injury, just damages, to be recovered in an action of trespass on the case before any court of competent jurisdiction. [MCL 242.1, as amended by 1951 PA 19.]

Because neither this statute nor any other contemporaneous statute referred to anything resembling the two-inch rule, we conclude that the rule at that time could only have been a common-law rule. See *Glancy*, 457 Mich at 588, which explained that "the two-inch rule was . . . a common-law threshold for negligence based on the 'reasonable repair' standard of care of the statutory highway exception." See also *Rule v Bay City*, 387 Mich 281, 282; 195 NW2d 849 (1972), in which this Court held that "for the reasons stated by Mr. Justice ADAMS in his dissent in *Harris v Detroit*, 367 Mich 526, 529 (1962), we do not regard it as desirable to continue to enforce the 'two-inch' rule,' " and Justice ADAM's dissent in *Harris*, in which he referred to the two-inch rule as a "judge-made rule of law," and opined that " ' "chang[ing] [the common-law] should not be left to the legislature." ' " *Harris,* 367 Mich at 533-534 (ADAMS, J., dissenting), quoting *Bricker v Green*, 313 Mich 218, 235; 21 NW2d 105 (1946), quoting the William L. Storrs Lectures by Justice Benjamin Cardozo before the Yale University Law School in 1921, collected in Cardozo, *The Nature of the Judicial Process*, pp 151-152.

two-inch rule was described as meaning that "a depression in a walk which does not exceed 2 inches in depth will not render a municipality liable for damages incident to an accident caused by such depression." "The basis of the two-inch rule [was] the concept of 'reasonable repair.' " *Glancy*, 457 Mich at 586. "The two-inch rule was a bright-line rule stating that defects of two inches or less constituted 'reasonable repair' as a matter of law." *Id.* at 586-587. In 1972, however, this Court abolished the rule, *Rule v Bay City*, 387 Mich 281; 195 NW2d 849 (1972),[7] and, in 1998, we refused to readopt it, *Glancy*, 457 Mich at 582. In 1999, the Legislature took up the issue, and a statutory two-inch rule was adopted in MCL 691.1402a,[8] which provides:

> (1) Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:
>
> (a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.

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[7] In *Rule*, 387 Mich at 283, this Court announced, "[W]e will no longer hold as a matter of law that a depression or obstruction of two inches or less in a sidewalk may *not* be the basis for a municipality's liability for negligence." (Emphasis in the original.)

[8] The catchline of MCL 691.1402a in the Michigan Complied Laws Annotated states, "Duties to repair or maintain county highways; liabilities"; however, we recognize that the Legislature did not itself enact this catchline as part of the statute, and that such a catchline shall not be used to construe the section more broadly or narrowly than the text of the section would otherwise indicate. See MCL 8.4b.

> (b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.
>
> (2) A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair.
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> (3) A municipal corporation's liability under subsection (1) is limited by section 81131 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.81131.[9]

Although the very first sentence of MCL 691.1402a(1) begins by stating that a municipality is *not* liable for injuries arising from a portion of a county highway outside the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation, this sentence is prefaced by the language "[e]xcept as otherwise provided by this section," and the very next sentence of this subsection states that a municipality *is* liable for such injuries under certain circumstances.[10] That is, a municipality *is*

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[9] MCL 324.81131(11) provides that municipalities are not liable for injuries resulting from the use of off-road vehicles absent gross negligence.

[10] That MCL 691.1402a(1) does *not* completely abrogate a municipality's liability for injuries resulting from defective sidewalks is further supported not only by the fact that the second sentence of subsection (1) states that "[t]his subsection does *not* prevent or limit a municipal corporation's liability" under certain circumstances, but also by the fact that subsection (3) states that "[a] municipal corporation's *liability under subsection (1)* is limited by . . . MCL 324.81131." (Emphasis added.) It would have been unnecessary to indicate in subsection (3) that a municipality's liability is limited by MCL 324.81131 if subsection (1) had already completely abrogated that liability. It would have been similarly unnecessary to indicate in subsection (2) that a discontinuity defect of less than 2 inches creates a rebuttable inference that the municipality maintained the sidewalk in reasonable repair if subsection (1) had already abrogated a municipality's duty in this regard. Therefore, al-

liable for injuries arising from a defective sidewalk adjacent to a county highway if (a) the municipality knew or should have known at least 30 days before the occurrence of the injury of the existence of the defect in the sidewalk and (b) that defect was a proximate cause of the injury. MCL 691.1402a(1). In addition, MCL 691.1402a(2) provides that a discontinuity defect of less than 2 inches creates a rebuttable inference that the municipality maintained the sidewalk in reasonable repair, as is required by MCL 691.1402(1); this is the statutory two-inch rule.[11]

As discussed earlier, MCL 691.1402(1) imposes liability on municipalities for injuries resulting from defective sidewalks, i.e., sidewalks that the municipality has failed to maintain in reasonable repair. *Haliw*, 464 Mich at 303 ("Pursuant to [MCL 691.1402(1)], the duty to maintain public sidewalks in 'reasonable repair' falls on

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though subsection (1) does limit a municipality's liability for injuries resulting from defective sidewalks, it does not completely abrogate this liability.

[11] The statutory two-inch rule's "rebuttable inference" of reasonable repair is distinct from the common-law rule's irrebutable presumption of reasonable repair. As the Court of Appeals explained in *Gadigian v City of Taylor*, 282 Mich App 179, 183-184; 774 NW2d 352 (2009),

> [i]n crafting [MCL 691.1402a(2)], the Legislature could have adopted the former common-law rule, which flatly prohibited claims involving discontinuity defects of less than two inches. . . .
>
> But rather than eliminating all sidewalk-injury claims arising from defects of less than two inches, . . . the Legislature used the term "rebuttable inference."

This Court has granted leave to appeal in *Gadigian* to address the meaning of "rebuttable inference" in MCL 691.1402a(2). In the order granting leave, the parties have been directed to address "what evidence a plaintiff must present to rebut the inference of reasonable repair." *Gadigian v City of Taylor*, 485 Mich 966 (2009). Given our conclusion that the two-inch rule does not apply in the instant case, there is no need to hold this case in abeyance for *Gadigian*.

local governments, including cities, villages, and townships."). However, MCL 691.1402a limits this liability by providing that municipalities are only liable for injuries resulting from defective sidewalks adjacent to *county* highways under the specified circumstances. Moreover, if this defect constitutes a discontinuity of less than 2 inches, a rebuttable inference arises that the municipality maintained the sidewalk in reasonable repair, which is all that the municipality is required to do under MCL 691.1402(1). Therefore, when MCL 691.1402(1) and MCL 691.1402a are read together, it is clear that municipalities are generally liable for injuries resulting from defective sidewalks.[12]

While defendant contends that the rebuttable inference of MCL 691.1402a(2) applies to all cases in which a plaintiff is seeking to impose liability on a municipality for an injury resulting from a defective sidewalk, plaintiff contends that this rebuttable inference only applies in cases in which the defective sidewalk is adjacent to a *county* highway. For several reasons, we agree with plaintiff.

First, as discussed above, MCL 691.1402a(1) begins by stating that a municipality "is not liable for injuries arising from, a portion of a *county* highway . . . , including a sidewalk," unless certain conditions are satisfied. (Emphasis added.) These conditions are then set forth in MCL 691.1402a(1)(a) and (b). Then, immediately thereafter, MCL 691.1402a(2) indicates that a discontinuity defect of less than 2 inches creates a rebuttal

[12] Both MCL 691.1402 and MCL 691.1402a are in the GTLA, MCL 691.1402 immediately precedes MCL 691.1402a, and MCL 691.1402 expressly states, "Except as otherwise provided in *section 2a* [MCL 691.1402a], each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair . . . ." (Emphasis added.) Therefore, it is absolutely clear that MCL 691.1402 and MCL 691.1402a must be read together. See n 4 of this opinion.

inference that the municipality maintained the sidewalk in reasonable repair. Nothing in subsection (2) suggests that its scope is any different than that of subsection (1); that is, there is no language in subsection (2) that indicates that although subsection (1) only applies to *county* highways, subsection (2) should be construed as additionally applying to highways other than county highways, such as state or city highways.

Second, not only do the placement of subsection (2) and the absence of language in subsection (2) distinguishing it from subsection (1) suggest that subsection (2), as with subsection (1), only applies to *county* highways, but the syntax of subsection (2) also suggests that both these subsections apply only to *county* highways. Subsection (2) refers to "*the* highway." (Emphasis added.) As this Court has explained:

> "The" and "a" have different meanings. "The" is defined as "definite article. 1. (used, [especially] before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an). . . ." *Random House Webster's College Dictionary*, p 1382. [*Massey v Mandell*, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000).][13]

Because subsection (2) refers to "*the* highway," we must determine to which "specific or particular" highway subsection (2) refers to. That is, because subsection (2) does not refer to "*a* highway," we cannot read subsection (2) as applying to highways in "general."[14] Given that subsec-

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[13] We must follow these distinctions between "a" and "the" because the Legislature has directed that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language . . . ." MCL 8.3a. See, e.g., *Detroit v Tygard*, 381 Mich 271, 275; 161 NW2d 1 (1968) ("We regard the use of the definite article 'the' as significant.").

[14] Contrary to the Court of Appeals and defendant's contention, MCL 691.1402a(2) does not apply to "any" highway. See *Robinson*, 282 Mich

tion (2) immediately follows subsection (1), which limits its application to "*county* highway[s]," "*the* highway" referred to in subsection (2) must be the same highway referred to in subsection (1)—the *county* highway.

Third, subsection (2) cannot be read in isolation, but must be read in context. Defendant argues, and the Court of Appeals agreed, that because the Legislature did not expressly use the word "county" in subsection (2), this word cannot be read into subsection (2). If subsection (2) were to be read in isolation, defendant and the Court of Appeals might be correct in this analysis because it is well established that "we may not read into the statute what is not within the Legislature's intent as derived from the language of the statute." *AFSCME v Detroit*, 468 Mich 388, 400; 662 NW2d 695 (2003). However, it is equally well established that to discern the Legislature's intent, statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole. *Apsey v Mem Hosp*, 477 Mich 120, 132 n 8; 730 NW2d 695 (2007) ("To discern the true intent of the Legislature, . . . statutes must be read together, and no one section should be taken in isolation."); *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005) (" '[T]he meaning of statutory language, plain or not, depends on context.' ") (citation omitted); *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) (" '[W]ords in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole.' ") (citation omitted).[15]

App at 618; Defendant's brief opposing the application for leave to appeal, p 14. Instead, it applies to "the" highway, i.e., "the" highway referred to in MCL 691.1402a(1)—the *county* highway.

[15] Defendant's contention that the subsections comprising MCL 691.1402a should be read as "stand[ing] alone" stands in stark contrast

"[A]ny attempt to segregate any portion or exclude any portion [of a statute] from consideration is almost certain to distort the legislative intent." 2A Singer & Singer, Statutes and Statutory Construction (7th ed), § 47.2, p 282. For the reasons discussed throughout this opinion, although only subsection (1) expressly refers to "county" highways, we believe that when MCL 691.1402a is read as a whole, it is clear that both subsections (1) and (2) only apply to such highways.

Fourth, the Legislature is not required to be overly repetitive in its choice of language. In essence, the issue here boils down to whether the Legislature was required to repetitively restate "county" throughout the entire statutory provision. We do not believe that this is required of the Legislature in order that it communicate its intentions. Instead, we believe that a reasonable person reading this statute would understand that all three subsections of this provision apply only to *county* highways. Indeed, if the Legislature had intended subsections (2) and (3) to apply to highways other than county highways, we believe that it would have been reasonably incumbent upon the Legislature to so indicate. Even subsection (1) only refers to "county highway" one time and thereafter simply refers to "the highway," and defendant conceded at oral argument that these subsequent references to "the highway" in subsection (1) signify "county highway." The first time

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to these well-established rules of construction. In addition, defendant's reliance on the equally well-established doctrine of *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another"), *Miller v Allstate Ins Co*, 481 Mich 601, 611; 751 NW2d 463 (2008), is misplaced. All that doctrine tells us is that which everybody agrees—the express reference in MCL 691.1402a(1) to county highways excludes all other highways; that is, MCL 691.1402a(1) only applies to county highways. However, because MCL 691.1402a(2) does not expressly refer to a specific highway, other than "the highway," this doctrine does not aid us in our interpretation of MCL 691.1402a(2).

that "highway" is used in MCL 691.1402a, it is immediately preceded by the word "county"; however, the next three times that it is used, it is not preceded by the word "county." Although defendant concedes that the second and third such references mean "county highway," defendant argues that the fourth reference to "highway" means *any* highway. We respectfully disagree. Instead, we believe that the fourth reference to "highway," just like the previous references in MCL 691.1402a, is a reference only to "county highways." In short, we do not believe that the Legislature is under an obligation to cumbersomely repeat language that is sufficiently incorporated into a statute by the use of such terms as "the," "such," and "that."[16]

Fifth, unless the Legislature indicates otherwise, when it repeatedly uses the same phrase in a statute, that phrase should be given the same meaning throughout the statute. *Paige v Sterling Hts*, 476 Mich 495, 520; 720 NW2d 219 (2006) (indicating that "absolutely identical phrases in our statutes" should have identical meanings). In MCL 691.1402a, all the references to "the highway" are encompassed within the identical phrase—"outside of the improved portion of *the highway* designed for vehicular travel." Therefore, all the references to "the highway" should be interpreted in the same manner. Given that the first three references to "highway" in MCL 691.1402a indisputably refer to county highways only, we see no reason why the fourth reference to "highway" should be construed any differently.

Finally, the principle that statutory provisions should not be construed in a manner that renders language

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[16] See, e.g., *Townsend v M-R Products, Inc*, 436 Mich 496, 502 n 8; 461 NW2d 696 (1990) ("Rather than repeat the phrases 'weekly compensation benefits,' and 'accrued weekly benefits,' the drafters used the shorter '[the] compensation'/'benefits' to encompass both.").

within those provisions meaningless also supports our conclusion that the two-inch rule of MCL 691.1402a(2) only applies to sidewalks adjacent to county highways. *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 70; 748 NW2d 524 (2008) ("[A]n interpretation that renders language meaningless must be avoided."). As discussed earlier, before MCL 691.1402a was enacted in 1999, MCL 691.1402(1) already imposed liability on municipalities for injuries resulting from defective sidewalks. *Haliw*, 464 Mich at 303 ("Pursuant to [MCL 691.1402(1)], the duty to maintain public sidewalks in 'reasonable repair' falls on local governments, including cities, villages, and townships."). Therefore, MCL 691.1402a was plainly not enacted to introduce such liability on municipalities. Instead, it was enacted to *limit* this liability.[17] So one must ask how does MCL 691.1402a limit this liability? At first blush, it would

[17] As the Court of Appeals explained in *Carr v City of Lansing*, 259 Mich App 376, 380-381; 674 NW2d 168 (2003):

> . . . MCL 691.1402a, added by 1999 PA 205, effective December 21, 1999, creates no liability for municipalities that would not otherwise exist. The 1999 legislation also amended [MCL 691.1402(1)] to add "[e]xcept as otherwise provided in section 2a" immediately preceding the imposition of the duty of "each governmental agency having jurisdiction over a highway" to maintain it "in reasonable repair so that it is reasonably safe and convenient for public travel." Section 2a is MCL 691.1402a. So, reading the plain language of the amendment, [MCL 691.1402a] is an exception to [MCL 691.1402(1)], the highway exception to the general rule of governmental immunity established in [MCL 691.1407(1)]. The obvious purpose of [MCL 691.1402a] is to limit the liability municipalities would otherwise face to maintain sidewalks, trailways, crosswalks, or other installations pursuant to [MCL 691.1401(e)] and [MCL 691.1402(1)] by virtue of the exclusion of municipalities from the fourth sentence of [MCL 691.1402(1)], which limits state and county liability to "the improved portion of the highway designed for vehicular travel . . . ." See *Haliw,* [464 Mich] at 303, and *Weakley* [*v Dearborn Hts (On Remand)*, 246 Mich App 322, 326; 632 NW2d 177 (2001)]. Moreover, by its plain terms, [MCL 691.1402a] applies only to "a portion of a *county* highway outside of the improved portion of the highway designed for

appear that MCL 691.1402a(1) limits this liability to instances in which (a) the municipality knew or should have known of the defect in the sidewalk at least 30 days before the injury occurred and (b) this defect was a proximate cause of the injury. However, both of these limitations also existed before the enactment of MCL 691.1402a. Indeed, both of these limitations have existed since the Legislature first enacted the GTLA in 1965.

The first of these limitations, i.e., the one set forth in MCL 691.1402a(1)(a) regarding the municipality's knowledge of the defect, was first set forth in MCL 691.1403, which provides:

> 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.

As one can see, MCL 691.1402a(1)(a) and MCL 691.1403 are virtually identical; they both limit a municipality's liability to instances in which the municipality knew or should have known of the defect at least 30 days before the injury took place.

The second of these limitations, i.e., the one set forth in MCL 691.1402a(1)(b) requiring that the defect in the sidewalk have been a proximate cause of the injury, was first set forth in MCL 691.1402(1), which provides, in pertinent part:

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vehicular travel" (emphasis added), but only a state highway and a city street are involved in this case.

> 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.]

This Court has held that this language requires that the defect have been a proximate cause of the injury:

> W]here a plaintiff successfully pleads in avoidance of governmental immunity, i.e., that the alleged injury occurred in a location encompassed by MCL 691.1402(1), the plaintiff must still prove, consistent with traditional negligence principles, the remaining elements of breach, causation, and damages contained within the statute. . . .
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> * * *
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> Proof of causation requires both cause in fact and legal, or proximate, cause. [*Haliw*, 464 Mich at 304, 310.]

See also *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 434; 751 NW2d 8 (2008) ("To recover under MCL 691.1402(1), a plaintiff must demonstrate that a defect in the highway was [a] proximate cause of the plaintiff's injury.").

Although it is clear that MCL 691.1402a(1) was enacted to limit the liabilities of a municipality with regard to *county* highways, given that the two limitations set forth in MCL 691.1402a(1)(a) and (b) existed before MCL 691.1402a was enacted and that these limitations already applied to *all* highways, there must be some *other* reason that the Legislature chose to enact MCL 691.1402a(1). We believe that this other reason was to codify the two-inch rule with respect to *county* highways only. That is, unless MCL 691.1402a(1) is interpreted as limiting the two-inch rule to sidewalks adjacent to county highways, it is nothing more than a

restatement of existing law in Michigan. In other words, MCL 691.1402a(1) is mere surplusage unless "county highway" in that subsection is construed to *limit* the application of the two-inch rule in MCL 691.1402a(2), and it is well established that "[i]n interpreting a statute, we [must] avoid a construction that would render part of the statute surplusage or nugatory." *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009). In light of this historical backdrop, we believe it is clear that the significance of MCL 691.1402a(1) is its *limitation* to county highways.[18]

To summarize, MCL 691.1402a(1) limits a municipality's liability with regard to county highways, MCL 691.1402a(2) codifies the two-inch rule with regard to county highways, and MCL 691.1402a(3) limits a municipality's liability with regard to county highways and off-road vehicles.[19] In other words, subsection (1) sets

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[18] The fact that the two-inch rule was placed in MCL *691.1402a*, rather than MCL 691.1402 further supports our conclusion that the two-inch rule was intended to apply to *county* highways only, rather than *all* highways. In other words, if the Legislature had intended the two-inch rule to apply to *all* highways, why did the Legislature place the two-inch rule in MCL 691.1402a, a statutory provision in which two out of its three subsections indisputably apply only to *county* highways, rather than MCL 691.1402, which applies to *all* highways?

[19] Given that MCL 691.1402a(1) and (2) thoroughly address the liability of municipalities with regard to county highways, it makes sense that the Legislature would want to clarify in MCL 691.1402a(3) that the limitations of liability pertaining to off-road vehicles already found in the Natural Resources and Environmental Protection Act, MCL 324.81131, and referred to in MCL 691.1402(4), are still to be applied to municipalities with regard to county highways. That is, the Legislature may well have been concerned that, in the absence of subsection (3), the argument might be raised that MCL 324.81131 was preempted by MCL 691.1402a with regard to a municipality's liability for injuries resulting from defective county highways. Further, contrary to defendant's contention, the mere fact that MCL 691.1402a(3) expressly refers back to MCL 691.1402a(1), while MCL 691.1402a(2) does not, does not mean that only subsections (1) and (3) are limited to county highways. Instead, this

forth in clear terms the general rule regarding a municipality's liability for defective sidewalks adjacent to county highways, subsection (2) adopts a statutory two-inch rule for those sidewalks, and subsection (3) provides an exception to liability for these same sidewalks. This establishes a fully rational and coherent legislative scheme. MCL 691.1402a does not apply to sidewalks adjacent to highways other than county highways, such as sidewalks adjacent to state highways. Therefore, the two-inch rule of MCL 691.1402a(2) does not apply to the latter.[20]

IV. CONCLUSION

For the reasons discussed, we conclude that the two-inch rule of MCL 691.1402a(2) does not apply to sidewalks adjacent to state highways; it only applies to sidewalks adjacent to county highways. Therefore, we reverse the judgment of the Court of Appeals, reinstate the trial court's orders granting plaintiff's motion to

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difference is most likely attributable to the simple fact that subsection (3), unlike subsection (2), provides that a municipality's "liability" is limited, and, thus, it is necessary in subsection (3) to explain to what "liability" this subsection is referring.

[20] As the Court of Appeals stated in *Darity v City of Flat Rock*, unpublished opinion per curiam of the Court of Appeals, decided February 21, 2006 (Docket No. 256481), at 4-5, lv den 476 Mich 858 (2006):

> Because the sidewalk at issue was adjacent to a state trunkline and not a county road, MCL 691.1402a does not govern this action. . . .
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> [I]n enacting MCL 691.1402a, the Legislature decided to limit liability with respect to *county roads only*. The Legislature's failure to impose similar limits with respect to state roads does not suggest that the Legislature was unaware of that liability or did not intend that liability would exist. Rather, the absence of a provision concerning portions of state highways outside the improved portion means that a municipal corporation's liability for those areas pursuant to MCL 691.1402 remains unreduced. [Emphasis added.]

strike the two-inch rule as an affirmative defense and denying defendant's motion for summary disposition, and remand to the trial court for further proceedings.

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

YOUNG, J. (*concurring*). I concur with the majority's decision in this case to the extent that it offers a sensible construction of MCL 691.1402a, upon the interpretation of which I believe reasonable minds can differ. However, I write separately for two purposes. First, I wish to set forth a plausible alternative interpretation that the Legislature very well could have intended when drafting MCL 691.1402a. And second, to the extent that the majority opinion in this case has adopted an incorrect interpretation of this statute, I urge the Legislature to clarify its intent with regard to the scope of the "two-inch rule" of the highway exception to governmental immunity.

This case requires that we determine whether the two-inch rule of MCL 691.1402a(2) is limited in application to county highways like the liability created elsewhere in that statute, or whether the rule may apply generally to all sidewalks that abut any public roadway. Generally, MCL 691.1402(1) requires a municipality to "maintain" its highways in reasonable repair, and this includes sidewalks.[1] However, MCL 691.1402a, which is divided into three separate subsections, further clarifies this duty.[2] There is no dispute

[1] MCL 691.1401(e).

[2] MCL 691.1402a provides:

> (1) Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is *not liable* for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel,

that the plain language of MCL 691.1402a(1) provides the standard under which a municipal corporation will be liable with respect to sidewalks abutting *county highways*. There is further no dispute that MCL 691.1402a(3) explicitly refers back to MCL 691.1402a(1) to provide a particular exception to the liability created in that subsection, and thus by direct reference is also limited in application to county highways. The present dispute concerns only whether the rebuttable inference for discontinuity defects of less than 2 inches in MCL 691.1402a(2) is limited to county highways like the liability created in subsections (1) and (3), or whether MCL 691.1402a(2) applies generally to sidewalks abutting any public roadway within a municipal corporation's jurisdiction. Plaintiff, who was injured on a sidewalk abutting a state trunk line highway, has advanced an interpretation adopted by the majority whereby the two-inch rule is limited in application to injuries that occur on county highways. Defendant

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including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:

(a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.

(b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.

(2) A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair.

(3) A municipal corporation's liability under subsection (1) is limited by section 81131 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.81131.

conversely advances an interpretation providing for the broadest application of the two-inch rule when defending against this type of lawsuit.

The majority concludes that plaintiff has the stronger position in this case and provides a reasonable and text-based analysis in support, utilizing well established canons of statutory construction. I join that decision, yet I am not wholly convinced that the Legislature intended to create a distinction between county and non-county highways when codifying the two-inch rule of MCL 691.1402a(2).[3] Accordingly, I am setting forth here several considerations that support an alternative legislative intent.

First and foremost, MCL 691.1402a(2) itself does not expressly contain a limitation to county highways. In this sense, MCL 691.1402a(2) is clear: without a reference to county highways, we should be hesitant to impute language to MCL 691.1402a(2) that the Legislature did not use. This could represent a specific omission by the Legislature, and words excluded from a statute—particularly when used elsewhere in the statute—must be presumed to have been excluded for a specific purpose.[4]

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[3] The practical effect of this decision creates a rule whereby municipalities have the benefit of a statutory inference that somewhat arbitrarily depends on whether a plaintiff's slip and fall occurred on a sidewalk abutting a county highway or a state trunk line highway. I recognize that it is certainly within the province of the Legislature to create such a rule, and this Court enforces that intent, even if an unusual outcome results. See *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 161; 680 NW2d 840 (2004). Yet the "arbitrariness" of where the rule applies under the majority's interpretation suggests that the Legislature may have intended no such limitation of the rule.

[4] See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). It is axiomatic that this Court does not read words into a statute that the Legislature has excluded. *Byker v Mannes*, 465 Mich 637, 646-647; 641 NW2d 210 (2002).

Structurally, MCL 691.1402a contains three separate subsections, all of which may stand independently and need not necessarily be read together. These subsections are not joined together by an introductory paragraph that would clearly indicate that they all encompass the same limitation—that is, application to county highways. In this way, MCL 691.1402a may logically be read as a *compendium* of highway liability rules. If that is the case, limitations in one subsection should not be read into another subsection absent explicit commands to do so. Unlike MCL 691.1402a(3), in which the Legislature provided an explicit command to read that subsection subject to the limitations of MCL 691.1402a(1), there is *no* such command that limits the application of MCL 691.1402a(2) to the subject matter of MCL 691.1402a(1). Recognizing that separate subsections of a statute may have independent significance does not offend the canon of construction that statutory provisions are to be read in the context of that which surrounds them.[5]

Additionally, neither the syntax employed by the Legislature nor rules of grammar necessarily compels the majority's interpretation. As the majority correctly notes, the Legislature's varied use of definite versus indefinite articles in a statute requires that those articles be accorded their grammatically correct meanings.[6] The definite articles in MCL 691.1402a(2) in the phrases "the municipal corporation" and "the highway"

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[5] See, e.g., *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005); *Lansing Mayor*, 470 Mich at 167-168.

[6] A comparison of the definitions for "a" and "the" in Black's Law Dictionary notes:

> **[A.]** The word "a" has varying meanings and uses. "A" means "one" or "*any*," but less emphatically than either. . . .
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must refer to a specific antecedent. The majority quite reasonably believes that these definite articles in MCL 691.1402a(2) refer back to the indefinite modification of "defect" and "municipal corporation" in MCL 691.1402a(1). However, this is not necessarily so: the definite articles used in MCL 691.1402a(2) may logically refer to an earlier noun modified indefinitely in MCL 691.1402a(2) itself—"*a* discontinuity defect." Under this reading, the phrases "*the* municipal corporation" and "*the* highway" refer back to the specific corporation and highway relating to the indefinite "discontinuity defect" at the beginning of MCL 691.1402a(2). This indefinite defect does not necessarily refer back to "*the* defect" (in county highways) discussed in MCL 691.1402a(1). Thus, the uses of the definite article "the" may not have been intended to refer to a defect mentioned in a previous subsection, but instead could have been utilized because the use of indefinite articles at this point would simply not make grammatical sense.[7]

I believe that these considerations, taken together, evidence a legitimate contention that MCL 691.1402a(2) neither explicitly subjects itself to the county highway

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The. An article which *particularizes the subject spoken of*. "Grammatical niceties should not be resorted to without necessity; but it would be extending liberality to an unwarrantable length to confound the articles 'a' and 'the'. *The most unlettered persons understand that 'a' is indefinite, but 'the' refers to a certain object*." [Black's Law Dictionary (5th ed) (emphasis added).]

[7] For example, it would be nonsensical (or, at least, make less sense) for the statute to read: "A discontinuity defect of less than 2 inches creates a rebuttable inference that *a* municipal corporation maintained the sidewalk . . . outside the improved portion of *a* highway . . . in reasonable repair." There would be no reason for the drafter to use the italicized indefinite articles here. By this point, MCL 691.1402a(2) is not referring to any municipal corporation or any highway; rather, it is a definite municipality that has definite control over a particular highway with the defect.

limitation nor implicitly relies on this limitation in order to make logical sense. Yet while this analysis represents a separate plausible understanding of MCL 691.1402a(2), ultimately I am fairly convinced by the majority's interpretation that MCL 691.1402a is best understood as a seamless whole that applies to county highways, the separate provisions of which work better in concert than contrast. Thus, I concur in the majority opinion, but would call the Legislature to action if this Court has reasonably, yet mistakenly, limited the scope of the two-inch rule when construing the provisions of MCL 691.1402a.

WEAVER, J. (*concurring*). I concur in the result of the majority opinion because I believe that in this close case, the plaintiff has a more persuasive position. I agree with Justice YOUNG as he states in his concurrence: "I am fairly convinced . . . that MCL 691.1402a is best understood as a seamless whole that applies to county highways, the separate provisions of which work better in concert than contrast."

Further, I also agree with Justice YOUNG that, "to the extent that the majority opinion in this case has adopted an incorrect interpretation of this statute, I urge the Legislature to clarify its intent with regard to the scope of the 'two-inch rule' of the highway exception to governmental immunity."

PEOPLE v RICHMOND

Docket No. 136648. Argued December 8, 2009 (Calendar No. 1). Decided April 30, 2010.

Edwin D. Richmond was bound over to the Wayne Circuit Court for trial on charges of manufacturing marijuana, possession with intent to deliver marijuana, and possession of a firearm during the commission of a felony. He moved to quash the bindover and suppress the evidence, arguing in part that the affidavit supporting the search warrant was insufficient to establish probable cause and that the search was therefore illegal. The court, Ulysses W. Boykin, J., suppressed the evidence, ruling that the examining magistrate had abused her discretion in issuing the warrant. The court's ruling excluded all the evidence against defendant, and the prosecution moved to voluntarily dismiss the case without prejudice. The court granted the motion and dismissed the case without prejudice. The prosecution then appealed the suppression of the evidence. The Court of Appeals, K. F. KELLY, P.J., and OWENS and SCHUETTE, JJ., reversed in an unpublished opinion per curiam, issued April 22, 2008 (Docket Nos. 277012 and 277015), and remanded the case for reinstatement of the charges. Defendant sought leave to appeal, arguing that the Court of Appeals had erred by reversing on the merits and that the prosecution's appeal in the Court of Appeals was improper because the issue was moot after the prosecution voluntarily dismissed the case. The Supreme Court initially denied defendant's application for leave to appeal, 482 Mich 1041 (2008), but granted the application on reconsideration, limited to consideration of the mootness issue, 483 Mich 1115 (2009).

In an opinion by Justice CAVANAGH, joined by Chief Justice KELLY and Justices MARKMAN and HATHAWAY, the Supreme Court *held*:

The prosecution rendered its appeal moot by voluntarily obtaining dismissal of the charges.

1. The judicial power is the right to determine actual controversies arising between adverse litigants. A court will not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before it. A case is moot when it presents nothing but abstract questions of law that do not rest on

existing facts or rights. Whether a case is moot is a threshold issue that a court addresses before it reaches the substantive issues of the case itself. Appellate courts will sua sponte refuse to hear cases they have no power to decide, including those that are moot.

2. Once the circuit court dismissed the charges against defendant, an action no longer existed and there was no longer any controversy left for the Court of Appeals to consider. The dismissal of the charges on the prosecution's motion rendered the other issues in the case moot, including the evidentiary issue. The Court of Appeals had no power to decide a moot question and erred by reaching the substantive issues. While the prosecution has a right under MCL 770.12(1) and MCR 7.202(6)(b) to appeal a final order, that statutory right does not give courts the power to review an otherwise moot issue. The prosecution denied itself appellate review by voluntarily obtaining the dismissal.

3. Even though an issue is moot, it is nevertheless justiciable if the issue is one of public significance that is likely to recur yet evade judicial review. This exception to the mootness doctrine, however, has not been applied when the party seeking review on appeal rendered the issue moot by that party's own volitional conduct and could have avoided mooting the issue by seeking an appeal. In this case, the prosecution could have obtained judicial review of the suppression order by pursuing an interlocutory appeal rather than voluntarily obtaining dismissal of the charges and removing the controversy. This case does not involve a situation in which the transitory nature of the particular controversy would render the issue moot before a party could obtain appellate review, nor does it involve a situation in which the opposing party could, by its own conduct, render an issue moot to preclude an aggrieved party from seeking appellate review, situations in which the exception would apply.

Judgment of the Court of Appeals vacated.

Justice CORRIGAN, joined by Justices WEAVER and YOUNG, dissenting, would hold that the dismissal of the charges on the prosecution's motion did not render the subsequent appeal moot. The circuit court's suppression of the evidence aggrieved the prosecution and necessitated the dismissal because the prosecution could not proceed without the evidence. Under MCL 770.12(1), the prosecution may appeal by right a final judgment or final order of the circuit court, and a party who asks for a final judgment in order to appeal an antecedent ruling, such as the suppression order here, is entitled to contest the merits of that issue on appeal. The prosecution had a right to appeal the dismissal order and raise the suppression issue, and the Court of

Appeals had jurisdiction to hear the appeal and reach the substantive issues. The majority's holding deprives the prosecution of its statutory right to appeal a final order solely because the dismissal was on the prosecution's motion rather than on defendant's motion or the circuit court's own motion.

1. APPEAL — MOOTNESS — JUDICAL POWER.

The judicial power is the right to determine actual controversies arising between adverse litigants; a court will not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before it; a case is moot when it presents nothing but abstract questions of law that do not rest on existing facts or rights; mootness is a threshold issue that a court addresses before reaching the substantive issues of the case; appellate courts will sua sponte refuse to hear moot cases.

2. APPEAL — MOOTNESS — EXCEPTIONS TO MOOTNESS.

A moot issue is nonetheless justiciable if the issue is one of public significance that is likely to recur yet evade review; this exception to the mootness doctrine does not apply when the party seeking review on appeal has rendered the issue moot by that party's own volitional conduct and could have avoided mooting the issue by seeking an appeal.

3. CRIMINAL LAW — MOOTNESS — PROSECUTION MOTIONS TO DISMISS CHARGES — DISMISSAL OF CHARGES.

The dismissal of criminal charges against a defendant on the prosecution's motion renders any other issues in the case moot, and an appellate court has no power to consider those moot questions.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the people.

Matthew R. Abel and *Alan L. Kaufman* for defendant.

Amici Curiae:

Brian A Peppler, David S. Leyton, and *Donald A. Kuebler* for the Prosecuting Attorneys Association of Michigan.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Joel D. McGormley*, Assistant Attorney General, for the Attorney General.

CAVANAGH, J. We granted leave to appeal to address whether the dismissal of the charges against defendant on the prosecution's motion rendered moot the prosecution's subsequent appeal in the Court of Appeals. *People v Richmond*, 483 Mich 1115 (2009). We hold that the prosecution's voluntary dismissal of the charges rendered its appeal moot and, as a result, the Court of Appeals erred by reaching the substantive issues of the prosecution's appeal. Accordingly, we vacate the judgment of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

After receiving an anonymous tip, the police seized a bag of garbage that was left at a curb in front of defendant's home. The bag contained a plant stem that tested positive for marijuana and mail that was addressed to defendant. The police then obtained a search warrant from a magistrate to search defendant's home. On the basis of evidence gathered during the execution of the search warrant, defendant was subsequently charged with manufacturing 5 kilograms or more but less than 45 kilograms of marijuana, MCL 333.7401(2)(d)(*ii*), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*), and possession of a firearm during the commission of a felony, MCL 750.227b. After defendant was charged and bound over to the circuit court for trial, he moved to quash the bindover and suppress the evidence, arguing, among other things, that the affidavit supporting the warrant was insufficient to establish probable cause and the search was therefore illegal.

The circuit court suppressed the evidence, ruling that the examining magistrate had abused her discretion in issuing the warrant. The circuit court's ruling excluded all the evidence against defendant. The prosecutor then moved to voluntarily dismiss the case without prejudice, stating that "[g]iven the Court's decision, it would make more sense for me to dismiss this case at this time since we are not able to go forward since the evidence has been suppressed."[1] As a result, the court signed an order of acquittal/dismissal, which indicated that the case was dismissed without prejudice "on the motion of the People." The prosecution appealed the circuit court's decision to suppress the evidence to the Court of Appeals.

The Court of Appeals reversed the circuit court's suppression order and remanded the case for reinstatement of the charges against defendant. *People v Richmond*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2008 (Docket Nos. 277012 and 277015). Defendant appealed in this Court, arguing that the Court of Appeals erred by reversing the circuit court on the merits. Defendant also argued, for the first time, that the prosecution could not appeal the circuit court's ruling in the Court of Appeals because the issue was moot after the prosecution voluntarily obtained dismissal of the case. After initially denying defendant's application for leave to appeal, *People v Richmond*, 482 Mich 1041 (2008), we granted defendant's application on reconsideration, limited to the consideration of the mootness issue, *Richmond*, 483 Mich at 1115.

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[1] There is a dispute about whether the prosecution's voluntary dismissal of the charges was a *nolle prosequi* under MCL 767.29. We need not, however, address that dispute because it does not affect our analysis of the issue that is currently before this Court.

II. ANALYSIS

In this case, we must determine whether the dismissal of the charges on the prosecution's motion rendered moot the prosecution's subsequent appeal in the Court of Appeals and, if so, whether the issue was nevertheless justiciable. We hold that the prosecution's voluntary dismissal of the charges rendered its appeal moot and, because a court should not hear moot issues except in circumstances that are not applicable under the facts of this case, the Court of Appeals erred by reaching the substantive issues of the prosecution's appeal.

A. OVERVIEW OF THE MOOTNESS DOCTRINE

It is well established that a court will not decide moot issues. This is because it is the "principal duty of this Court . . . to decide actual cases and controversies." *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002), citing *Anway v Grand Rapids R Co*, 211 Mich 592, 610; 179 NW 350 (1920). That is, " '[t]he judicial power . . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.' " *Anway,* 211 Mich at 616 (citation omitted). As a result, "this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before" it. *Federated Publications*, 467 Mich at 112. Although an issue is moot, however, it is nevertheless justiciable if "the issue is one of public significance that is likely to recur, yet evade judicial review." *Id.* It is " 'universally understood . . . that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, . . . or a judgment upon some matter which, when rendered, for any reason, cannot have any practical

legal effect upon a then existing controversy.' " *Anway*, 211 Mich at 610, quoting *Ex parte Steele*, 162 F 694, 701 (ND Ala, 1908). Accordingly, a case is moot when it presents "nothing but abstract questions of law which do not rest upon existing facts or rights." *Gildemeister v Lindsay*, 212 Mich 299, 302; 180 NW 633 (1920).

In general, because reviewing a moot question would be a " 'purposeless proceeding,' " *Stern v Stern*, 327 Mich 531, 534; 42 NW2d 737 (1950) (citation omitted), appellate courts will sua sponte refuse to hear cases that they do not have the power to decide, including cases that are moot, *In re MCI Telecom Complaint*, 460 Mich 396, 434 n 13; 596 NW2d 164 (1999), citing *Ideal Furnace Co v Int'l Molders' Union of North America*, 204 Mich 311; 169 NW 946 (1918).[2] Whether a case is moot is a threshold issue that a court addresses before it reaches the substantive issues of the case itself. *In re MCI*, 460 Mich at 435 n 13.

B. APPLICATION OF THE MOOTNESS DOCTRINE

In this case, the prosecution's own action clearly rendered its subsequent appeal moot. After the circuit court suppressed the evidence, the prosecution moved to dismiss the charges against defendant. As a result of the prosecution's voluntarily seeking dismissal of the charges, the circuit court dismissed the charges without prejudice and any existing controversy between the parties was rendered moot. Once the charges were dismissed, an action no longer existed, and, thus, there was no longer any controversy left for the Court of Appeals to consider. Accordingly, because all the charges

[2] Indeed, because a court should, on its own motion, recognize and reject claims that it does not have the power to decide, defendant's failure to raise the mootness argument at the Court of Appeals is irrelevant to this Court's analysis. See *In re MCI*, 460 Mich at 434-435 n 13.

against defendant had been dismissed at the time of the prosecution's appeal, the Court of Appeals judgment was based on a " 'pretended controversy,' " *Anway*, 211 Mich at 610 (citation omitted), that did not "rest upon existing facts or rights," *Gildemeister*, 212 Mich at 302. Because a court cannot "tender advice" on matters that are no longer in litigation, see *Anway*, 211 Mich at 611-612, quoting *Snell v Welch*, 28 Mont 482, 482; 72 P 988 (1903) (quotation marks omitted), the Court of Appeals made a determination on a " 'mere barren right—a purely moot question,' " which, under this Court's precedent, it did not have the power to decide, *Anway*, 211 Mich at 605, quoting *Tregea v Modesto Irrigation Dist*, 164 US 179, 186; 17 S Ct 52; 41 L Ed 395 (1896).[3]

Although the prosecution does not have a constitutional right to appeal, the dissent argues that the prosecution may nevertheless appeal because the dismissal was a "final order" and the prosecution has a statutory right under MCL 770.12(1) and MCR 7.202(6)(b) to appeal a final order. The "final order" that the prosecution appealed in this case, however, was the order of acquittal/dismissal that was granted *at the prosecution's request.* This dismissal rendered the other issues in the case moot,[4] including the evidentiary issue, and the prosecution's statutory right to appeal does not

[3] Additionally, under the facts of this case, the Court of Appeals may have encroached on an executive function in violation of the doctrine of separation of powers by remanding for reinstatement of the charges. If the prosecution's voluntary dismissal was a *nolle prosequi* under MCL 767.29, the prosecution could have reinstated the "original charge on the basis of obtaining a new indictment . . . ." *People v Curtis*, 389 Mich 698, 706; 209 NW2d 243 (1973). Because the case was dismissed without prejudice, however, the prosecution retained the executive power to reinstate the charges regardless of whether the prosecution's voluntary dismissal was a *nolle prosequi*.

[4] As one jurisdiction has noted:

give courts the power to review an otherwise moot issue.[5] Thus, in this case, the prosecution, not this Court, denied itself appellate review by obtaining dismissal of its own case and, therefore, rendering its appeal moot.[6]

When the issues raised by a party on appeal are clearly moot, an appellate court should ordinarily decline to address the substantive issues raised in the appeal unless an exception to the mootness doctrine applies. As noted, this Court has held that even though an issue is moot, it is nevertheless justiciable if the issue is one of public significance that is likely to recur, yet may evade judicial review. *Federated Publications*, 467 Mich at 112. The facts of this case, however, do not meet this exception.

This Court has declined to apply this exception when the party seeking review of an issue on appeal has rendered the issue moot by that party's own volitional conduct and the party could have avoided mooting the issue by seeking an appeal. For example, in *Federated Publications*, the city denied a newspaper's Freedom of

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> An order to dismiss without prejudice entered at the request of the State is different from an order to dismiss entered on the court's own volition or at the request of the defendant, because the State is actually withdrawing the case as opposed to the court's rendering a decision on its own motion or at the request of the defendant, either of which would vacate, annul, or void the prosecution. [*State v Grager*, 713 NW2d 531, 534 (ND, 2006).]

[5] Given this reasoning, we respectfully disagree with the dissent's assertion that we have failed to provide an answer to its claim that this Court's decision impermissibly prevents the prosecution from pursuing a statutory right to appeal. Contrary to the dissent's assertion, MCL 770.12(1) does not give this Court the power to review an otherwise moot issue.

[6] Moreover, because the prosecution appealed the dismissal order that it had requested, the prosecution was not an aggrieved party and likely lacked standing. See *Richmond*, 482 Mich at 1041 (KELLY, J., dissenting).

Information Act (FOIA) request. *Id*. at 103. The newspaper subsequently sued for disclosure under FOIA. The circuit court granted, in part, the newspaper's motion for summary disposition and ordered the release of certain documents. The city filed an emergency motion in the Court of Appeals to stay the circuit court proceedings. *Id*. at 104. The Court of Appeals initially granted the city's emergency motion to stay, but later vacated its order. *Id*. at 104-105. After the Court of Appeals vacated its order, the city released the documents that were subject to the circuit court's order to the newspaper without taking any additional action. *Id*. at 105. The city later appealed the circuit court's motion for partial summary disposition as of right, and the Court of Appeals affirmed the circuit court's decision in part. *Federated Publications, Inc v City of Lansing*, unpublished opinion per curiam, issued November 14, 2000 (Docket Nos. 218331 and 218332). The city appealed in this Court. After this Court determined that the city's release of the documents to the newspaper rendered moot any claimed exemptions for those records, we reasoned that the case did not present an issue that was likely to recur yet regularly evade judicial review because "[q]uite simply, all that the city would have had to do . . . to secure review of [the] issue was to appeal the disclosure order to this Court." *Federated Publications*, 467 Mich at 112-113. Thus, because the city released the documents, this Court determined that the issue would not otherwise have evaded review because it had been rendered moot only by the city's own conduct. See *id*. at 101, 113.[7]

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[7] Similarly, in *Ideal Furnace*, this Court declined to reach the substantive issues of an appeal after a defendant was adjudicated guilty of contempt of court and paid a fine. This Court held that the questions on appeal were "purely academic" because the defendant, by his own act of

Like the city's action in *Federated Publications*, the issue in this case is not likely to recur yet evade judicial review because the prosecution's own conduct rendered the issue moot. The prosecution could have obtained judicial review of the circuit court's decision by simply seeking an interlocutory appeal of the suppression order, rather than voluntarily obtaining dismissal of the charges.[8] Therefore, by opting to dismiss the charges, the prosecution voluntarily removed from its claim the controversy that would generally have allowed it to seek appellate review.[9] As in *Federated Publications*, we

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paying the fine, had "discharged the order entered by the court below." *Ideal Furnace*, 204 Mich at 312-313.

[8] Notably, the dissent fails to recognize that the prosecution did not pursue this potential avenue for relief and instead opted to dismiss its own case and therefore render its appeal moot.

[9] Although interlocutory appeals are granted by leave of the Court of Appeals, see MCR 7.205, we note that the prosecution should be able to meet the requirements of the court rule in cases such as this with little difficulty. While granting an interlocutory appeal is reviewed on a case-by-case basis, when an order to suppress evidence effectively eliminates the prosecution's case, the prosecution should be able to show that it "would suffer substantial harm by awaiting final judgment before taking an appeal" because requiring the prosecution to proceed to trial without the suppressed evidence could preclude appellate review given that the prohibition against double jeopardy, see Const 1963, art 1, § 15, and US Const, Am V, could prevent the prosecution from trying the defendant a second time. MCR 7.205(B)(1). Accord *State v Meeks*, 262 SW3d 710, 720 (Tenn, 2008) (observing that "the State should be able to carry its burden of persuasion [for obtaining an interlocutory appeal] with little difficulty" given that "the State could not obtain meaningful appellate review of the suppression order because the Double Jeopardy Clauses of the federal and state constitutions would prevent the State from trying the accused a second time").

Allowing the prosecution to appeal after it chooses to dismiss its case would not only allow the prosecution to circumvent caselaw from this Court regarding the mootness doctrine, but it would also allow the prosecution to circumvent the rules pertaining to interlocutory appeals by permitting the prosecution to simply move to dismiss its case without prejudice anytime it is dissatisfied with an adverse evidentiary ruling.

decline to extend the mootness exception on the basis of mere speculation that the issue "could" recur but evade judicial review because of the prosecution's own procedural misstep.[10]

Notably, the facts of this case are distinguishable from cases in which this Court has decided to address an otherwise moot issue because it was one of public significance that was likely to recur yet evade judicial review. In general, this Court has applied the doctrine to cases in which the transitory nature of a particular controversy would render the issue moot before a party could obtain appellate review. See, e.g., *Socialist Workers Party v Secretary of State*, 412 Mich 571, 582 n 11; 317 NW2d 1 (1982) (stating that the fact that an election had taken place presented the "classic situation where a controversy is 'capable of repetition, yet evading review' " because the parties would seldom obtain appellate review of the issue before an election takes place); see, also, *People v Kaczmarek*, 464 Mich 478, 481; 628 NW2d 484 (2001), and *In re Midland Publishing Co, Inc*, 420 Mich 148, 151 n 2; 362 NW2d 580 (1984). This Court has also applied the doctrine when an opposing party could, by its own conduct, render an issue moot to preclude an aggrieved party from seeking appellate review of the issue. See, e.g., *Detroit v Ambassador Bridge Co*, 481 Mich 29, 50-51; 748 NW2d 221 (2008). Neither of these situations is present in this case. Although there may be other instances in which a court will nevertheless decide the merits of an other-

[10] We decline to address how hypothetical situations that are not currently before this Court, such as if a trial court refuses to dismiss a case after it suppresses evidence or refuses to stay the proceedings to allow a prosecutor to seek leave to appeal, would affect this appeal. We have, however, opened an administrative file, ADM 2008-36, to consider whether this Court should adopt a court rule to address the issue presented in this case.

wise moot issue, to the extent that this Court has considered them, they are not applicable here.[11] And, as in *Federated Publications*, we decline to address an otherwise moot issue when it is not likely that the issue will recur but evade judicial review because the party seeking relief voluntarily rendered the issue moot. As a result, the Court of Appeals erred by reaching the substantive issues of the prosecution's otherwise moot appeal.[12]

III. CONCLUSION

The prosecution rendered moot its appeal in the Court of Appeals by voluntarily obtaining dismissal of the charges. Because a court should not hear moot issues except under circumstances that are not applicable under the facts of this case, the Court of Appeals erred by reaching the substantive issues in the prosecution's appeal. Accordingly, we vacate the judgment of the Court of Appeals.

KELLY, C.J., and MARKMAN and HATHAWAY, JJ., concurred with CAVANAGH, J.

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[11] See, e.g., *Mead v Batchlor*, 435 Mich 480, 486; 460 NW2d 493 (1990) (stating that "[w]here a court's adverse judgment may have collateral legal consequences for a defendant, the issue is not necessarily moot").

[12] We reject the prosecution's and the dissent's suggestion that this Court should extend *Dybata v Kistler*, 140 Mich App 65; 362 NW2d 891 (1985), to the facts of this case. To begin with, *Dybata* is factually inapposite to this case because it was a civil case in which the parties stipulated a dismissal. In this case, the parties did not stipulate a dismissal. Further, extending *Dybata* to the factual situation here would require this Court to recognize another exception to the mootness doctrine, which we decline to do for the reasons stated in this opinion.

Moreover, contrary to the dissent's assertion that "the prosecution obtained dismissal of the charges not because it wished to abandon the case, but for the purpose of pursuing it at the appellate level," the prosecution did not indicate on the record that it intended to appeal.

CORRIGAN, J. (*dissenting*). I would hold that the dismissal on the prosecutor's motion did not render the subsequent appeal moot. The circuit court's decision to suppress the evidence aggrieved the prosecution and necessitated the dismissal because the prosecutor was unable to proceed without the evidence. Accordingly, the Court of Appeals did not err by reaching the substance of the prosecution's appeal.

Except when double jeopardy bars further proceedings, the prosecution may take an appeal of right from a final judgment or a final order of a circuit court in a criminal case. MCL 770.12(1). In a criminal case, a "final judgment" or "final order" includes "an order dismissing the case[.]" MCR 7.202(6)(b)(i). "[T]he people have a right to raise issues related to earlier interlocutory orders in an appeal of right from the final order." *People v Torres*, 452 Mich 43, 59; 549 NW2d 540 (1996). "The [Court of Appeals] has jurisdiction of an appeal of right filed by an aggrieved party from . . . [a] final judgment or final order of the circuit court . . . ." MCR 7.203(A)(1). In this case, the prosecution was aggrieved by the circuit court's suppression ruling, which effectively ended its case. It had an appeal of right from the dismissal order, in which it was permitted to raise the suppression issue, and the Court of Appeals had jurisdiction over that appeal.

The majority concludes that the prosecution's "voluntary" dismissal of the charges rendered the subsequent appeal moot, thus depriving the Court of Appeals of jurisdiction. "This 'Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before us unless the issue is one of public significance that is likely to recur, yet evade judicial review.' " *Detroit v Ambassador Bridge Co*, 481 Mich 29, 50; 748 NW2d 221 (2008),

quoting *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002), overruled in part on other grounds by *Herald Co Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463; 719 NW2d 19 (2006). "[A] moot case is one which seeks to get a judgment on a pretended controversy . . . or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." *Anway v Grand Rapids R Co*, 211 Mich 592, 610; 179 NW 350 (1920), quoting *Ex parte Steele*, 162 F 694, 701 (ND Ala, 1908). A case is moot if it presents questions that are "purely academic," *Ideal Furnace Co v Int'l Molders' Union of North America*, 204 Mich 311, 312; 169 NW 946 (1918), or "abstract questions of law which do not rest upon existing facts or rights," *Gildemeister v Lindsay*, 212 Mich 299, 302; 180 NW 633 (1920).

The majority acknowledges that the suppression ruling created a controversy, but concludes that "by opting to dismiss the charges, the prosecution voluntarily removed from its claim the controversy that would generally have allowed it to seek appellate review." I respectfully disagree. The prosecutor's "voluntary" dismissal of the charges did *not* render the questions on appeal "abstract" or "purely academic" because it did not end the controversy regarding the circuit court's suppression ruling. The prosecution retained a legally cognizable interest in the outcome of the case: the prosecution could *only* pursue its case against defendant after an appellate court's review and reversal of the circuit court's (erroneous) evidentiary determination that suppressed crucial evidence. Indeed, the prosecution obtained dismissal of the charges not because it wished to abandon the case, but for the purpose of pursuing it at the appellate level. The dismissal permitted the prosecution to present to the Court of Appeals

through an appeal of right the live controversy surrounding the suppression ruling. The mootness doctrine precludes adjudication of a claim that seeks a judgment that " 'cannot have any practical legal effect upon a then existing controversy.' " *Anway*, 211 Mich at 610 (citation omitted). Here, the prosecution sought enforcement of our decision in *People v Keller*, 479 Mich 467; 739 NW2d 505 (2007), which would have the practical legal effect of permitting reinstatement of the charges.

The majority's decision in this case deprives the prosecution of its statutory right to appeal a final order, MCL 770.12(1), for the sole reason that the circuit court dismissed the charges against defendant on the prosecution's motion rather than on the defendant's motion or the court's own motion. Its decision means that the circuit court's suppression ruling, which was based on *People v Keller*, 270 Mich App 446; 716 NW2d 311 (2006), is allowed to stand even though this Court reversed the Court of Appeals' decision in *Keller*.[1] The majority's decision overturns the Court of Appeals' decision in this case, which corrected the circuit court's

[1] In *Keller*, 479 Mich at 478-479, we concluded that the Court of Appeals erred by holding that the affidavit in support of a search warrant was insufficient:

> [T]here is a "multiple-step analysis to determine whether severability is applicable." First the court must divide the warrant into categories. Then, the court must evaluate the constitutionality of each category. If only some categories are constitutional, the court must determine if the valid categories are distinguishable from the invalid ones and whether the valid categories "make up the great part of the warrant." Here, the warrant authorizes the seizure of three categories of evidence: marijuana; distribution evidence, such as currency and packaging paraphernalia; and possession evidence, such as proof of residency. Of these three categories, the only one that is arguably invalid is the distribution evidence. If it were invalid, that category would be severable from the others. [Citations omitted.]

ruling in light of our decision in *Keller*.[2] It also frustrates the purpose of MCL 770.12(1), which was designed to ensure that the prosecution has the same right to appeal that a defendant has, within constitutional limits. *Torres*, 452 Mich at 59. The majority has no answer to the justified criticism that its opinion prevents the pursuit of a statutorily provided right to appeal created explicitly for prosecutors. That this right was created in direct response to prior decisions by this Court that disadvantaged prosecutors makes the majority's decision all the more ironic and mistaken.[3]

The majority's suggestion that the prosecution voluntarily mooted its own case by obtaining dismissal of the charges is problematic because it implies that the prosecution could have simply "unmooted" the case at

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[2] In this case, the Court of Appeals concluded, under our decision in *Keller*, that the circuit court erred by concluding that the information in the affidavit was insufficient to establish probable cause to issue a warrant because the discovery of a marijuana stem in the trash taken from defendant's home provided a sufficient basis to conclude that there was probable cause to search the home. *People v Richmond*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2008 (Docket Nos. 277012 and 277015), p 3. Although that discovery did not provide a substantial basis for concluding that there was probable cause to search for evidence of cultivation, the valid part of the warrant formed the greater portion of the warrant, so that the portion of the warrant pertaining to cultivation was severable. *Id*.

[3] MCL 770.12 was amended by 1988 PA 66 to provide for this right of appeal. The source of the public act was HB 4719. Senate Legislative Analysis, HB 4719, March 1, 1988, explained that HB 4719 was introduced to address the disadvantage to the prosecution created by the combination of two Michigan Supreme Court decisions, *People v Cooke*, 419 Mich 420; 355 NW2d 88 (1984), which held that prosecutor appeals are only permitted in limited instances set forth in Code of Criminal Procedure, and *People v Coles*, 417 Mich 523; 339 NW2d 440 (1983), which ruled that, upon a defendant's request in an appeal of right or by leave granted, an appellate court must review a trial court's exercise of discretion in sentencing, but may grant the defendant relief only if the sentencing court abused its discretion to the extent that it shocks the conscience of the appellate court.

any time by reinstating the charges. This is simply not true. MRPC 3.1 provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous." In light of the circuit court's ruling suppressing the evidence on which it sought to try the case, the prosecution could not ethically reissue the charges.[4] Instead, it properly filed a claim of appeal in the Court of Appeals on March 20, 2007. On July 25, 2007, while the appeal was pending, we issued *Keller*.

Moreover, there is absolutely no difference between a prosecutor who moves to dismiss a case for the purpose of pursuing an appeal and a prosecutor who agrees to a dismissal by the circuit court in order to pursue an appeal. The majority fails to explain why the fact that the circuit court dismissed the case on the prosecutor's motion rather than on defendant's motion or the court's own motion justifies depriving the prosecution of its appeal of right. In either case, dismissal of the charges is a recognition that the prosecution's case cannot proceed given the court's evidentiary ruling and permits the prosecution to appeal that evidentiary ruling. Caselaw from our Court of Appeals recognizes this. In *Dybata v Kistler*, 140 Mich App 65; 362 NW2d 891 (1985), a medical malpractice case, the trial court barred testimony from the plaintiff's expert witness regarding the standard of care applicable to a general practitioner. In light of that ruling, the plaintiff stipulated to an order dismissing her claim against a doctor of osteopathy in general practice. *Id*. at 67-68. After the case proceeded to trial against a second doctor, the plaintiff appealed the dismissal order. *Id*. at 68. The Court of Appeals rejected the defendant's argument that

[4] The majority has no answer to this ethical quandary.

the court lacked jurisdiction given the plaintiff's stipulation of the dismissal:

> As a threshold matter, defendant argues that plaintiff cannot appeal from a stipulated order dismissing her claim. Although we agree with the proposition that one may not appeal from a consent judgment, order or decree, *Dora v Lesinski*, 351 Mich 579; 88 NW2d 592 (1958), we do not believe a dismissal expressly necessitated by and premised upon a dispositive evidentiary ruling is a "consent" judgment or order. To require plaintiff to present proofs as a mere prelude to a certain directed verdict in order to preserve the issue would serve no one's interest. The question is properly before us. [*Id*.][5]

Similarly, in *Fairley v Andrews*, 578 F3d 518, 521 (CA 7, 2009), Judge Frank H. Easterbrook explained that the "only prerequisites to appellate jurisdiction are a final judgment and a timely notice of appeal."

> That said, if plaintiffs consented to the entry of judgment against them, we must affirm. Litigants aren't aggrieved when the judge does what they want. Plaintiffs contend that they accepted dismissal as inevitable only after the district court gutted their case. This matches the district judge's description. Acknowledging that a case is hopeless, given a prior ruling (which the party believes to be unsound), is a far cry from abandoning the suit. . . . [A] party who asks for a final judgment in order to appeal an antecedent ruling is entitled to contest the merits of that issue on appeal. [*Id*. at 521-522 (citations omitted).]

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[5] The majority dismisses *Dybata* as "factually inapposite to this case because it was a civil case in which the parties stipulated a dismissal." The majority observes that here "the parties did not stipulate a dismissal." There is no functional difference between the stipulated dismissal order " 'in light of the court's ruling' on the motion *in limine*" in *Dybata*, 140 Mich App at 67-68, and the prosecution's motion to dismiss the charges after the circuit court's dispositive evidentiary ruling on defendant's motion to suppress in this case. *Dybata* is thus most certainly not "factually inapposite."

Dybata and *Fairley* recognized what the majority in this case ignores: an acknowledgment "that a case is hopeless, given a prior ruling," *id.* at 522, does not extinguish the controversy concerning that prior ruling. On the contrary, agreement to a dismissal order permits the aggrieved party to avail itself of an appeal of right while avoiding the certain directed verdict that would result from proceeding with a hopeless case. This analysis is even more compelling in a criminal case, in which a directed verdict or acquittal *bars* any appeal under double jeopardy principles.[6]

Because I would hold that "a party who asks for a final judgment in order to appeal an antecedent ruling is entitled to contest the merits of that issue on appeal," *id.*, I respectfully dissent.[7]

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[6] Statutes in several jurisdictions address this problem directly by expressly permitting prosecutor appeals from suppression orders. In Delaware, when a trial court enters an order suppressing evidence and the attorney general certifies that the suppressed evidence is essential to the prosecution of the case, the court "shall dismiss" the charges, and the prosecution has an appeal of right from the dismissal order. Del Code Ann tit 10, § 9902(b) and (c). In New York, under NY Crim Proc L 450.20(8), the prosecution may take an appeal of right from a pretrial order suppressing evidence, provided that it files

> a statement asserting that the deprivation of the use of the evidence ordered suppressed has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in the court either (a) insufficient as a matter of law, or (b) so weak in its entirety that any reasonable possibility of prosecuting such charge to a conviction has been effectively destroyed. [NY Crim Proc L 450.20(1).]

See also Ohio R Crim P 12(K).

[7] The majority suggests that the Court of Appeals "may have encroached on an executive function in violation of the doctrine of separation of powers by remanding for reinstatement of the charges." While I agree with the majority that it was for the prosecutor to decide whether to reinstate the charges, this does not undermine the conclusion that the

WEAVER and YOUNG, JJ., concurred with CORRIGAN, J.

Court of Appeals properly exercised jurisdiction over the prosecution's appeal. Moreover, the Court of Appeals' remanding for reinstatement of the charges merely recognized that the prosecution moved for dismissal of the charges only because of the circuit court's suppression ruling, which the Court of Appeals properly reversed.

BREWER v A D TRANSPORT EXPRESS, INC

Docket No. 139068. Decided May 10, 2010.

Anthony J. Brewer, a Michigan resident, sought workers' compensation benefits for an injury he suffered in Ohio while working for A. D. Transport Express, Inc. The Accident Fund Insurance Company of America was A. D. Transport's workers' compensation insurance carrier. The magistrate found that Brewer had failed to establish that his contract for hire was made in Michigan. Accordingly, the magistrate dismissed Brewer's petition for lack of subject-matter jurisdiction under MCL 418.845. The Workers' Compensation Appellate Commission affirmed. The Court of Appeals denied Brewer's application for leave to appeal in an unpublished order, entered May 5, 2009 (Docket No. 289941). The Supreme Court ordered and heard oral argument on whether to grant Brewer's application for leave to appeal or take other peremptory action. 485 Mich 853 (2009).

In an opinion by Justice CORRIGAN, joined by Justices CAVANAGH, YOUNG, and MARKMAN, JJ., the Supreme Court *held*:

At the time of Brewer's injury, MCL 418.845 provided that the Workers' Compensation Agency had jurisdiction over matters involving out-of-state injuries if the injured employee was a resident of Michigan at the time of the injury and the contract of hire was made in this state. 2008 PA 499 amended the statute, effective January 13, 2009, to provide that the agency has jurisdiction if either the employee was a resident of Michigan at the time of the injury or the contract of hire was made in this state. The statutory text does not clearly manifest a legislative intent that the new jurisdictional standard apply retroactively. The Legislature provided a specific, future effective date and omitted any reference to retroactivity. The amendment does not fall within an exception for remedial or procedural amendments that may apply retroactively. Rather, the amendment created an important new legal burden and potentially enlarged existing substantive rights. The amended version of MCL 418.845 applies only to injuries occurring on or after January 13, 2009.

Affirmed.

Chief Justice KELLY concurred in the result only.

Justice HATHAWAY, joined by Justice WEAVER, dissenting, would have granted Brewer's application for leave to appeal, believing that the Court would benefit from plenary review of the issues.

WORKERS' COMPENSATION — SUBJECT-MATTER JURISDICTION — OUT-OF-STATE INJURIES — STATUTES — RETROACTIVITY OF STATUTES.

The amendment of MCL 418.845 enacted by 2008 PA 499, which expanded the jurisdiction of the Workers' Compensation Agency over matters involving out-of-state injuries by giving the agency jurisdiction if either the injured employee was a resident of Michigan or the contract of hire was made in Michigan, applies only to injuries occurring on or after January 13, 2009.

Daryl Royal and *Richard L. Warsh* for Anthony J. Brewer.

Lacey & Jones (by *Gerald M. Marcinkoski*) for A. D. Transport Express, Inc., and Accident Fund Insurance Company of America.

Amicus Curiae:

Charles W. Palmer for the Michigan Association for Justice.

CORRIGAN, J. This case requires us to consider whether a recent expansion of the subject-matter jurisdiction of the Workers' Compensation Agency over out-of-state injuries, MCL 418.845, as amended by 2008 PA 499, applies retroactively to cases in which the claimant was injured before the effective date of the amendment. We hold that the amendment does not apply because the statutory text does not manifest a legislative intent to apply the amendment to antecedent injuries. Moreover, the amendment does not fall within an exception for remedial or procedural amendments that may apply retroactively; rather, it created an important new legal burden and potentially enlarged

existing substantive rights. We thus affirm the decision of the Workers' Compensation Appellate Commission (WCAC) upholding the magistrate's dismissal of plaintiff's petition for lack of jurisdiction.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

Plaintiff Anthony J. Brewer, a Michigan resident, sought workers' compensation benefits for an injury he allegedly suffered in Ohio in 2003 while working for defendant A. D. Transport Express, Inc., as a truck driver. Defendant denied that plaintiff's contract of hire was made in Michigan, a necessary condition for the Workers' Compensation Agency to exercise jurisdiction over plaintiff's out-of-state injury under the jurisdictional standard in effect when plaintiff was injured, MCL 418.845, as enacted by 1969 PA 317. Despite acknowledging that whether the contract of hire was made in Michigan was at issue, plaintiff's counsel failed to present any direct proof regarding where and how plaintiff was hired.

Defendant's trucking company is headquartered in Canton, Michigan, but it has satellite offices in Kentucky and New Jersey and provides transportation services nationwide. Plaintiff's payroll and employment records showed the Canton office address, but the magistrate found that these facts did not satisfy plaintiff's burden of proof to establish jurisdiction. The record contained no evidence of what contact, if any, plaintiff had with the Canton office during the hiring process. Moreover, plaintiff's employment required him to drive to destinations in both Michigan and Ohio. The magistrate thus concluded that speculation would be required to find that the contract of hire was made in Michigan and dismissed plaintiff's petition.

The WCAC affirmed, finding no facts that would allow the magistrate to conclude that the contract of hire was made in Michigan. It noted plaintiff's failure to present evidence of the circumstances or location of his hiring.

The Court of Appeals denied plaintiff's application for leave to appeal for lack of merit in the grounds presented.[1]

Plaintiff applied for leave to appeal in this Court. We directed the clerk to schedule oral argument on the application and directed the parties to "address whether the legislative change to MCL 418.845, 2008 PA 499, should be applied to this case."[2]

II. STANDARD OF REVIEW

Whether the amendment of MCL 418.845 enacted by 2008 PA 499 applies retroactively is a question of law that we review de novo. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001).[3]

III. ANALYSIS

At the time of plaintiff's injury, MCL 418.845 provided:

> The bureau [now the Workers' Compensation Agency] shall have jurisdiction over all controversies arising out of

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[1] *Brewer v A D Transport Express, Inc*, unpublished order of the Court of Appeals, entered May 5, 2009 (Docket No. 289941).

[2] *Brewer v A D Transport Express, Inc*, 485 Mich 853 (2009).

[3] No basis exists under MCL 418.861a(3) and (14) to reverse the administrative finding that plaintiff failed to establish that the contract of hire was made in Michigan. We thus confine our analysis to the legal question whether the amendment enacted by 2008 PA 499 applies retroactively.

> injuries suffered outside this state where the injured employee is a resident of this state at the time of injury *and* the contract of hire was made in this state. Such employee or his dependents shall be entitled to the compensation and other benefits provided by this act. [Emphasis added.]

We discussed the history of this jurisdictional provision in *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 33-38; 732 NW2d 56 (2007). The essential point is that beginning with the first enactment of a provision in 1921, the text of MCL 418.845 and its predecessors had, until the enactment of 2008 PA 499, always provided jurisdiction over out-of-state injuries if (1) the injured employee resided in this state at the time of injury *and* (2) the contract of hire was made in Michigan. In *Boyd v W G Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993), however, a majority of this Court declined to enforce the residency requirement on the basis of its view that the requirement had not been enforced since its rejection by *Roberts v I X L Glass Corp*, 259 Mich 644; 244 NW 188 (1932).[4] The *Boyd* Court viewed the residency requirement as "not only undesirable but also unduly restrictive." *Boyd*, 443 Mich at 524.

In *Karaczewski*, the majority opinion overruled *Boyd* and held that MCL 418.845 must be applied as written. The majority explained that the Legislature's use of the conjunctive term "and" required that both jurisdictional requirements be met. *Karaczewski*, 478 Mich at 33. Nonetheless, in order to protect the reliance interests of plaintiffs who had received or were receiving benefits as part of a final judgment, the majority applied its holding only to claimants for whom there

[4] This view was rejected in *Karaczewski*, 478 Mich at 34-38, because a majority of the Court believed that the residency requirement had been applied since the enactment of 1943 PA 245.

had not been a final judgment awarding benefits as of the date of the opinion. *Id.* at 45 n 15.[5]

Following this Court's decision in *Karaczewski*, the Legislature enacted 2008 PA 499, effective on January 13, 2009, amending MCL 418.845 to provide jurisdiction over out-of-state injuries "if the injured employee is employed by an employer subject to this act and if *either* the employee is a resident of this state at the time of injury *or* the contract of hire was made in this state." (Emphasis added.) Thus, under the amendment, a claimant injured outside Michigan need only show *either* that he was a Michigan resident at the time of his injury *or* that his contract of hire was made in this state. This expansion of jurisdiction is unprecedented because even under *Boyd*, a claimant was required to show that the contract of hire was made in Michigan. The Legislature has now gone further to authorize jurisdiction when a Michigan resident is injured *outside Michigan under a contract of hire that was not made in Michigan*.[6]

The question we must resolve is whether the amendment of MCL 418.845 enacted by 2008 PA 499 applies retroactively to a claimant such as plaintiff who was injured before the effective date of the amendment. "In determining whether a statute should be applied retroactively or prospectively only, '[t]he primary and over-

[5] On the same date that we heard oral argument in this case, this Court also heard argument in *Bezeau v Palace Sports & Entertainment, Inc* (Docket No. 137500) regarding whether the *Karaczewski* holding should be further limited to apply only prospectively. As plaintiff has acknowledged, however, the extent of retroactivity of *Karaczewski* has no bearing on this case because the jurisdictional requirement at issue here, that the contract of hire have been made in Michigan, was enforced even under *Boyd*.

[6] Although constitutional challenges to this expansion of jurisdiction may arise, no such issues have been raised in this case, and we need not address them at this time.

riding rule is that legislative intent governs. All other rules of construction and operation are subservient to this principle.' " *Frank W Lynch*, 463 Mich at 583 (citation omitted). Statutes are presumed to apply prospectively only unless a contrary intent is clearly manifested. *Id*. "We note that the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively." *Id*. at 584; see also *Nicholson v Lansing Bd of Ed*, 423 Mich 89, 93; 377 NW2d 292 (1985) (stating that in workers' compensation cases, the statutory provision in effect at the time of the injury governs "unless the Legislature clearly indicates a contrary intention"). Even if the Legislature acts to invalidate a prior decision of this Court, the amendment is limited to prospective application if it enacts a substantive change in the law. *Hurd v Ford Motor Co*, 423 Mich 531, 533; 377 NW2d 300 (1985).

Here, 2008 PA 499 contains no language that would clearly manifest a legislative intent to apply the new jurisdictional standard retroactively. The amendment merely states the new jurisdictional standard; it contains no language suggesting that this new standard applies to antecedent events or injuries. Therefore, the amendment applies only to injuries occurring on or after the effective date of the amendment, January 13, 2009.

In addition, this Court has recognized that "providing a specific, future effective date and omitting any reference to retroactivity" supports a conclusion that a statute should be applied prospectively only. See *White v Gen Motors Corp*, 431 Mich 387, 398-399; 429 NW2d 576 (1988) (opinion by RILEY, J.), relying on *Selk v Detroit Plastic Prods (On Resubmission)*, 419 Mich 32, 35 n 2; 348 NW2d 652 (1984). As discussed, in adopting 2008 PA 499, the Legislature provided a specific, future effective date of January 13, 2009, and omitted any reference to retroactivity.

Further undermining any notion of a legislative intent to apply the amendment of MCL 418.845 retroactively is the fact that, although the Legislature adopted the amendment after our decision in *Karaczewski,* it did not reinstate the pre-*Karaczewski* state of the law. On the contrary, the amendment enacted by 2008 PA 499 created *an entirely new jurisdictional standard*, granting jurisdiction over out-of-state injuries of Michigan employees whose contracts of hire were not made in Michigan. That is, this amendment did not restore the status quo before *Karaczewski*, which required a Michigan contract of hire for jurisdiction, but instead created a new rule under which *either* a Michigan contract of hire *or* Michigan residency would suffice. In light of these circumstances and the text of the amendment, we simply can discern no clearly manifested legislative intent to apply the amendment retroactively.

Moreover, the amendment of MCL 418.845 does not fall within an exception for "remedial" or "procedural" amendments that may apply retroactively. *Frank W Lynch*, 463 Mich at 584. In *Franks v White Pine Copper Div*, 422 Mich 636, 672; 375 NW2d 715 (1985), the Court explained that "statutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights" may be applied retroactively. An amendment that affects substantive rights is not considered "remedial" in this context. *Id.* at 673; *Frank W Lynch*, 463 Mich at 585; *White*, 431 Mich at 397 (opinion by RILEY, J.). Even if a new cause of action is not created, a statute may not be applied retroactively if it creates " 'an important new legal burden . . . .' " *Frank W Lynch*, 463 Mich at 585, quoting *Landgraf v USI Film Prods*, 511 US 244, 283; 114 S Ct 1483; 128 L Ed 2d 229 (1994).

We conclude that the exception for remedial or procedural amendments does not apply because 2008 PA 499 created an important new legal burden and potentially enlarged existing rights. By expanding the jurisdiction of the Workers' Compensation Agency to include out-of-state injuries suffered by Michigan employees whose contracts of hire were not made in Michigan, the amendment imposed a new legal burden on out-of-state employers not previously subject to the jurisdiction of the Workers' Compensation Agency. It also potentially enlarged existing rights for Michigan residents injured in other states under contracts of hire not made in Michigan.

We thus conclude that the amendment of MCL 418.845 enacted by 2008 PA 499 does not fall within the exception for legislation that is deemed remedial or procedural.

IV. CONCLUSION

We hold that the amendment of MCL 418.845 enacted by 2008 PA 499 does not apply retroactively to cases in which the claimant was injured before the effective date of the amendment. The amendment contains no language clearly manifesting a legislative intent that it apply retroactively. Moreover, the amendment created an important new legal burden and potentially enlarged existing rights; it consequently does not fall within an exception for remedial or procedural amendments that may apply retroactively. We thus affirm the decision of the Workers' Compensation Appellate Commission upholding the magistrate's dismissal of plaintiff's petition for lack of jurisdiction.

CAVANAGH, YOUNG, and MARKMAN, JJ., concurred with CORRIGAN, J.

KELLY, C.J., I concur in the result only.

HATHAWAY, J. (*dissenting*). We dissent from the majority's decision in this matter. Leave to appeal was not granted in this case. Rather, oral argument on plaintiff's application for leave to appeal in this Court was heard in order to determine whether we should grant leave to appeal, deny leave to appeal, or take other peremptory action. Having reviewed the limited briefing and having heard limited oral argument, we would grant leave to appeal because we believe that the Court would benefit from plenary review of the issues before rendering a decision.

WEAVER, J., concurred with HATHAWAY, J.

PEOPLE v WILCOX

Docket No. 136956. Argued December 8, 2009 (Calendar No. 2). Decided May 11, 2010.

A St. Joseph Circuit Court jury convicted Larry E. Wilcox of first-degree criminal sexual conduct. Defendant's recommended minimum sentence range calculated under the sentencing guidelines was 27 to 56 months. Defendant, however, had previously been convicted of second-degree criminal sexual conduct. The court, Paul Stutesman, J., acknowledged that it was bound by MCL 750.520f, a statute requiring "a mandatory minimum sentence of at least 5 years" for certain persons convicted of a second or subsequent criminal sexual conduct offense, and sentenced defendant to a prison term of 10 to 40 years. The court did not indicate that it was departing from the guidelines range or articulate a substantial and compelling reason to do so. The Court of Appeals, DAVIS, P.J., and MURRAY and BECKERING, JJ., affirmed defendant's conviction and sentence. 280 Mich App 53 (2008). The Supreme Court granted defendant leave to appeal. 483 Mich 1094 (2009).

In an opinion by Chief Justice KELLY, joined by Justices CAVANAGH, MARKMAN, and HATHAWAY, the Supreme Court *held*:

The sentencing guidelines apply to minimum sentences in excess of 5 years imposed under MCL 750.520f. MCL 769.34(2)(a) provides that if a statute mandates a minimum sentence, the sentencing court must impose sentence in accordance with that statute and that imposing a mandatory minimum sentence is not a departure from the guidelines. The "mandatory" minimum in MCL 750.520f(1), however, is a flat 5-year term. Five years is the only minimum sentence set by law with no discretion for the court to individualize punishment. The words "at least" in the statute are permissive. They authorize a higher minimum sentence, but nothing in the statute mandates that any minimum sentence exceed 5 years. A minimum sentence imposed under MCL 750.520f(1) that exceeds 5 years and is not within the recommended minimum sentence range calculated under the guidelines constitutes a departure from the guidelines, and the court must articulate substantial and compelling reasons to depart from the recom-

mendation. The 10-year minimum sentence defendant received constituted an upward departure, and the trial court did not state substantial and compelling reasons justifying the departure.

Reversed and remanded for resentencing.

Justice WEAVER, dissenting, would affirm for the reasons stated in Justice YOUNG's dissent with the exception of its citation of *People v Smith*, 482 Mich 292 (2008).

Justice YOUNG, joined by Justice CORRIGAN, dissenting, disagreed that defendant's 10-year minimum sentence represented a departure from the minimum sentence range calculated under the guidelines. MCL 769.34(2)(a) requires the sentencing court to impose a sentence "in accordance with" a statute that mandates a minimum sentence for the offense. MCL 750.520f(1) requires a minimum sentence of at least 5 years. By use of the modifying phrase "at least," the Legislature created an indeterminate mandatory minimum sentence rather than an absolute mandatory minimum sentence of 5 years. Any minimum sentence of 5 years or more is a mandatory minimum imposed pursuant to MCL 750.520f(1) and, under MCL 769.34(2)(a), is not a departure. The majority's decision will apply to all statutes that require an indeterminate mandatory minimum sentence and will replace those sentences with absolute minimum sentences that the Legislature did not enact.

SENTENCES — CRIMINAL SEXUAL CONDUCT — REPEAT CRIMINAL SEXUAL CONDUCT OFFENDERS — SENTENCING GUIDELINES — DEPARTURES FROM GUIDELINES RECOMMENDATIONS.

The sentencing guidelines apply to minimum sentences in excess of 5 years imposed under MCL 750.520f, which requires a court to impose a mandatory minimum sentence on certain persons convicted of a second or subsequent criminal sexual conduct offense; a sentence imposed under MCL 750.520f(1) that exceeds 5 years and is not within the recommended minimum sentence range calculated under the guidelines constitutes an upward departure from the guidelines, and the sentencing court must articulate substantial and compelling reasons for the departure (MCL 769.34[2], [3]).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *John L. McDonough*, Prosecuting Attorney, and *Mark G. Sands*, Assistant Attorney General, for the people.

State Appellate Defender (by *Christopher M. Smith*) for defendant.

KELLY, C.J. At issue in this case is whether the legislative sentencing guidelines[1] apply to defendant's 10-year minimum sentence imposed under MCL 750.520f, the repeat criminal sexual conduct (CSC) offender statute. In deciding the issue, we must also determine what constitutes the "mandatory minimum" sentence referred to in MCL 750.520f(1), which requires a minimum sentence of "at least 5 years."

Defendant contends that the statute's mandate is simply 5 years, whereas the prosecution contends that the statute mandates any minimum sentence of 5 years or more. If we accept defendant's argument, his 10-year minimum sentence was a departure from the guidelines recommendation and he is entitled to resentencing. The trial court did not provide substantial and compelling reasons justifying a departure.[2] If we agree with the prosecution, defendant's 10-year minimum sentence was not a departure because the Legislature has explicitly stated that a mandatory minimum sentence is not a departure.[3] The Court of Appeals agreed with the prosecution, concluding that "[b]ecause defendant's 10-year minimum sentence is 'at least' five years, it satisfies the requirements of [MCL 750.520f]."[4]

We conclude that the guidelines apply to defendant's sentence and that the "mandatory minimum" sentence in MCL 750.520f(1) is a flat 5-year term. Because the trial court imposed a 10-year minimum sentence that

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[1] MCL 777.1 *et seq.*

[2] *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008). Because the trial court in this case believed that the guidelines were inapplicable, it did not articulate reasons warranting a departure. Thus, it failed to offer substantial and compelling reasons justifying the extent of the particular departure made, as required by *Smith*, 482 Mich at 295.

[3] MCL 769.34(2)(a) states in part that "[i]mposing a mandatory minimum sentence is not a departure under this section."

[4] *People v Wilcox*, 280 Mich App 53, 57; 761 NW2d 466 (2008).

exceeded both the applicable guidelines range and the 5-year mandatory minimum, defendant's sentence was a departure from the guidelines. However, the trial court did not state substantial and compelling reasons justifying a departure, let alone any reasons justifying the particular departure made. Therefore, we reverse the judgment of the Court of Appeals and remand the case for resentencing.

FACTS AND PROCEDURAL HISTORY

Larry Wilcox was charged with first-degree CSC. The felony information notified him that he faced an enhanced sentence under MCL 750.520f as a repeat CSC offender and under MCL 769.10 as a second-offense habitual offender. At trial, the prosecutor introduced two documents into evidence in support of the repeat offender enhancements. They established that defendant had been convicted of second-degree CSC[5] in 1987.

The jury convicted defendant as charged. His sentencing information report calculated the applicable guidelines minimum sentence range as 27 to 56 months. After acknowledging that MCL 750.520f applied, the trial judge imposed a sentence of 10 to 40 years. The judge did not indicate that the 120-month minimum sentence was a departure from the guidelines range and did not provide a substantial and compelling reason for departing.

Defendant appealed as of right. The Court of Appeals affirmed his conviction and sentence in a published opinion. The panel summarily dismissed his argument that the sentence improperly exceeded both the sentencing guidelines range and the 5-year mandatory

[5] MCL 750.520c.

minimum sentence established by MCL 750.520f(1).[6] The panel further opined that defendant's sentence was not a departure from the guidelines, implicitly concluding that the guidelines were inapplicable because defendant had been sentenced under MCL 750.520f.[7]

We granted defendant's application for leave to appeal, limited to the issue whether the sentencing guidelines applied to the sentence and, if so, whether defendant is entitled to resentencing.[8]

STANDARD OF REVIEW

We review issues of statutory interpretation de novo.[9] Our primary goal is to give effect to the intent of the Legislature.[10] The first step in ascertaining intent is to focus on the language of the statute. If the language is unambiguous, we presume that the Legislature intended the meaning expressed.[11]

ANALYSIS

Resolution of the issue in this case depends on how the statutes discussing the application of the sentencing

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[6] *Wilcox*, 280 Mich App at 57.

[7] *Id*. Oddly, just two days earlier, the same panel of the Court of Appeals came to the opposite conclusion in another case and determined that the guidelines did apply to sentences imposed under MCL 750.520f. *People v Walton*, unpublished opinion per curiam of the Court of Appeals, issued June 3, 2008 (Docket No. 276161). In *Walton*, the trial court concluded that the guidelines did not apply to sentences imposed under MCL 750.520f. The panel vacated defendant's sentence and remanded for resentencing based on its conclusion that "the actual offense defendant committed" was first-degree CSC, an enumerated felony to which the guidelines apply. *Walton*, unpub op at 3.

[8] *People v Wilcox*, 483 Mich 1094 (2009).

[9] *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009).

[10] *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007).

[11] *Id*.

guidelines interact with MCL 750.520f. MCL 769.34(2) describes the offenses to which the sentencing guidelines apply:

> Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed.

Thus, the sentencing guidelines apply to felonies enumerated in part 2 of chapter XVII of the Code of Criminal Procedure, MCL 777.11 through 777.19, committed on or after January 1, 1999, except as otherwise provided in MCL 769.34(2). Defendant was convicted of first-degree CSC,[12] which is a felony enumerated in MCL 777.16y. It is undisputed that he committed the offense after January 1, 1999. Therefore, the sentencing guidelines apply to his sentence absent an exception elsewhere in the statute.

MCL 769.34(2) does provide exceptions to the applicability of the sentencing guidelines. MCL 769.34(2)(a) contains the exception at issue here. It states:

> *If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section.* If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the statute authorizes the sentencing judge to depart from that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the manda-

[12] MCL 750.520b.

> tory minimum sentence is not a departure under this section. If the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section. [Emphasis added.]

The parties do not dispute that MCL 750.520f provides for a mandatory minimum sentence, putting it within the purview of MCL 769.34(2)(a). MCL 750.520f(1) provides:

> If a person is convicted of a second or subsequent offense under [MCL 750.520b, 750.520c, or 750.520d], the sentence imposed under those sections for the second or subsequent offense *shall provide for a mandatory minimum sentence of at least 5 years.* [Emphasis added.]

The dispositive question is whether the mandatory minimum sentence established by MCL 750.520f(1) is "at least 5 years" or simply a flat 5-year minimum sentence. Defendant contends that the 5-year minimum is the only sentence that is mandatory and that any sentence above 5 years is permissive. Therefore, defendant argues, any minimum sentence exceeding 5 years is permissible rather than mandated; as a consequence, it is governed by the guidelines. Defendant states that, if the minimum sentence exceeds the range set by the guidelines, it must be justified by substantial and compelling reasons. Because his 10-year minimum sentence exceeded both the 5-year mandatory minimum and the applicable guidelines range, defendant argues that his sentence constituted a departure.

The prosecution counters that the words "at least" indicate a legislative intent that any minimum sentence imposed under MCL 750.520f may exceed 5 years, regardless of the guidelines range. Therefore, the prosecution argues, any minimum sentence imposed on a repeat CSC offender under MCL 750.520f is limited only by the "two-thirds rule" contained in MCL 769.34(2)(b).[13] Because defendant's 10-year minimum is "at least 5 years" and does not exceed two-thirds of the maximum sentence imposed (40 years), the prosecution concludes that the sentence complied with MCL 769.34(2)(a) and (b).

We reject the prosecution's argument. The use of the words "at least" in MCL 750.520f(1) does not grant trial courts the discretion to impose minimum sentences that are subject only to the limitation of the two-thirds rule. Such an interpretation is inconsistent with MCL 769.34(2)(a). Also, it is contrary to a central purpose of the sentencing guidelines—greater uniformity in sentencing.[14]

The first sentence of MCL 769.34(2)(a) provides that, if a statute mandates a minimum sentence, "the court shall impose sentence in accordance with that statute." The next sentence states that imposing a mandatory minimum sentence is not a departure from the sentenc-

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[13] MCL 769.34(2)(b) provides that "[t]he court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence."

[14] *Smith*, 482 Mich at 312 & n 46. The dissent seizes on this sentence and argues as though our decision hinges solely on it. *Post* at 78. The dissent apparently believes that referring to the purpose underlying the enactment of the sentencing guidelines somehow evidences that we are deviating from the language of the statute. We do not view this reference as a remarkable one, as it is one we have made before, including in *Smith*, an opinion that the author of the dissent signed. Moreover, the dissent entirely ignores our discussion of the statutory language on pp 67-69 of this opinion.

ing guidelines. The difference in the language of the two sentences is of critical importance. The first states that, when a statute like MCL 750.520f provides for a mandatory minimum sentence, the court must impose a sentence "in accordance with" the statute. This wording provides for a sentence that merely conforms with, but is not necessarily compelled by, the statute at issue.[15] Because it is "at least 5 years," defendant's 10-year minimum sentence is unquestionably in accordance with MCL 750.520f.

By contrast, the second sentence of MCL 769.34(2)(a) lacks the broad wording "in accordance with" that is present in the first sentence. It provides only that "[i]mposing a mandatory minimum sentence is not a departure" from the sentencing guidelines. This linguistic distinction is critical because, given the statute's language, only the mandatory minimum sentence is not a departure from the guidelines. Notably, the statute does not specify that a sentence imposed "in accordance with" a statute providing a mandatory minimum sentence is "not a departure."

Therefore, the proper interpretation of these statutes hinges on the extent to which MCL 750.520f(1) is "mandatory," so that a sentence compelled by it is not a departure under MCL 769.34(2)(a). One definition of "mandatory" is "authoritatively ordered; obligatory."[16] "Mandatory" and, in particular, "mandatory minimum" are also legal terms of art. As such, reference to a legal dictionary is appropriate.[17] Black's Law Dictionary defines "mandatory" as "[o]f, relating to, or constituting a

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[15] A lay dictionary's definitions of "accordance" include "agreement; conformity: *in accordance with the rules*." *Random House Webster's College Dictionary* (2001).

[16] *Id.*

[17] MCL 8.3a; *People v Jones*, 467 Mich 301, 304; 651 NW2d 906 (2002).

command; required; preemptory."[18] Although Black's contains no definition for "mandatory minimum," it defines "mandatory sentence" as "[a] sentence set by law with no discretion for the judge to individualize punishment."[19]

Applying these definitions to MCL 750.520f(1), we must conclude that the only minimum that is "mandatory" in the statute is 5 years. Five years is the only minimum sentence in MCL 750.520f(1) that is "set by law with no discretion for the judge to individualize punishment."[20] By contrast, the words "at least" are permissive. They authorize a higher minimum sentence, such as the 10-year minimum imposed here, but nothing in the statute mandates that the minimum sentence exceed 5 years. Although MCL 750.520f(1) authorizes a minimum sentence in excess of 5 years, it does not mandate it.[21]

The prosecution argues that this interpretation of the statute renders nugatory the words "at least."[22] We disagree. The use of "at least" in MCL 750.520f(1)

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[18] Black's Law Dictionary (8th ed), p 981.

[19] *Id.* at 1394.

[20] The dissent is correct that "5 years is the *starting point* of the minimum sentence, *not* its upper terminus." *Post* at 76. But the dissent fails to acknowledge that this 5-year "starting point" is the only truly mandatory aspect of MCL 750.520(f)(1). The "upper terminus" of a defendant's minimum sentence is controlled by the top of the applicable guidelines range, unless the trial court articulates substantial and compelling reasons for an upward departure.

[21] For example, in the case at bar, the guidelines range topped out at 56 months, but MCL 750.520f(1) required the court to impose a minimum sentence of 5 years. If a 5-year minimum sentence had been imposed, it would not have been considered a departure sentence pursuant to MCL 769.34(2)(a), even though it exceeded the guidelines range by 4 months.

[22] "Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible." *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980),

authorizes courts to impose minimum sentences of 5 years or more. However, because only 5 years is mandatory, MCL 769.34(2)(a) exempts only a 5-year minimum sentence from the departure provision in MCL 769.34(3). Hence, if a minimum sentence under MCL 750.520f(1) exceeds 5 years and is higher than the top of the applicable guidelines range, it constitutes a departure. The judge must articulate substantial and compelling reasons for it.

The language "at least" in MCL 750.520f(1) is not in the least rendered nugatory under this analysis. In fact, it comes into play often. Any offender convicted of a repeat CSC offense whose guidelines range exceeds 5 years may properly receive a minimum sentence of "at least 5 years." For example, a repeat CSC offender whose guidelines range is 180 to 240 months may properly receive a 200-month minimum sentence. Such a sentence would be permissible because it meets the mandatory provision of MCL 750.520f(1) in that it is not less than 5 years. The additional 140 months in excess of 5 years also complies with MCL 769.34(2) because the sentence is within the applicable guidelines range.[23]

Moreover, to accept the prosecution's interpretation would undermine the legislative intent behind the sentencing guidelines statutes and potentially lead to arbitrary sentencing. Allowing trial courts to ignore the guidelines when imposing a sentence under MCL 750.520f could lead to similarly situated defendants receiving wholly disparate sentences.

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citing *Stowers v Wolodzko*, 386 Mich 119, 133; 191 NW2d 355 (1971), and *Scott v Budd Co*, 380 Mich 29, 37; 155 NW2d 161 (1968).

[23] Indeed, if the guidelines range were 180 to 240 months and the trial court imposed a minimum sentence of 120 months, that minimum sentence would constitute a downward departure.

For example, under the prosecution's interpretation, a repeat CSC offender like defendant, whose guidelines range contemplates a relatively low minimum sentence, could nevertheless receive a 60- to 90-year sentence.[24] Such a harsh minimum sentence would not require that the trial court give substantial and compelling reasons justifying the disparity between the guidelines range and the actual minimum sentence imposed.

By contrast, a recidivist offender subject to a guidelines range that far exceeds the 5-year mandatory minimum could receive a sentence far below the guidelines range. The trial court could impose the 5-year minimum without being required to provide a justification for the downward departure.[25] However, the defen-

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[24] The dissent does not address this anomaly.

[25] The dissent's contention that our opinion creates "a new, but unexplained, statutory scheme for mandatory minimum sentences" is mistaken. *Post* at 79. A 5-year minimum sentence for a defendant with a guidelines range of 7 to 10 years would indeed constitute a downward departure under MCL 769.34(2)(a). When the lower end of the guidelines range is 5 years or greater, a trial court that imposes a sentence of 5 years or more is no longer imposing a "mandatory" minimum. Rather, the court is merely imposing a sentence, as required by MCL 769.34(2)(a), that is "in accordance with" MCL 750.520f(1).

By contrast, the 5-year minimum is "mandatory" when the guidelines range tops out below 5 years. In those circumstances, a 5-year sentence is truly the mandatory minimum sentence, so it is not a departure. It is hardly inconsistent to conclude that a 5-year sentence is no longer mandatory when a defendant's guidelines range expressly contemplates a higher minimum sentence.

The dissent cites several criminal statutes that provide for indeterminate mandatory minimum sentences, using language such as "not less than [X] years." See *post* at 76 n 9. It then argues that "the majority reads out of our law books the indeterminate nature of these mandatory minimum sentences and replaces those sentences with absolute minimum terms that the Legislature did not enact." *Post* at 76-77. This is incorrect. Under the majority opinion, a judge remains free to impose any minimum sentence that is consistent with the guidelines range, subject to the two-thirds rule. Our opinion simply makes clear that, where a

dant in question could be subject to a guidelines range contemplating, for example, at least a 20-year minimum term. Given the Legislature's stated goal in enacting the guidelines of promoting uniformity in sentencing, we believe that this is not a result that the Legislature contemplated.

Defendant's applicable guidelines minimum sentence range was 27 to 56 months. Under MCL 750.520f(1), the trial court was required to impose a minimum sentence of "at least 5 years." However, because 5 years is the only truly minimum sentence that is mandatory under MCL 750.520f(1), any minimum sentence exceeding 5 years must fall within the applicable guidelines range. Otherwise, the sentence would not be "a mandatory minimum sentence." It would constitute a departure from the sentencing guidelines, and the court would have to articulate substantial and compelling reasons for the extent of its departure.

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judge imposes a minimum sentence in excess of the lowest permissible minimum sentence, it must be consistent with the guidelines. Hence, if the guidelines range tops out below the minimum sentence the court wishes to impose, the judge needs to provide substantial and compelling reasons for exceeding the guidelines. Our opinion does not "read[] out of our law books" the indeterminate nature of mandatory minimum statutes by replacing them with absolute minimum terms. By way of illustration, if a statute provides that the minimum sentence shall be "at least two years," the trial court can impose a minimum sentence higher than two years. But if it wants to provide a minimum sentence higher than the top of the guidelines range, it must articulate substantial and compelling reasons for it. If the guidelines range is 12 to 24 months for a crime requiring a two-year minimum sentence and if the court wants to impose a three-year minimum sentence, it may do so. But it must provide substantial and compelling reasons for the upward departure. Concomitantly, if the guidelines range is 36 to 48 months and the court wishes to impose a two-year minimum sentence, it must provide substantial and compelling reasons for imposing a downward departure. Contrary to the dissent, requiring compliance with the articulation requirements of the guidelines does not replace an indeterminate minimum sentence with an absolute minimum sentence.

The trial court's 10-year minimum sentence in this case constituted an upward departure from the sentencing guidelines. The court did not articulate substantial and compelling reasons for the extent of its departure. Accordingly, defendant is entitled to resentencing.

CONCLUSION

We hold that the legislative sentencing guidelines apply to minimum sentences in excess of 5 years that are imposed under MCL 750.520f. We further hold that, for purposes of applying MCL 769.34(2)(a), the "mandatory minimum" sentence referred to in MCL 750.520f(1) is a flat 5-year term.

Here, the trial court imposed a 10-year minimum sentence that exceeded both the applicable guidelines minimum sentence range and the 5-year mandatory minimum. Therefore, defendant's sentence was a departure from the guidelines. Because the trial court did not state substantial and compelling reasons justifying its departure pursuant to *Smith*, we reverse the judgment of the Court of Appeals and remand the case for resentencing.

CAVANAGH, MARKMAN, and HATHAWAY, JJ., concurred with KELLY, C.J.

WEAVER, J. (*dissenting*). I dissent and would affirm the judgment of the Court of Appeals for the reasons stated in Justice YOUNG's dissent with the exception of his citation in footnote 4 of *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008), a case in which I dissented.

YOUNG, J. (*dissenting*). I dissent from the majority's conclusion that the 10-year minimum sentence, imposed by the sentencing court pursuant to the repeat

criminal sexual conduct (CSC) offender mandatory minimum sentence requirement,[1] represents a departure from the legislative sentencing guidelines.[2] Instead, I would affirm the judgment of the Court of Appeals. The sentence imposed here is excepted from the statutory guidelines and thus the sentencing court is not required to state "substantial and compelling reasons" for the minimum sentence imposed, as the majority now requires.

Defendant was convicted of first-degree CSC for digitally penetrating the vagina of his daughter. Because he previously was convicted of second-degree CSC, he was sentenced as a repeat CSC offender to a minimum of 10 years in prison.[3] On appeal, defendant argued that his 10-year minimum sentence represented an upward departure from the legislative sentencing guidelines and that the sentencing court failed to articulate substantial and compelling reasons to justify the upward departure.[4] The prosecution claimed that defendant's minimum sentence did not constitute a departure because it complied with the repeat CSC offender mandatory minimum sentence requirement, and the Court of Appeals agreed.

MCL 769.34(2)(a) places mandatory minimum sentences within the framework of the legislative sentencing guidelines and provides, in relevant part:

> If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accor-

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[1] MCL 750.520f(1).

[2] MCL 777.1 *et seq*.

[3] Defendant's maximum sentence of 40 years is not at issue in this case.

[4] See *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008). Defendant's minimum sentence guidelines range was calculated at 27 to 56 months.

> dance with *that statute*. Imposing a mandatory minimum sentence is not a departure under this section.[5]

Thus, the statutory guidelines defer to another statute that specifies a mandatory minimum sentence. "That statute" in this case is MCL 750.520f(1). It creates just such a mandatory minimum sentence for recidivist sex offenders:

> If a person is convicted of a second or subsequent offense under [MCL 750.520b, 750.520c, or 750.520d], the sentence imposed under those sections for the second or subsequent offense shall provide for a mandatory minimum sentence of *at least* 5 years.[6]

Here, defendant's 10-year minimum sentence was "in accordance with" the mandatory minimum sentence of "at least 5 years." Moreover, as the sentencing court imposed "a mandatory minimum sentence"—a sentence of "at least 5 years"—that sentence was not a departure from the guidelines and the court was not required to justify the minimum sentence imposed. Therefore, the sentence imposed by the sentencing court satisfies both MCL 769.34(2)(a) and MCL 750.520f(1), as applied here in conformance with their clear and unambiguous meanings. Yet the majority disagrees; the question is why?

I. THE MAJORITY FAILS TO CONSTRUE THE STATUTE IN ACCORDANCE WITH ITS PLAIN LANGUAGE

The majority claims that the mandatory minimum sentence articulated in MCL 750.520f(1) is "5 years," not "at least 5 years," as the statute plainly reads. Such a conclusion is obviously wholly inconsistent with the plain meaning of MCL 750.520f(1), as evidenced by its

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[5] Emphasis added.

[6] MCL 750.520f(1) (emphasis added).

grammatical structure, which describes the mandatory minimum sentence required under that provision as "*at least* 5 years." The Legislature could have created an *absolute* "mandatory minimum" sentence of 5 years, but it did not.[7] Instead, by using the phrase "at least" to modify "5 years," the Legislature created an indeterminate "mandatory minimum" sentence for recidivist sex offenders. Under the mandatory minimum sentence, 5 years is the *starting point* of the minimum sentence, *not* its upper terminus. Accordingly, a sentencing court must impose a sentence within the indeterminate mandatory minimum sentence of MCL 750.520f(1)—namely, any minimum sentence of 5 years or more—and that sentence "is not a departure"[8] from the legislative sentencing guidelines.

The majority's misinterpretation will not be limited to the statute now before us. In numerous statutes, some covering our most serious crimes, the Legislature has chosen to create an *indeterminate*, rather than an absolute, mandatory minimum sentence.[9] Under to-

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[7] For example, MCL 750.227b(1) sets an absolute mandatory term of 2 years' imprisonment for a first offense of possessing a firearm during the commission of a felony. Various statutes similarly provide an absolute mandatory term of life imprisonment: MCL 333.7413(1) (subsequent violations of certain serious controlled substance offenses); MCL 750.316(1) (first-degree murder); MCL 750.543f(2) (terrorism causing death); MCL 750.544 (treason).

[8] MCL 769.34(2)(a).

[9] See, e.g., MCL 333.7410(2) (providing a sentence of "not less than 2 years or more than 3 times that authorized by [MCL 333.7401(2)(a)(*iv*)]" for delivery of a controlled substance within 1,000 feet of a school or library); MCL 333.7410(3) (providing a sentence of "not less than 2 years or more than twice that authorized by [MCL 333.7401(2)(a)(*iv*)]" for possessing with intent to deliver a controlled substance within 1,000 feet of a school or library); MCL 333.7413(3) (providing a sentence of "not less than 5 years nor more than twice that authorized under [MCL 333.7410(2)] or (3)" for a subsequent offense of delivering or possessing with intent to deliver a controlled substance within 1,000 feet of a school

day's decision, the majority reads out of our law books the indeterminate nature of these mandatory minimum sentences and replaces those sentences with absolute minimum terms that the Legislature did not enact.

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or library); MCL 750.112 (providing a sentence of "not less than 15 years nor more than 30 years" for committing burglary with explosives); MCL 750.520b(2)(b) (providing a sentence of "life or any term of years, but not less than 25 years" for first-degree CSC committed by an individual 17 years of age or older against a victim under the age of 13); MCL 750.529 (providing a sentence of "life or for any term of years" but "not less than 2 years" for armed robbery involving "an aggravated assault or serious injury"); see also MCL 257.257(2) and (3) (providing sentences for subsequent offenses of altering or forging documents from the Secretary of State of "not less than 2 years or more than 7 years" and "not less than 5 years or more than 15 years" respectively); MCL 257.329(2) and (3) (providing sentences for subsequent offenses of possessing or selling false certificates of insurance of "not less than 2 years or more than 7 years" and "not less than 5 years or more than 15 years" respectively); MCL 257.625(7)(a)(*i*)(A) and (*ii*)(A) (providing sentences for various driving-while-intoxicated offenses of "not less than 5 days or more than 1 year" and subsequent offenses of "not less than 1 year or more than 5 years"); MCL 257.625k(7) and (9) (providing sentences of "not less than 5 years or more than 10 years" for a laboratory or manufacturer that falsely certifies an ignition interlock device); MCL 257.625m(5)(a) (providing a sentence of "not less than 1 year or more than 5 years" for a subsequent offense of driving a commercial vehicle with a bodily alcohol content of 0.04 grams or more but less than 0.08 grams per specified volume of blood, breath, or urine); MCL 257.903(2) and (3) (providing sentences of "not less than 2 years or more than 7 years" and "not less than 5 years or more than 15 years" respectively for subsequent offenses of making false certifications on an application for various licenses through the Secretary of State); MCL 333.13738(3) (providing a sentence of "not less than 5 years and not more than 20 years" for illegally disposing of toxic waste in a manner that constitutes "an extreme indifference for human life"); MCL 750.161(1) (providing a sentence of "not less than 1 year and not more than 3 years" for deserting or abandoning one's spouse or children); MCL 750.210a(b) (providing a sentence of "not less than 2 nor more than 5 years" for possessing or selling products containing "valerium" without a license or prescription); MCL 750.361 (providing a sentence of "not less than 1 year nor more than 2 years" for stealing "journal bearings" from a railroad car); MCL 750.458 (providing a sentence of "not less than 2 years nor more than 20 years" for detaining a woman in a house of prostitution to effectuate repayment of a debt).

The majority apparently eschews the clear language of MCL 750.520f(1) because it concludes that the 10-year minimum sentence imposed here would be "contrary to a central purpose of the sentencing guidelines—greater uniformity in sentencing."[10] This rationale will not scour when one considers that the obligation of the judiciary is to apply legislative policies according to the unambiguous words used by the Legislature in the statutes enacted, not according to abstract policy considerations only judges can divine.[11] Whatever the broader policy of the legislative sentencing guidelines, the Legislature directed that a minimum sentence of "*at least* 5 years" satisfies the particular statute at issue here, MCL 750.520f(1), and that is the policy we must apply.[12]

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[10] *Ante* at 67.

[11] As the author of the majority opinion has stated:

> The first step in statutory interpretation is to give effect to the intent of the Legislature. To do so, we examine first the specific language of the statute. If the language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we will enforce the statute as written. This Court should reject an interpretation of a statute that speculates about legislative intent and requires us to add language into the statute. [*People v Carpenter*, 464 Mich 223, 250; 627 NW2d 276 (2001) (KELLY, J., dissenting) (citations omitted).]

See also *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 312; 596 NW2d 591 (1999) (KELLY, J.) ("[W]e need not, and consequently will not, speculate regarding legislative intent beyond the plain words expressed in the statute."); *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 53; 594 NW2d 455 (1999) (KELLY, J., concurring in part and dissenting in part) (criticizing the majority for elevating the "purpose of the statute" over the "plain language of the statute"); *Rogers v Detroit*, 457 Mich 125, 140; 579 NW2d 840 (1998) (KELLY, J.) ("Here, the statutory meaning is clear on its face. Therefore, the role of the judiciary is not to articulate its view of 'policy,' but to apply the statute in accord with its plain language."), overruled by *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

[12] If the Legislature has a general goal of promoting "uniformity in sentencing" under the sentencing guidelines statute, it is still free to create exceptions to that goal, as I believe it has clearly done here by

II. THE MAJORITY'S MISCONSTRUCTION CREATES AN INCONSISTENCY

Despite the obvious and clear language of MCL 750.520f(1), the majority has inexplicably created its own alternative statute. The majority has similarly deviated from the obvious and clear language of MCL 769.34(2)(a) and created a new, but unexplained, statutory scheme for mandatory minimum sentences.

The majority determines that an absolute term of 5 years is the "mandatory minimum" for a recidivist sex offender under MCL 750.520f(1). However, the majority also claims that a sentencing court *departs* from the guidelines when it sentences a defendant to a 5-year minimum term if the lower limit of the defendant's guidelines range is calculated at more than 5 years.[13] This is entirely contrary to MCL 769.34(2)(a), which expressly states that "[i]mposing a mandatory minimum sentence *is not a departure under this section*."[14] Now the majority compels the sentencing court to justify as a departure a minimum sentence that is excepted from the statutory sentencing guidelines in the first instance.

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referring to another statute that provides a mandatory but indeterminate minimum sentencing range for particular crimes. If applying the plain language of the recidivist sex offender statute leads to anomalous results as contended by the majority, see *ante* at 71-72 & n 24, it is solely the province of the Legislature to remedy—assuming, contrary to the language it used, that the Legislature believed a sentence of *at least 5 years* was too high a minimum sentence for a serial sex offender.

[13] *Ante* at 71 n 25. For example, under the majority's misconstruction of MCL 769.34(2)(a), if a defendant's guidelines range were calculated at 7 to 10 years, a sentencing court is precluded from imposing a sentence "in accordance with" the *mandatory* minimum sentence provided in MCL 750.520f(1), without stating reasons for its sentencing "departure." If, however, a defendant's guidelines range were calculated at 2 to 4 years, the majority (correctly) asserts that a sentencing court's imposition of a 5-year minimum sentence, pursuant to MCL 750.520f(1), is not a departure.

[14] Emphasis added.

The problem with the majority's analysis is this: MCL 769.34(2)(a) specifically provides that the guidelines are *not* controlling here; rather, the guidelines defer to another statute that includes a mandatory minimum sentence. Yet the majority insists on reverting to the guidelines despite the Legislature's clear directive to the contrary and declines to provide any statutory support for this decision.[15]

Imposing a 10-year minimum sentence for a recidivist sex offender is not a departure from the legislative sentencing guidelines because it is a "mandatory minimum sentence"[16] of "at least 5 years" as provided in MCL 750.520f(1). Accordingly, I dissent and would instead affirm the judgment of the Court of Appeals.

CORRIGAN, J., concurred with YOUNG, J.

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[15] See *ante* at 71 n 25.

[16] MCL 769.34(2)(a).

PIERRON v PIERRON

Docket No. 138824. Argued October 6, 2009 (Calendar No. 2). Decided May 11, 2010.

Plaintiff Timothy Pierron obtained a divorce from defendant Kelly Pierron in the Wayne Circuit Court. An amended divorce judgment granted the parties joint legal custody of their two minor children and established defendant's residence as the children's primary residence and that each party's residence would be the children's legal residence. At the time of the divorce, both parties resided in Grosse Pointe Woods, and the children attended the Grosse Pointe public school system. When defendant moved to Howell and attempted to enroll the children in the Howell public school system, plaintiff sought an order requiring that the children attend Grosse Pointe schools and awarding plaintiff sole custody. Following an evidentiary hearing, the court, Lita M. Popke, J., ruled that the proposed change of schools would alter the established custodial environment and that defendant had failed to establish by clear and convincing evidence that the change in schools would be in the best interests of the children. The court ordered that the children remain in the Grosse Pointe school system, and defendant appealed. The Court of Appeals, CAVANAGH, P.J., and JANSEN and METER, JJ., vacated the order, concluding that the proposed change would not modify the established custodial environment and that the trial court had thus erred by requiring defendant to prove by clear and convincing evidence rather than a preponderance of the evidence that the proposed change in schools would be in the children's best interests. 282 Mich App 222 (2009). The Supreme Court granted plaintiff's application for leave to appeal. 483 Mich 1135 (2009).

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

When considering an important decision affecting the welfare of a child, the trial court must first determine whether the proposed change would modify the established custodial environment of the child. The child's standpoint, rather than that of the parents, controls in this determination. This determination will establish the burden of

proof that the parent proposing the change must meet to demonstrate that the change is in the child's best interests.

1. If the proposed change would modify the established custodial environment, the parent proposing the change must establish by clear and convincing evidence that the change is in the child's best interests. The court must consider all 12 best-interest factors set forth in MCL 722.23. If the court determines that the proposed change will not modify the established custodial environment, the parent proposing the change must demonstrate by a preponderance of the evidence that the change is in the child's best interests. The court must determine whether each best-interest factor applies. If the court determines that a particular factor is irrelevant to the issue before it, it must state that conclusion on the record, but need not make substantive factual findings concerning the factor beyond that determination.

2. The change of schools proposed in this case will not modify the established custodial environment, and the trial court's ruling to the contrary was against the great weight of the evidence. The 60-mile distance between the proposed schools and plaintiff's home would be more inconvenient but not so far that plaintiff cannot continue his activities with the children and involvement in their education, and the change in plaintiff's parenting time would be minor.

3. The trial court also clearly erred in its application of best-interest factor i (reasonable preference of the child), MCL 722.23(i), when it refused to consider each child's preference to attend a Howell school because neither child had previously attended a school in that system and presumably lacked any factual basis on which to form a reasonable preference. Factor i does not require that the child's preference be communicated through "detailed thought or critical analysis"; the reasonable-preference standard merely excludes preferences that are arbitrary or inherently indefensible. The trial court did not indicate that the children's preferences violated this minimal standard of reasonableness.

Affirmed and remanded for further proceedings.

Justice CORRIGAN, concurring in part and dissenting in part, agreed that if a proposed change would not modify the established custodial environment, the trial court must not only determine the applicability of all 12 best-interest factors, it must also address each factor that is relevant to the specific issue before it. However, she would reverse the judgment of the Court of Appeals and reinstate the trial court's order because the trial court's finding that the proposed school change would modify the children's established custodial environment with plaintiff was not against the great weight of the evidence.

1. PARENT AND CHILD — CHILD CUSTODY — ESTABLISHED CUSTODIAL ENVIRONMENT — MODIFICATION OF ESTABLISHED CUSTODIAL ENVIRONMENT — BEST-INTEREST FACTORS.

If an important decision affecting the welfare of a child will modify the established custodial environment of the child, the parent proposing the change must demonstrate by clear and convincing evidence that the change is in the best interests of the child; in making its determination, the trial court must consider all 12 best-interest factors set forth in MCL 722.23.

2. PARENT AND CHILD — CHILD CUSTODY — ESTABLISHED CUSTODIAL ENVIRONMENT — MODIFICATION OF ESTABLISHED CUSTODIAL ENVIRONMENT — BEST-INTEREST FACTORS.

If an important decision affecting the welfare of a child will not modify the established custodial environment of the child, the parent proposing the change must demonstrate by a preponderance of the evidence that the change is in the best interests of the child; in making its determination, the trial court must consider whether each of 12 best-interest factors set forth in MCL 722.23 applies; if the court determines that a particular factor is irrelevant to the issue before it, it must state that conclusion on the record, but need not make substantive factual findings concerning the factor beyond that determination.

3. PARENT AND CHILD — CHILD CUSTODY — BEST-INTEREST FACTORS — REASONABLE PREFERENCES OF THE CHILD.

Factor i of the best-interest factors applicable in child-custody determinations (reasonable preference of the child) does not require that the child's preference be communicated through "detailed thought or critical analysis"; the reasonable-preference standard merely excludes preferences that are arbitrary or inherently indefensible (MCL 722.23[i]).

Scott Bassett and *Miller, Canfield, Paddock and Stone, P.L.C.* (by *Lynn Capp Sirich* and *Jennifer M. LaTosch*), for Timothy Pierron.

Beverly Safford for Kelly Pierron.

Amicus Curiae:

Rebecca Shiemke, *Gail Towne*, and *Erika Salerno* for the Family Law Section of the State Bar of Michigan.

PER CURIAM. At issue here is whether a proposed change of school to one that is 60 miles from the child's present school would modify the established custodial environment of that child and whether, absent a change in the established custodial environment, the trial court must, when considering an important decision affecting the welfare of the child, analyze each of the 'best-interest' factors articulated in MCL 722.23, even if a factor is not relevant to the immediate issue before the court. Under the facts of this case, we answer each of these questions in the negative and therefore affirm.

Plaintiff-father and defendant-mother have two children from their marriage. The divorce judgment entered in 2000 granted the parties joint legal custody and established the children's primary residence with defendant. Both parties and their children lived in Grosse Pointe Woods until 2007, when defendant relocated to Howell, which is approximately 60 miles away. When defendant tried to enroll the children in Howell public schools, plaintiff objected. At the conclusion of a six-day evidentiary hearing, the trial court ruled that the established custodial environment was with both parents and that defendant's proposed change of schools would modify the children's established custodial environment because plaintiff's parenting time would be adversely affected by the 60-mile distance between the proposed schools and plaintiff's home. Additionally, the trial court held that defendant had not satisfied her burden of proof under the 'clear and convincing evidence' standard to show that the change was in the best interests of the children. The Court of Appeals vacated the trial court's order, holding that the trial court erred by concluding that the established custodial environment would be modified. *Pierron v Pierron*, 282 Mich App 222, 250-251; 765 NW2d 345 (2009). Moreover, the Court remanded the case for the trial court to reevalu-

ate the change-of-school issue and determine whether defendant had demonstrated by a 'preponderance of the evidence' that the change was in the children's best interests. *Id*. at 264.

Under the Child Custody Act, MCL 722.21 *et seq*., "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. Under this standard, a reviewing court should not substitute its judgment on questions of fact unless the factual determination " 'clearly preponderate[s] in the opposite direction.' " *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994), quoting *Murchie v Std Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959).

The Child Custody Act "applies to all circuit court child custody disputes and actions, whether original or incidental to other actions." MCL 722.26(1). The act provides that when parents share joint legal custody—as the parties do here—"the parents shall share decision-making authority as to the important decisions affecting the welfare of the child." MCL 722.26a(7)(b). However, when the parents cannot agree on an important decision, such as a change of the child's school, the court is responsible for resolving the issue in the best interests of the child. *Lombardo v Lombardo*, 202 Mich App 151, 159; 507 NW2d 788 (1993); see also MCL 722.25(1).[1] When resolving important decisions that affect the welfare of the child, the court must first consider whether the proposed change would modify the established custodial environment. The established custodial environment is the environment in which

[1] MCL 722.25(1) provides, "If a child custody dispute is between the parents, . . . the best interests of the child control."

"over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). While an important decision affecting the welfare of the child may well require adjustments in the parenting time schedules, this does not necessarily mean that the established custodial environment will have been modified. *Brown v Loveman*, 260 Mich App 576, 595-596; 680 NW2d 432 (2004).[2] If the required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed. See *id*. The court may not " 'change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.' " *Id*. at 585, quoting MCL 722.27(1)(c).

Here, the trial court found that the proposed change of schools would modify the established custodial environment because the 60-mile distance between the proposed schools and plaintiff's home "would . . . impinge on the father's ability to provide educational guidance, discipline, and the necessities of life." The Court of Appeals, however, concluded that the trial court's ruling that the proposed change of schools would alter the established custodial environment was

[2] *Brown* involved a change in residence of more than 100 miles, and a custodial environment in which "each parent had fifty percent parenting time." *Brown*, 260 Mich App at 595-596. The dissent asserts that *Brown* stands for "the proposition that if a proposed move would relegate an 'equally active' parent to the more circumscribed role of 'weekend' parent, the parenting time modification would amount to a change in the established custodial environment." Whatever the merits of that proposition, there is no evidence in the instant case that the allocation of parenting time between plaintiff and defendant was "nearly equal."

against the great weight of the evidence because the distance of the new schools from plaintiff's home would only require relatively minor adjustments to plaintiff's parenting time. We agree with the Court of Appeals.

Although the testimony here established that plaintiff is conscientiously involved with his children's education, there is no reason to believe from either the testimony or the trial court's findings of fact that the change of schools will significantly modify the established custodial environment the children share with plaintiff. A review of the record indicates that the children visit plaintiff's home approximately three weekends out of every four, from Saturday afternoon until Sunday evening. Before the instant action was filed with the trial court, the children did not visit overnight on weeknights during the school year.[3] The record also indicates that plaintiff occasionally picks the children up from tutoring and takes them out to dinner during the week. And, one week out of every seven, plaintiff takes the children out to lunch.

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[3] After the instant action was filed, the trial court entered an order regarding school district and parenting time, which required the children to attend Grosse Pointe schools. There is some testimony indicating that the children occasionally stayed overnight with plaintiff on some school nights after this order was entered, but *only* presumably to reduce the amount of time that the children spent traveling between Howell and Grosse Pointe Woods. The dissent observes that the trial court found that "overnight visits on weeknights and first option parenting time for plaintiff would no longer be practical" if the children were enrolled in Howell schools. In context, the trial court was clearly referring to the parenting time provision in the judgment of divorce as part of its analysis of whether the established custodial environment would be modified. However, plaintiff, in fact, had not been engaged in weeknight, overnight parenting time. The parenting time provision, by itself, does not establish the actual custodial environment, *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981), and it was error for the trial court to consider the provision allowing weeknight, overnight visits without also considering that these visits were not occurring.

Given this record, plaintiff's weekend parenting time will be unaffected. With regard to weekdays, plaintiff is involved with the children during the daytime for only one week out of every seven because this is all that his work schedule allows. Although the 60-mile distance is acknowledgedly more inconvenient for plaintiff, it is not so far that plaintiff cannot continue his occasional midweek activities with his children and his involvement in their education.[4] Moreover, the record reflects

[4] The dissent seems to rely largely on the 60-mile distance itself, rather than on the actual impact that this distance has on the established custodial environment. For instance, the dissent provides several examples of how plaintiff's midweek involvement with his children, much of which pertains to one-time events, may be hindered. However, even with respect to these events, plaintiff was able to attend his son's graduation ceremony that was scheduled during plaintiff's regular workday because the school was near plaintiff's office; when Andrew truanted from school, both plaintiff and defendant dealt with the issue immediately; and when defendant attempted to register the children in the Howell schools, she listed plaintiff as the fourth person to contact in case of emergency, after herself, her sister, who lives closer, and another individual. There is nothing in the record to indicate that plaintiff will be unable to attend graduation ceremonies or other significant events, or to respond to discipline issues or emergencies, if the children attend Howell schools. More pertinently, however, none of these events alters to whom the children naturally look for "guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). The dissent observes that plaintiff assisted his children with their weeknight homework assignments. According to the record, this occurred "sometimes" on the same evening that he took his children out to dinner. The dissent also observes that plaintiff conducted weekly science tutoring sessions for his son and worked on science projects in the basement. These sessions took place during a single school year, and it is unclear whether they occurred on a school night or during the weekend. Therefore, it is also unclear whether such sessions would be affected by the proposed change of school. Regardless, we do not take issue with the fact that plaintiff has been a good parent. Although the dissent feels the need to contrast defendant unfavorably with plaintiff, we merely believe that the additional 60-mile distance is not so far away that plaintiff cannot continue occasionally to take his children out to dinner and help them with their homework as he had sometimes done in the past.

that the children spend the vast majority of their time in the established custodial environment of their mother, the defendant. In fact, plaintiff's own testimony acknowledged that the children "spend most of their time" with "their mother." From the children's perspective, the changes in the established custodial environment they share with plaintiff should be minor, if at all.[5] This being the case, defendant's 60-mile move to Howell does not legally effect a change in the established custodial environment the children share with either plaintiff or defendant. Therefore, we agree with the Court of Appeals that the trial court's determination that the proposed change of schools would alter the established custodial environment was against the great weight of the evidence.

Because there is no change in the established custodial environment, the heightened evidentiary burden is not applicable, and defendant is required to prove by a preponderance of the evidence that the proposed

[5] In asserting that the established custodial environment would be modified if the children were to attend Howell schools, the dissent cites matters that are simply irrelevant in this case. For example, it asserts that the trial court's finding that the proposed change of schools would modify the established custodial environment is supported by the fact that plaintiff suffers from multiple sclerosis, which limits his prospects of finding employment closer to Howell and which required plaintiff to use a wheelchair during a recent vacation with the children. While we share the dissent's understandable solicitude for plaintiff and his handicap, there is no evidence to indicate that this handicap affects his custodial relationship with his children, and it has no bearing on the established custodial environment either as it is currently or as it would be if the children were to attend Howell schools. Finally, the dissent claims that defendant's asserted "irresponsibility" as a parent "bolsters" the trial court's finding that the proposed change of schools would modify the established custodial environment. While, if true, this may well constitute a relevant consideration in assessing whether the proposed change of schools would be in the children's best interests, it is considerably less relevant in assessing whether the proposed change would modify the custodial environment.

change of schools would be in the best interests of the children, using the best-interest factors identified in MCL 722.23. However, the best-interest factors are geared toward general custody determinations, and many of these factors are simply irrelevant to particular "important decisions" affecting the welfare of a child. For instance, factor f, pertaining to the "moral fitness of the parties involved," MCL 722.23(f), while highly relevant in making a custody determination between parents, has no discernible bearing on determining whether a proposed change of school is in a child's best interests.

The trial court itself expressed frustration with the best-interest factors because many of these factors had nothing to do with the issue at hand. Despite this, the trial court felt obligated to consider factors that were wholly unrelated to the change-of-school issue. For example, the court determined that factor c, pertaining to the "capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs," MCL 722.23(c), favored plaintiff, focusing on the parties' disparity of income. The trial court observed that defendant had failed to make any effort to obtain full-time employment even though she claimed that job prospects were better in Howell. While disparity of income between the parties and defendant's asserted failure to secure full-time employment might be significant if the issue before the court involved a change of custody, these considerations have little or nothing to do with the change-of-school issue. The Court of Appeals addressed the scope of the best-interest factors in this context by concluding that "the court must narrowly focus its consideration of each best-interest factor on the specific 'important decision[]

affecting the welfare of the child' that is at issue." *Pierron*, 282 Mich App at 252-253. We agree with this conclusion.

If a proposed important decision affecting the welfare of the child will not modify the established custodial environment, evaluating best-interest factors that are irrelevant to the particular issue before the court distracts from the proper focus of the proceeding and poses the risk that one parent's preference will prevail even though that preference is not in the best interests of the child.

Nevertheless, MCL 722.23 requires "the *sum total* of the . . . factors to be considered, evaluated, and determined by the court[.]" (Emphasis added.) In *Parent v Parent*, 282 Mich App 152; 762 NW2d 553 (2009), the Court of Appeals addressed this issue, also in the context of a dispute over a proposed change of school. Recognizing that even though each of the factors might not be relevant to the issue, MCL 722.23 requires consideration of "all" the factors, the Court held that "[t]he trial court must at least make explicit factual findings with regard to the *applicability* of each factor." *Id*. at 157 (emphasis added). We believe that this approach complies with MCL 722.23 and allows for the proper evaluation of whether an important decision is genuinely in the best interests of the children, in accordance with the Child Custody Act. Therefore, we hold that when a trial court is considering a decision that will not modify the established custodial environment, such as the change-of-school issue in this case, it must consider the applicability of all the factors. However, if the trial court determines that a particular factor is irrelevant to the immediate issue, it need not make substantive factual findings concerning the factor beyond this determination, but need merely state that conclusion on the record.

We also agree with the Court of Appeals that the trial court clearly erred on a major legal issue regarding factor i, "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference," MCL 722.23(i). Although both children expressed a preference to attend Howell schools, it appears that the trial court refused to consider their preferences because neither child had ever attended a Howell school and, therefore, presumably lacked any factual basis on which to form a reasonable preference. Essentially, the trial court imposed a requirement of actual, firsthand experience, in this case with a Howell school, in order for the child's preferences to be valid. However, we agree with the Court of Appeals that factor i does not "require that a child's preference be accompanied by detailed thought or critical analysis" and that the "reasonable preference" standard merely "exclude[s] those preferences that are arbitrary or inherently indefensible." *Pierron*, 282 Mich App at 259. The trial court did not indicate that the children's stated preferences violated this minimal standard of reasonableness.

To summarize, when considering an important decision affecting the welfare of the child, the trial court must first determine whether the proposed change would modify the established custodial environment of that child. In making this determination, it is the child's standpoint, rather than that of the parents, that is controlling. If the proposed change would modify the established custodial environment of the child, then the burden is on the parent proposing the change to establish, by clear and convincing evidence, that the change is in the child's best interests. Under such circumstances, the trial court must consider all the best-interest factors because a case in which the proposed change would modify the custodial environment is

essentially a change-of-custody case. On the other hand, if the proposed change would *not* modify the established custodial environment of the child, the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests. In addition, under those circumstances, although the trial court must determine whether each of the best-interest factors applies, if a factor does not apply, the trial court need not address it any further. In other words, if a particular best-interest factor is irrelevant to the question at hand, i.e., whether the proposed change is in the best interests of the child, the trial court need not say anything other than that the factor is irrelevant.

In this case, because we agree with the Court of Appeals that the proposed change of schools will not modify the established custodial environment,[6] we affirm the Court of Appeals' decision to vacate the trial court's order. However, even by a 'preponderance of the evidence' standard, this case presents a very close question with regard to whether attending Howell Schools is in the best interests of the children. It is clear that plaintiff is concerned about his children, is involved in their education, and provides guidance, structure, and discipline even when the children are not in his care. While the change of schools would not modify the established custodial environment, we recognize that the change of schools may, in fact, impair plaintiff's ability to be readily accessible to provide guidance and structure. These facts, of course, are relevant to assessing where the interests of these children lie, and, on

[6] We emphasize that we do not hold here that a proposed change of school will *never* modify an established custodial environment. Rather, we merely hold that, under the specific facts of this case, this particular change of schools does not modify the established custodial environment.

remand, we encourage the trial court to carefully consider all relevant factors when making this assessment. We remand to the trial court for further proceedings not inconsistent with this opinion.[7]

KELLY, C.J., and CAVANAGH, WEAVER, YOUNG, MARKMAN, and HATHAWAY, JJ., concurred.

CORRIGAN, J. (*concurring in part and dissenting in part*). I concur with the majority that when a trial court determines that an important decision affecting the welfare of a child would *not* modify the child's established custodial environment, all 12 best interest factors in MCL 722.23 may not be relevant to the specific decision before the court. I agree further that in such cases the trial court nonetheless must consider the applicability of all the statutory best interest factors and state its factual findings and conclusions regarding each relevant factor on the record. I acknowledge that this approach comports with the applicable provisions of the Child Custody Act, MCL 722.21 *et seq*.

I respectfully dissent, however, from the majority's conclusion that the established custodial environment

[7] We have considered defendant's post-argument motion to "correct the record, strike the response oral argument [sic] and the response brief [sic] of the plaintiff-appellant; to investigation [sic] into deception systematically perpretrated [sic] by the plaintiff-appellant; and for costs and sanctions against the plaintiff-appellant," and it is denied. However, defendant's motion contains over 25 specific allegations that plaintiff's counsel has "lied," "intentionally misled," "deceived," or been "manipulative" concerning the facts of this case. Additionally, defendant makes aspersions concerning the integrity of the attorney grievance process, and she has "noticed that the video tape of the oral argument in the State Bar's web cite [sic] was cleaned up a bit and can not be relied upon for the full record." We find all these allegations to be irresponsible and unsubstantiated. Therefore, costs of $250 are assessed against defendant's counsel in favor of plaintiff under MCR 7.316(D)(1)(b) for filing this vexatious motion.

between plaintiff father and the two minor children will not be modified in this case. After a six-day evidentiary hearing spanning 1,136 transcript pages and at least 54 exhibits, the trial court found that an established custodial environment existed with both parents and that defendant mother's unilateral decision to remove the children from Grosse Pointe Public Schools and enroll them in Howell Public Schools would alter the children's established custodial environment with plaintiff. The record abundantly supports the trial court's findings. After scrutinizing the record, I am mystified by the majority's blanket endorsement of the Court of Appeals' conclusion that the trial court's finding was against the great weight of the evidence when the Court of Appeals failed to discuss what evidence clearly preponderated in the opposite direction. I am similarly perplexed by the majority's resistance to reviewing the evidence adduced and its related assertion that much of the evidence on the lower court record—evidence that the majority deems unnecessary to discuss—is irrelevant. The majority essentially second-guesses the trial court's findings regarding the existence of an established custodial environment with both parents and the destruction of the children's established custodial environment with plaintiff. The majority concludes that the children "spend the vast majority of their time" with defendant, so adjustments were merely to plaintiff's parenting time. I cannot join this distortion of the record before us. I further conclude that the result here does not conform to the highly deferential "great weight of the evidence" standard of review.

Numerous witnesses testified about the quality of Grosse Pointe and Howell Public Schools. Only plaintiff and defendant, however, testified about the modifications to plaintiff's parenting time and the established custodial environment as a result of the proposed school

change. Defendant failed to squarely rebut plaintiff's testimony in this regard. Further, the testimony of the children's tutor, Deb Dixon, corroborated plaintiff's testimony about his strong interest in the children's education and his active involvement in their daily lives. Under the great weight of the evidence standard, a reviewing court defers to the trial court's credibility determinations, and the trial court's factual findings should be affirmed unless the evidence clearly preponderates in the opposite direction. Because the record does not reveal that the evidence before the trial court clearly preponderated in the opposite direction, I would reverse the Court of Appeals' decision and reinstate the trial court's order directing that the children remain enrolled in Grosse Pointe Public Schools.

I have a firm conviction on the basis of my review of the record that the move to Howell will strip these children of two parents' involvement in their education and discipline, thereby relegating them to the care of a single parent, defendant mother.[1] That parent seems quite inattentive to the children's needs. Further, her

[1] The trial court expressed a similar concern about enrolling the children in Howell Public Schools. While issuing its opinion from the bench in regard to best interest factor j, the trial court found in pertinent part:

> [Plaintiff] repeatedly stated his strong conviction that children need both parents actively involved in their lives. He felt the move to the Howell school district would impede his ability to participate in their educational and every day lives. Without both parents in their lives on a daily basis, [plaintiff] feels the children face a higher potential for failure. This is especially true in his opinion because Andrew struggles academically. He wants to be there for his son to help guide his educational development.
>
> [Defendant] feels [plaintiff] can still participate adequately from Grosse Pointe, but she did not otherwise address his concerns nor the general philosophy of the need for two parents to raise their children actively and on a daily basis.

proposal to enroll the children in a new school district appears to be based on her desire to relocate, and not

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As the following sample of testimony from the record illustrates, there is no basis to disturb the trial court's finding as against the great weight of the evidence:

> • In response to whether Grosse Pointe Public Schools afforded his children with the best opportunities that he could offer them, plaintiff responded, "Yes, it is. I think it is. Is the school system better? Yes. Is that all that matters? No, you need both parents. You need both parents working together. But honestly with one parent doing [sic] out in Howell is not going to work with them."
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> • In response to the potential impact of the children attending Howell Public Schools, plaintiff stated, "I'm vastly concerned about what these kids are going to do in school. Even if they are straight A students in Howell, I'm not sure if that's going to be enough; but I honestly, I doubt they'll be straight A students in Howell. They're going to be even worse than they were in Grosse Pointe. With only Kelly doing it and not two parents, they're going to fail. And that's my biggest fear is they're not what—that's my biggest fear is they're failing if they go to Howell."
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> • In response to whether enrolling Andrew in Howell Public Schools would ease the stress on plaintiff and Andrew's relationship, plaintiff responded, "No. My assumption if he is going to attend Howell school[s], I will lose contact with him and it's going to be heinous. Kelly raised Ian by herself. There was no other father for Ian there. And what happened to Ian? He flunked out. You're going to take my kid and put him in Howell schools without a father. And Howell schools, we're arguing this, but you know what, Howell schools is [sic] not better than Grosse Pointe schools. And so you're going to take my child and put him in a school system that's not as good and what's going to happen to him? Ian is smarter than Andrew. And Ian flunked out. What's going to happen to Andrew in Howell schools?"
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> • In response to how attending Howell Public Schools would affect the children's family relationship with plaintiff, plaintiff explained, "I will see them less. We cannot do the overnight visits. I will see them intermittently on weekends. When they're living in Grosse Pointe around the block, I saw them routinely on weekends. Now I'm seeing them every once in a while and it takes a fight over the phone with Kelly."

what is in the children's best interests. Modifying the status quo and enrolling the children in Howell Public Schools is a decision reflecting defendant's best interests to be sure, but not the best interests of the parties' two minor children.

I. FACTS AND PROCEDURAL HISTORY

As the majority explains in part, plaintiff and defendant had two children during their marriage, Andrew (born 5/6/1994) and Madeline (born 1/25/99).[2] When the parties divorced in 2000, the judgment of divorce awarded joint legal custody. With regard to educational decisions, the judgment provided:

> As joint legal custodians, each parent shall have equal decision-making authority with respect to matters concerning . . . education. Both parents shall be fully informed with respect to the children's progress in school and shall be entitled to participate in all school conferences, programs and other related activities in which parents are customarily involved. Both parents shall have full access to the children's school records, teachers, counselors, and to their medical records and health care providers.

• In response to whether plaintiff was willing to work for a relationship with the children's friends in Howell, plaintiff stated, "I will do anything to keep my relationship with my kids. I don't know if it's going to be possible though because, if she is living in Howell, the friends are in Howell, how—as your example, how are you going to pick up their friends and drive the friends down for two hours to spend time with me, and then drive them back? . . . I don't know how many parents are going to have their friends—their kids go to see—go spend a weekend at some other man's house. In Grosse Pointe, I know the parents. I spend time with the parents. I see them at the PTA meetings. We have relationships."

[2] Defendant also has a child from a previous relationship, Ian. The record does not establish Ian's date of birth, but the testimony indicates that he was 18 years old at the time of the evidentiary hearing and resided with defendant while attending community college.

Additionally, the judgment of divorce granted defendant primary physical custody but awarded plaintiff "reasonable and liberal parenting time . . . which shall include alternate weekends, alternate holidays, time during school and summer vacations, and as otherwise agreed between the parties." In 2001, an amended judgment of divorce entered. Consistent with the original judgment of divorce, the amended judgment stated that "the parties shall have joint legal custody and shared parenting time" and that defendant's residence "continues as primary residence." The parenting time provision was modified to provide greater flexibility. It stated that plaintiff's parenting time "shall include overnights and all mutually agreeable times, including first option of parenting time when and if [defendant] resumes and/or returns to full time employment or continued education that requires night classes."

After the divorce, plaintiff, defendant, and the children lived in Grosse Pointe Woods, where the children had resided since birth. Defendant and the children lived less than six blocks from plaintiff's home. The children's paternal grandparents, with whom they share a close and loving bond, also resided in Grosse Pointe. Upon reaching school age, the children both attended Grosse Pointe Public Schools. Madeline's elementary school was located 0.25 miles from plaintiff's home and 1.1 miles from defendant's home. Andrew's middle school was located 1.4 miles from plaintiff's home and 1.2 miles from defendant's home.

Despite his demanding radiology practice, plaintiff played an active role in the children's education: attending school concerts and ice cream socials, helping the children with homework on school nights, staying in contact with teachers, and arranging for a private tutor for the children when they struggled academically. In

April 2005, plaintiff was forced to seek judicial intervention to obtain private tutoring for Andrew after defendant rejected the idea. Defendant was comparatively less involved in the children's education even though she was essentially a stay-at-home parent who occasionally did upholstery work and taught figure skating.[3] Additionally, the children participated in various extracurricular activities in Grosse Pointe, including band, archery, figure skating, and dance. Plaintiff, defendant, and the children's paternal grandparents assisted in transporting the children and encouraging their involvement in extracurricular activities. For certain extracurricular activities, including Madeline's dance classes, plaintiff and the children's paternal grandmother handled all the transportation. The children also attended church with plaintiff and their paternal grandparents.

In April 2007, without notifying plaintiff, defendant offered to purchase a condominium in Howell.[4] At the time, the only individual whom defendant knew in Howell was her on-again, off-again boyfriend of five years.[5] After learning of defendant's actions, plaintiff proposed that defendant purchase his single family home in Grosse Pointe Woods for the same price that she offered for the condominium in Howell. Plaintiff's

[3] Although defendant graduated from a four-year university with a degree in science and a certificate in social work, she stopped working when she married plaintiff. At the time of the evidentiary hearing, defendant confirmed that she did not have a job and that she no longer did upholstery work or taught figure skating. Defendant primarily subsisted on approximately $28,000 a year in tax-free child support from plaintiff.

[4] Howell is located approximately 60 miles from Grosse Pointe Woods.

[5] Defendant's sister lived in Cohoctah Township and defendant's mother lived in West Bloomfield. According to defendant, it took approximately 25 minutes to drive from the condominium in Howell to her sister's home in Cohoctah Township.

proposal would have given defendant more than $100,000 in free equity. Plaintiff also attempted to negotiate a parenting time schedule with defendant. Defendant either rejected or did not respond to any of plaintiff's proposals. In June 2007, defendant moved to Howell. Contrary to the terms of the judgment of divorce granting equal decision-making with regard to education, defendant enrolled the children in Howell Public Schools. In July 2007, plaintiff filed a motion opposing the proposed change of schools, asserting that the "unilateral decision to move the children more than an hour from [p]laintiff's home and completely uproot them from their school district" would violate the judgment of divorce and modify the children's established custodial environment.[6] Plaintiff offered to pay for a rental home for defendant and the children during the pendency of the proceedings, but defendant refused plaintiff's offer.

During September and October 2007, the trial court conducted a six-day evidentiary hearing to determine whether the proposed change of schools was in the best interests of the children. At the conclusion, the court issued a 27-page opinion from the bench with a detailed consideration of the evidence. The court noted the governing burdens of proof. The party seeking to implement a school change has the burden of establishing by a preponderance of the evidence that the change is in

[6] Since the proposed change of schools first became an issue, the record reveals steadily increasing levels of acrimony between the parties and their respective counsel. This acrimony is aptly illustrated in defendant's post-argument motion to "correct the record, strike the response oral argument [sic] and the response brief [sic] of the plaintiff-appellant; to investigation [sic] into deception systematically perpretrated [sic] by the plaintiff-appellant; and for costs and sanctions against the plaintiff-appellant." I wholly concur with the majority's decision to deny defendant's motion and sanction defendant's counsel pursuant to MCR 7.316(D)(1)(b) for filing a vexatious motion.

the child's best interests. If, however, the proposed school change will affect the child's established custodial environment, the moving party has the heightened burden of persuading the court by clear and convincing evidence. The trial court found that both parents had an established custodial environment with their children. Because the trial court determined that the proposed school change would affect the parties' agreed-upon parenting time schedule and modify the children's established custodial environment "of flexibility and continued involvement" with plaintiff, defendant had the burden of persuading the trial court that the school change was in the children's best interests. After a careful review of the evidence and discussion about all 12 statutory best interest factors, the trial court concluded that defendant had failed to establish that the proposed change was in the children's best interests under either the clear and convincing evidence standard or the less rigorous preponderance of the evidence standard. Accordingly, the trial court ordered that the children remain enrolled in Grosse Pointe Public Schools. Soon thereafter, the trial court denied defendant's motion for reconsideration.

Defendant appealed by right, arguing that the trial court had applied the incorrect standard of review, misunderstood the applicable law, and made factual findings against the great weight of the evidence. Defendant also challenged the trial court's findings regarding statutory best interest factor i (reasonable preference of the child).

The Court of Appeals vacated the trial court's order, concluding that the trial court had erred by finding that the proposed school change would modify the children's established custodial environment with plaintiff because "only minor modifications to plaintiff's parenting

time" would be required.[7] The Court further held that the trial court had made factual findings against the great weight of the evidence regarding statutory best interest factors a (love, affection, and other emotional ties existing between the parties involved and the child) and h (home, school, and community record of the child). Additionally, the Court concluded that the trial court had committed clear legal errors regarding factors b (capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion), c (capacity and disposition of the parties involved to provide the child with food, clothing, medical care or remedial care, and other material needs), e (permanence, as a family unit, of the existing or proposed custodial home or homes), and i (reasonable preference of the child).[8] After opining that "defendant likely satisfied her burden of proof on the change-of-school issue in this case,"[9] the Court remanded the case for reevaluation of the proposed school change issue under the preponderance of the evidence standard.

Plaintiff then applied for leave to appeal in this Court. We granted plaintiff's application and directed the parties to address whether (1) defendant's decision to enroll the children in Howell Public Schools, which is 60 miles from their former school district and from plaintiff's home, resulted in a change in the custodial environment; (2) the clear and convincing evidence standard or the preponderance of the evidence standard governed defendant's burden of proof; (3) defendant demonstrated that the school change was in the chil-

[7] *Pierron v Pierron*, 282 Mich App 222, 249; 765 NW2d 345 (2009).

[8] *Id*. at 253-260.

[9] *Id*. at 261.

dren's best interests; and (4) the children's preference for Howell Public Schools was "reasonable."[10]

II. RELEVANCE OF STATUTORY BEST INTEREST FACTORS

I agree that in child custody disputes where the established custodial environment would *not* be modified, a trial court need not state its factual findings and conclusions regarding any statutory best interest factor that is irrelevant to the specific important decision under review. Further, I agree that requiring trial courts to evaluate best interest factors that are plainly irrelevant to a specific decision distracts from the overriding focus in any child custody dispute—namely, what is in the child's best interest. Consequently, I concur with the general approach set forth by the majority, but I emphasize that this approach is limited to those cases in which the proposed important decision would *not* modify the child's established custodial environment.[11]

An established custodial environment exists "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). The Legislature has instructed courts to consider "[t]he age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship" in analyzing whether the custodian and child share an established

[10] 483 Mich 1135 (2009).

[11] As the amicus curiae brief of the Family Law Section of the State Bar of Michigan observes, if the established custodial environment would be modified by the proposed important decision, the trial court, as a practical matter, could be addressing a possible change in custody, which would necessitate a full review of the child's custodial placement pursuant to the best interest factors listed in MCL 722.23.

custodial environment. *Id*. In child custody disputes between parents, "the best interests of the child control." MCL 722.25; see *Ireland v Smith*, 451 Mich 457, 466; 547 NW2d 686 (1996) ("In all events, however, the best interests of [the child], not of [the parents], are central."). The Legislature has stated that the "sum total" of 12 factors provides the basis for courts to consider, evaluate, and determine whether an important decision is in "the best interests of the child." MCL 722.23.[12] After carefully considering the whole situation, a trial court may determine that certain factors are plainly irrelevant to the particular decision before the court. In such cases, a trial court not only must

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[12] Specifically, MCL 722.23 provides:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

state its factual findings and conclusions regarding each relevant best interest factor on the record, but it also must expressly state its conclusion regarding the irrelevance of any remaining factors. See *Parent v Parent*, 282 Mich App 152, 156-157; 762 NW2d 553 (2009).

By distinguishing applicable and inapplicable best interest factors in child custody disputes where the established custodial environment would *not* be modified, a trial court can create a sufficient record for meaningful appellate review while focusing its analysis on the important decision at issue and how that decision will affect the welfare of the child. Accordingly, I concur with this aspect of the majority opinion.

III. GREAT WEIGHT OF THE EVIDENCE STANDARD AS APPLIED

Although I agree with the majority about the threshold applicability determination of the statutory best interest factors where the established custodial environment would *not* be modified, I disagree that the children's established custodial environment with plaintiff would not be modified under these facts. The trial court properly found that the proposed school change from Grosse Pointe to Howell would modify the children's established custodial environment with

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

plaintiff.[13] After scrutinizing this voluminous record, I conclude that plaintiff father was far more than a "weekend parent" and that defendant's unilateral decision to enroll the children in a new school district approximately 60 miles from their lifelong school district and home would modify the established custodial environment that the children share with plaintiff.[14] The evidence did not clearly preponderate against the trial court's findings, and the Court of Appeals' appli-

[13] I commend the trial court for doing an exemplary job in presiding over the convoluted evidentiary hearing before it.

[14] The majority seems to view the 60-mile distance between Howell and Grosse Pointe, which is less than 100 miles, as a presumptive basis to contravene the trial court's factual finding that the children's established custodial environment with plaintiff would be modified. The 60-mile distance itself did not preclude the trial court from finding that the children had an established custodial environment with both parents and that enrolling the children in Howell Public Schools would modify the established custodial environment with plaintiff. Moreover, contrary to the Court of Appeals, I do not read MCL 722.31(1) as implicitly providing that "a custodial parent *may* move a child's residence by *less* than 100 miles without first obtaining permission from the court or consent from the other party." *Pierron*, 282 Mich App at 245. Instead, the explicit statutory language is the best means to ascertain and give effect to the Legislature's intent. MCL 722.31(1) provides in part that "a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued." The Legislature has demonstrated its ability to include specific statutory presumptions in the Child Custody Act. See, e.g., MCL 722.27a(1) ("It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents."). However, the Legislature did not draft a presumption in MCL 722.31(1) that when parents share joint legal custody, a relocating parent's unilateral decision to move a child's legal residence less than 100 miles is presumed not to modify the child's established custodial environment with his or her other parent. Consequently, I cannot conclude that the distance itself creates a presumption that a change in legal residence of less than 100 miles will not modify to whom the children look "for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c).

cation of the great weight of the evidence standard constituted error requiring reversal. Consequently, I dissent from the majority's endorsement of the Court of Appeals' opinion in this regard.

MCL 722.28 enumerates the three relevant standards of review in child custody cases.[15] "Findings of fact are to be reviewed under the 'great weight' standard, discretionary rulings are to be reviewed for 'abuse of discretion,' and questions of law for 'clear legal error.' " *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994). Under the great weight of the evidence standard, "a reviewing court should not substitute its judgment on questions of fact unless they 'clearly preponderate in the opposite direction.' " *Id*. at 878, quoting *Murchie v Std Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959). Moreover, a reviewing court should defer to the trial court's credibility determinations. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). As *Fletcher* states, "[t]he great weight standard of review allows [for] a meaningful yet deferential review . . . ." *Fletcher*, 447 Mich at 878.

After the evidentiary hearing, the trial court concluded that defendant's proposal to enroll the children in Howell Public Schools, approximately 60 miles away from their current school district and plaintiff's home in Grosse Pointe Woods, would affect the existing parenting time schedule and modify the children's established custodial environment. The trial court found that if the children were enrolled in Howell

[15] MCL 722.28 provides:

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

Public Schools, overnight visits on weeknights and first option parenting time for plaintiff would no longer be practical.[16] Further, the trial court concluded that the children's established custodial environment with plaintiff was one "of flexibility and continued involvement" and that the testimony established that plaintiff "was involved on a continuing basis with [the] children's education." The trial court cited testimony establishing that plaintiff "visited the schools regularly, took the children to lunch on occasions, picked them up from tutoring, and saw them regularly despite the absence of a specific parenting time schedule."

The majority cites *Brown v Loveman*, 260 Mich App 576, 595; 680 NW2d 432 (2004), for the proposition that "[i]f the required parenting time adjustments will not change who the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed." Ironically, *Brown* concluded that the modification in parenting time in that case "necessarily would amount to a change in the established custodial environment, requiring analysis under the best interest factor framework." *Id.* at 596. Other Court of Appeals decisions have cited *Brown* for the proposition that if a proposed move would relegate an "equally active" par-

[16] The majority acknowledges that a review of the record reveals "some testimony indicating that the children occasionally stayed overnight with plaintiff on some school nights" after the instant action was filed, but the majority presumes that these weeknight overnight visits only occurred "to reduce the amount of time that the children spent traveling between Howell and Grosse Pointe Woods." Nothing in the record supports this statement. In light of the majority's concession that some weeknight overnight visits were occurring, I am perplexed by the majority's related conclusion that "it was error for the trial court to consider the provision allowing weeknight, overnight visits without also considering that these visits were not occurring."

ent to the more circumscribed role of "weekend" parent, the parenting time modification would amount to a change in the established custodial environment. See *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008). Such reasoning is equally instructive here because the proposed school change would alter the extent to which the children look to plaintiff "for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c).

The majority also describes the Court of Appeals as concluding that the trial court's finding was against the great weight of the evidence because "the distance of the new schools from plaintiff's home would only require relatively minor adjustments to plaintiff's parenting time." I am mystified by this holding on the record before us. Plaintiff testified in great detail about the modifications to his parenting time and the established custodial environment that would result from the proposed school change. Defendant failed to squarely rebut plaintiff's testimony in this regard. Contrary to the Court of Appeals' view, the salient issue is the impact of the proposed school change on plaintiff's ongoing involvement with the children's educational and everyday lives, not the distance between the school districts. See note 1 of this opinion. I find no basis to conclude that the trial court's finding was against the great weight of the evidence. Instead, ample evidence supported the trial court's finding that the children's established custodial environment would be modified if the proposed school change occurred.

To illustrate, without discussing contradictory evidence, the Court of Appeals summarily concluded, "[t]he mere 60-mile distance between Howell and Grosse Pointe Woods would not be a substantial barrier to plaintiff's continued parenting time, and the mere

change of school districts would not necessarily alter or materially reduce plaintiff's opportunity to exercise visitation with the minor children."[17] The trial court, however, heard testimony about myriad ways in which the proposed school change would modify the children's established custodial environment. I concur with the trial court's finding that the distance factor would impinge on plaintiff's ability to provide educational guidance and discipline for the children.

Plaintiff, for example, testified in great detail about the proposed school change hindering his ability to see the children flexibly during and after school on weekdays. While the children attended Grosse Pointe Public Schools, plaintiff could take them to breakfast before school or to lunch during school depending on his work schedule. Plaintiff routinely took the children out to dinner on Thursdays after he picked them up from tutoring. Further, plaintiff personally worked with the children on their weeknight homework assignments. At one point, plaintiff created a special weekly science tutoring session for Andrew during which Andrew and plaintiff did science projects in plaintiff's basement. Plaintiff also described instances where he had been able to attend daytime school functions. For example, a graduation ceremony for Andrew was scheduled during plaintiff's regular workday. Because the school was near the office where plaintiff's radiology group practiced, he was able to attend. The move to Howell would impede this midday and weeknight availability. Additionally, plaintiff testified that his concern about remaining involved in his children's daily lives led him to explore relocating to Howell and finding employment closer to the children, but his multiple sclerosis limited his

[17] *Pierron*, 282 Mich App at 250.

ability to find a comparable position elsewhere.[18] Although plaintiff stated that he had not taken a sick day in 10 years, plaintiff admitted that, because of his multiple sclerosis, he needed to use a wheelchair during a recent vacation with the children. The testimony about plaintiff's efforts to relocate and his multiple sclerosis further supports the trial court's finding that the children's established custodial environment with plaintiff would be modified by the proposed school change.

Further, defendant testified that she listed plaintiff as an emergency contact on forms filed with the Howell Public Schools. Yet, defendant listed plaintiff as the third emergency contact after defendant and two other individuals.[19] In contrast, during the evidentiary hearing, both plaintiff and defendant immediately responded when Andrew truanted from school in Grosse Pointe. Defendant testified that it took about 90 minutes to travel from Grosse Pointe to Howell in rush hour traffic. When asked whether plaintiff would have problems being involved with the children's education in Howell, defendant responded no. She suggested that plaintiff keep in touch over the computer or telephone. The evidence establishing plaintiff's ongoing personal involvement with the children and their education in Grosse Pointe belies defendant's suggestion. This testimony also supports the trial court's finding that the proposed school change would modify the children's established custodial environment with plaintiff.

Additionally, the record reveals defendant's troubling lack of personal responsibility for and interest in the

[18] Plaintiff was diagnosed with multiple sclerosis in 1993.

[19] On the same form, defendant identified herself as the children's legal guardian, but she failed to mark either yes or no to identify plaintiff as the children's other legal guardian.

children's education. Defendant, for example, professed that she did not need to attend Andrew and Madeline's parent-teacher conferences because she had attended conferences with her older son Ian. By contrast, plaintiff regularly attended parent-teacher conferences and was known by the school staff. Defendant also admitted that she received a letter from the school district when Madeline had amassed 27 tardy reports at school while living in her home. Although defendant stated that she had resolved the problem by taking away Madeline's computer time, Madeline nevertheless went on to accrue a total of 72 tardy reports for the school year, which is remarkable since the average school year is about 180 days.

Andrew had a similar problem, accumulating numerous reports of tardiness and absences. In one school year alone, Andrew amassed 90 absences from class and 28 tardy reports. Plaintiff described an instance where he came to pick up Madeline from school only to be told by Madeline's teacher that Madeline had not attended at all. When plaintiff called defendant, he spoke to Andrew. Andrew informed plaintiff that he had overslept in the morning, and, as a result, Andrew failed to wake defendant and Madeline so that the children could make it to school that day. The record reflects that Andrew, and not defendant, was responsible for the children's morning routine. These incidents reflect defendant's persistent inattentiveness to her children's educational needs and the crucial role played by plaintiff in the children's daily lives.

After defendant forced plaintiff to obtain a court order to arrange academic tutoring for Andrew, plaintiff sought the services of Deb Dixon on the basis of the recommendation of Andrew's teacher. Dixon testified that she had 11 years of experience working as an

academic tutor with more than 150 students, in addition to her previous career experience as a German teacher and guidance counselor at a local high school. She confirmed that plaintiff paid for the twice-weekly tutoring sessions, first to help Andrew with reading and later to help Madeline with reading and phonics. Moreover, Dixon testified that plaintiff would consistently inquire about the children's academic progress when he transported the children to and from tutoring, even calling Dixon periodically for updates. In contrast, defendant did not regularly speak to Dixon. Oftentimes, Dixon would go out to plaintiff's vehicle to tell plaintiff how the children had done. According to Dixon, defendant canceled tutoring sessions and did not display the amount of concern about Madeline's reading progress that one would expect of a parent. Defendant also suggested that her 18-year-old son Ian would be an appropriate math tutor for Andrew, even though Ian graduated from high school with a 1.8 grade point average and was not permitted to attend his high school commencement. Perplexingly, defendant also testified that "Ian is lazy, and he's paid for it by going to community college instead of the college of his choice where his friends went." Viewed together, the evidence regarding defendant's demonstrable irresponsibility and lack of interest in the children's education not only illustrates the importance of keeping plaintiff actively involved in the children's education, but it also bolsters the trial court's conclusion that the proposed school change would modify the children's established custodial environment.

The record supports the trial court's finding that the children had an established custodial environment "of flexibility and continued involvement" with plaintiff and that the proposed school change would modify that environment. From the children's perspective, their

established custodial environment would be modified if they enrolled in Howell Public Schools. As a practical matter, plaintiff would be relegated to the role of "weekend parent." Plaintiff specifically testified about the importance of the children needing two parents, stating that if defendant enrolled the children in Howell Public Schools, "it will truly be a single parent raising the kids." Although the Court of Appeals attempted to minimize the impact of the proposed school change on the children's established custodial environment with plaintiff, the Court of Appeals cited no evidence that clearly preponderated against the trial court's finding. Because the trial court's finding was not against the great weight of the evidence, I dissent.

IV. CONCLUSION

I concur in the principle that if a proposed change would *not* modify the established custodial environment, the trial court not only must determine the applicability of all 12 best interest factors, but it also must address each factor that is relevant to the specific issue before the court. With regard to this case, however, I conclude that the trial court's finding that the proposed school change would modify the children's established custodial environment with plaintiff did not violate the great weight of the evidence standard. Accordingly, I would reverse the Court of Appeals' decision and reinstate the trial court's order directing that the children remain enrolled in Grosse Pointe Public Schools.

DeCOSTA v GOSSAGE

Docket No. 137480. Decided May 25, 2010.

Donna B. DeCosta brought an action in the Hillsdale Circuit Court against David D. Gossage, D.O., and the Gossage Eye Center, alleging that Gossage committed medical malpractice in performing a cataract surgery. Gossage had moved his practice approximately four months before the surgery. He treated plaintiff several times at the old address and continued treating her at the new address. Plaintiff had sent defendants her notice of intent to file a suit (NOI) before the period of limitations expired, but sent the notice to the old address. The notice was forwarded to defendants' new address. Plaintiff sent a second notice of intent to the new address four days after the limitations period expired. Defendants moved for summary disposition on the ground that plaintiff had failed to comply with MCL 600.2912b(2) because she did not mail her notice of intent to defendants' last known professional business address before the limitations period expired. The court, Michael R. Smith, J., granted the motion. The Court of Appeals, CAVANAGH, P.J., and K. F. KELLY, J. (JANSEN, J., dissenting), affirmed in an unpublished opinion per curiam, issued September 2, 2008 (Docket No. 278665). The Supreme Court ordered and heard oral arguments on whether to grant plaintiff's application for leave to appeal or take other peremptory action. 483 Mich 963 (2009).

The Supreme Court *held*:

The judgment of the Court of Appeals is reversed.

Justice WEAVER, joined by Justice HATHAWAY, stated in the lead opinion that plaintiff satisfied MCL 600.2912b(2) when she mailed her NOI to defendants' prior address before the limitations period expired but defendants did not receive the NOI until after the limitations period expired. Proof of the mailing constituted prima facie evidence of compliance with MCL 600.2912b. The date defendants received the NOI was irrelevant. Under MCL 600.5856(c), plaintiff's timely NOI tolled the period of limitations despite any defects in it. MCL 600.2301 allows for the amendment of NOIs and requires the court to disregard any error or defect in the notice when the substantial rights of the parties are not affected and the amendment is in the furtherance of justice.

Because defendants actually received plaintiff's NOI, her mailing it to defendants' previous address did not affect any substantial right of the parties and defendants were not prejudiced. It is in the furtherance of justice to disregard any error or defect in this NOI because to do so is in accord with the purpose of MCL 600.2912b: to promote settlement in place of formal litigation, thereby reducing the cost of medical-malpractice litigation while still providing compensation to injured plaintiffs.

Chief Justice KELLY and Justice CAVANAGH concurred in the result.

Reversed and remanded for reinstatement of plaintiff's complaint.

Justice MARKMAN, joined by Justices CORRIGAN and YOUNG, stated that the Court of Appeals correctly held that the statute of limitations barred plaintiff's medical-malpractice action. MCL 600.2912b(2) specifies that a plaintiff "shall," before the period of limitations expires, mail an NOI to the defendant's "last known professional business address or residential address" in order to toll the period of limitations under MCL 600.5856(c), unless that address cannot "reasonably be ascertained." Plaintiff here failed to reasonably ascertain defendants' last known professional business address, and, as a result, defendants did not receive the NOI until after the limitations period had expired. Therefore, her untimely NOI did not toll the limitations period. Defendants' current business address was in the telephone book, defendants had not practiced at the address to which plaintiff mailed the NOI for almost 2½ years, defendants had treated plaintiff exclusively for all visits relevant to the asserted medical malpractice at their current address, and plaintiff had been to the current address in order to retrieve medical records pertaining to this case. Thus, plaintiff cannot credibly claim that she could not reasonably ascertain defendant's last known professional business address. In reaching a contrary conclusion, the plurality disregarded the requirements of MCL 600.2912b(2), and attempted to create a new rule that allows the limitations period to be tolled by an improperly addressed NOI as long as the defendant eventually received it, even if the defendant received it after the expiration of the limitations period.

Blaske & Blaske, P.L.C. (by *Thomas H. Blaske*), for plaintiff.

Plunkett Cooney (by *Robert G. Kamenec*) for defendants.

WEAVER, J. In this medical-malpractice case, we consider whether plaintiff satisfied the notice-of-intent requirements under MCL 600.2912b(2) when she timely mailed her notice of intent to file a claim (NOI) to defendants' prior address but defendants did not receive the NOI until after the expiration of the limitations period.[1] We conclude that plaintiff satisfied the mandates of MCL 600.2912b(2) because the statute states that "[p]roof of the mailing constitutes prima facie evidence of compliance with this section" and plaintiff mailed the NOI before the date the limitations period expired. The date defendants received the NOI is irrelevant.

Further, we conclude that the period of limitations was tolled in this case in light of the recent amendments of MCL 600.5856. In *Bush v Shabahang*, we recognized that while former MCL 600.5856(d) had been interpreted as precluding tolling when defects exist in an NOI, the current statute, MCL 600.5856(c), makes clear that whether tolling applies is determined by the timeliness of the NOI.[2] Thus, if an NOI is timely, the period of limitations is tolled despite defects contained therein. Plaintiff's NOI was timely, and accordingly the period of limitations was tolled. Further, *Bush* held that errors and defects in NOIs are to be addressed in light of MCL 600.2301, which allows the amendment of NOIs and requires the court to disregard "any error or defect" when the substantial rights of the parties are not affected and the amendment is in the furtherance of justice.[3] Because defendants actually received the forwarded copies of the NOI, they were not prejudiced by

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[1] The period of limitations for medical-malpractice actions is two years. MCL 600.5805(6).

[2] *Bush v Shabahang*, 484 Mich 156, 161, 185; 772 NW2d 272 (2009).

[3] *Id*. at 185.

the fact that plaintiff timely mailed notice to their previous address and no substantial right of any party was affected. Moreover, it is in the furtherance of justice to disregard any error or defect in the NOI in this instance because to do so is in accord with the purpose of MCL 600.2912b, which is to promote settlement in place of formal litigation, thereby reducing the cost of medical-malpractice litigation while still providing compensation to injured plaintiffs.

Accordingly, we conclude that the Court of Appeals majority erred by ruling that plaintiff's notice was ineffective to toll the period of limitations because defendants actually received the timely mailed NOI, which offered the opportunity for settlement in lieu of litigation. As there was no compromise of defendants' substantial rights and it is in the furtherance of justice to allow all parties to first seek settlement outside of court, we reverse the judgment of the Court of Appeals affirming the dismissal of plaintiff's complaint and remand this case to the trial court for further proceedings.

I. FACTS AND PROCEDURAL BACKGROUND

Defendant David Gossage presently operates his business as the Gossage Eye Center in Hillsdale, Michigan. From October 2002 until February 2004, Dr. Gossage maintained his office at 46 South Howell Street (the Howell office) in Hillsdale. Plaintiff Donna DeCosta sought treatment from Dr. Gossage at the Howell office in June 2002. Plaintiff made several subsequent visits to the Howell office.

In February 2004, Dr. Gossage apparently moved his medical practice to 50 West Carleton Road (the Carleton office) in Hillsdale. In June 2004, plaintiff sought treatment by defendant at the Carleton office. Defendant

performed cataract surgery on plaintiff's left eye on June 3, 2004. The surgery was performed at Hillsdale Community Health Center.

Plaintiff experienced several problems with her eye immediately following surgery, including vision loss and other complications. Plaintiff went back to defendant on June 4 and June 5, 2004, at the Carleton office, but her eye complications did not improve.

During her June 5 visit, defendant referred plaintiff to a retina specialist, Dr. Daniel Marcus of Toledo, Ohio. Dr. Marcus examined plaintiff in his office and later performed retinal surgery on plaintiff's left eye at Toledo Hospital. After this second surgery, plaintiff visited defendant at the Carleton office for a postoperative check. During this visit, defendant informed plaintiff that the postoperative lab results indicated that she was suffering from a coagulase-negative staphylococcal infection.

On November 20, 2006, plaintiff filed a medical-malpractice complaint against Dr. Gossage and defendant Gossage Eye Center (also referred to as the Gossage Eye Institute, P.L.C.), alleging unnecessary cataract surgery in unsanitary conditions, among other allegations. Under MCL 600.5805(6), a medical-malpractice claim must be brought within 2 years after the claim accrues—in this case, within 2 years of plaintiff's June 3, 2004 surgery performed by Dr. Gossage. Thus, plaintiff filed her medical-malpractice complaint more than 2 years after her June 3, 2004 surgery.

MCL 600.2912b(1) requires that before filing a medical-malpractice complaint, a plaintiff must give notice of the plaintiff's intent to file a claim. MCL 600.2912b(2) provides:

> The notice of intent to file a claim required under subsection (1) shall be mailed to the last known profes-

> sional business address or residential address of the health professional or health facility who is the subject of the claim. Proof of the mailing constitutes prima facie evidence of compliance with this section. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered.

Under MCL 600.5856(c), giving the NOI tolls the period of limitations.

Plaintiff mailed copies of her NOI to Dr. Gossage and Gossage Eye Center on June 1, 2006—two days before the two-year limitations period was to expire on June 3, 2006.

On June 5, 2006, an unknown individual at the old Howell office address accepted and signed for copies of the NOI and forwarded them to defendants at the Carleton office. Defendants acknowledge receipt of the forwarded NOI on June 6, 2006, three days after the two-year limitations period expired. Plaintiff also mailed a second set of copies of the NOI to the Carleton office, but these were mailed on June 7, 2006, four days after the limitations period expired.

After plaintiff filed her complaint for medical malpractice, defendants moved for summary disposition on the ground that plaintiff did not comply with MCL 600.2912b(2) because she failed to mail the NOI to defendants' "last known professional business address" within two years from the date of the alleged malpractice. On May 16, 2007, the trial court granted defendants' motion for summary disposition, concluding that plaintiff had failed to comply with MCL 600.2912b(2) because she had not timely mailed the NOI to defendants' last known business address.

Plaintiff appealed, and on September 2, 2008, the Court of Appeals affirmed the trial court's judgment in

a 2-1 decision. Dissenting Judge JANSEN acknowledged that plaintiff was aware of defendants' new address (since she had received treatment at the Carleton office several times),[4] but Judge JANSEN could "perceive no evidence to suggest that plaintiff was aware that the new address was defendants' *sole* or *exclusive* address."[5]

Plaintiff appealed in this Court, and we directed the clerk of the Court to schedule oral argument on whether to grant the application or take other peremptory action.[6]

II. STANDARD OF REVIEW

This Court reviews de novo issues of law.[7] We review a trial court's findings of fact for clear error.[8]

III. ANALYSIS

With the enactment of MCL 600.2912b, our Legislature instituted a requirement that the alleged injured party in a medical-malpractice action provide advance notice to a defendant medical provider before filing a complaint. The advance-notice requirement encourages settlement of a dispute in lieu of costly litigation, and rigid interpretations of MCL 600.2912b do not foster or encourage the statute's goal of advancing settlement and reducing litigation costs.

In *Bush*, we analyzed the effect of the 2004 amendments of MCL 600.5856, the tolling statute, on previous

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[4] Between June and October 2004, plaintiff sought treatment approximately seven times at the Carleton office.

[5] *DeCosta v Gossage*, unpublished opinion per curiam of the Court of Appeals, issued September 2, 2008 (Docket No. 278665), p 2 (JANSEN, J., dissenting).

[6] *DeCosta v Gossage*, 483 Mich 963 (2009).

[7] *Odom v Wayne Co*, 482 Mich 459, 467; 760 NW2d 217 (2008).

[8] *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

decisions of this Court that held that any defect in an NOI required dismissal of the plaintiff's cause of action.[9] *Bush* held that while former MCL 600.5856(d) had been interpreted as precluding tolling when defects exist in an NOI, the current statute, MCL 600.5856(c), now makes clear that whether tolling applies is determined by the timeliness of the NOI.[10] Thus, if an NOI is timely, the period of limitations is tolled despite defects contained therein. Our decision in *Bush* restored adherence to the statute's true intent of promoting settlement by derailing strained interpretations regarding the adequacy of an NOI. Exceedingly exacting interpretations of the NOI mandates—requiring plaintiffs to take extraordinary measures to satisfy the goal of providing advance notice—in fact frustrate the legislative goal of achieving prompt resolution of medical-malpractice claims without long and expensive litigation. We decline to adopt any such interpretation because it was not the intent of the Legislature. As we held in *Bush*:

> The stated purpose of § 2912b was to provide a mechanism for "promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs . . . ." To hold that § 2912b in and of itself mandates dismissal with prejudice would complicate, prolong, and significantly increase the expense of litigation. Dismissal with prejudice would be inconsistent with these stated purposes. [*Bush*, 484 Mich at 174-175, citing Senate Legislative Analysis, SB 270, August 11, 1993, and House Legislative Analysis, HB 4403 to 4406, March 22, 1993.]

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[9] See, e.g., *Boodt v Borgess Med Ctr*, 481 Mich 558, 561; 751 NW2d 44 (2008).

[10] *Bush*, 484 Mich at 161, 185.

MCL 600.2912b does not require dismissal with prejudice because such a result is inconsistent with the statute's stated purpose.[11] Moreover, the Revised Judicature Act contains a mechanism for courts to cure defects in proceedings.[12] As we stated in *Bush*, service of an NOI is a part of a medical-malpractice proceeding.[13] Consequently, it is subject to MCL 600.2301. Pursuant to MCL 600.2301, errors or defects in the proceedings *shall* be disregarded as long as the "substantial rights of the parties" are not affected.[14]

In the present case, defendants urge us to dismiss plaintiff's case because plaintiff sent the NOI to an address that they allege is their prior business address. Defendants argue, and the Court of Appeals majority agreed, that because MCL 600.2912b requires that the NOI be mailed to the *last* known professional business address and plaintiff sent the notice to a *prior* address rather than their *new* address, the NOI was defective and the defect cannot be cured. We disagree.

First, we are not convinced that the process of mailing the NOI was defective. While the NOI may have been mailed to what defendants claim is a *previous* address, there is no indication in the record that this was defendants' sole address. Not only did the United States Postal Service deliver the mail to the Howell

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[11] *Id.* at 174-175.

[12] MCL 600.2301 states:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. *The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties*. [Emphasis added.]

[13] *Bush*, 484 Mich at 176.

[14] MCL 600.2301.

office address, but someone at that address accepted and signed for the certified mail. Further, someone at the Howell office address promptly forwarded the NOI to defendants at the Carleton office address. From these facts, we cannot infer that the Carleton office address was defendants' sole business address for purposes of receiving professional business correspondence.

Moreover, even if we assume that this was a defect, it was a minor technical defect in the proceedings because defendants actually received the NOI. Such minor technical defects can be cured under MCL 600.2301. The second prong of MCL 600.2301 *requires* that we disregard defects in proceedings that do not affect the substantial rights of the parties. Because the NOI was promptly forwarded and defendants actually received it, no substantial right of defendants was affected. Accordingly, MCL 600.2301 mandates that we disregard this purported defect. To find that an otherwise compliant NOI is not acceptable because defendants did not initially receive the NOI at their new address would be contrary to the legislative intent behind MCL 600.2912b: to foster early action and possible settlement in medical-malpractice matters that might otherwise result in costly litigation.

Moreover, it is in the furtherance of justice to disregard the defect in the NOI process in this instance because to do so is in accord with the purpose of MCL 600.2912b, which is to promote settlement in place of formal litigation, thereby reducing the cost of medical-malpractice litigation while still providing compensation to injured plaintiffs. Defendants additionally urge us to hold that plaintiff did not satisfy MCL 600.2912b(2) because defendants did not receive the NOI before the expiration of the period of limitations. However, we are not persuaded by this argument. MCL

600.2912b(2) states that "[p]roof of the mailing constitutes prima facie evidence of compliance with this section." The statute does not require that a defendant receive an NOI before the period of limitations expires. When a defendant receives the NOI is irrelevant. Because plaintiff mailed the NOI before the date the limitations period expired, it was timely. Further, we agree with Judge JANSEN, who declined to affirm the trial court's judgment given the trial court's own findings:

> I respectfully dissent from the majority's determination that the trial court properly dismissed plaintiff's complaint.
>
> MCL 600.2912b(2) provides:
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> "The notice of intent to file a claim required under subsection (1) *shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim*. *Proof of the mailing constitutes prima facie evidence of compliance with this section*. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered." [Emphasis added.]
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> * * *
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> . . . I cannot omit mention of the fact that defendants actually received plaintiff's initial notice of intent, which was forwarded from defendants' previous address to their new address. MCL 600.2301 directs that "[t]he court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties." In light of the fact that defendants actually received plaintiff's initial notice of intent, I must conclude that plaintiff's act of mailing the notice to defendants' previous address "d[id] not affect the substantial rights of the parties." MCL 600.2301. Because

> they actually received the forwarded notice of intent, defendants were not prejudiced by the fact that plaintiff happened to send the notice to their previous address. I would reverse and remand for reinstatement of plaintiff's complaint.[15]

IV. CONCLUSION

Plaintiff satisfied the notice-of-intent requirements under MCL 600.2912b(2) when she timely mailed her NOI to defendants' prior address but defendants did not receive the NOI until after the expiration of the limitations period. MCL 600.2912b(2) states that "[p]roof of the mailing constitutes prima facie evidence of compliance with this section," and plaintiff mailed the NOI before the date the limitations period expired. The date defendants received the NOI is irrelevant.

Further, we conclude that the period of limitations was tolled in this case. If an NOI is timely, the period of limitations is tolled despite defects contained therein. MCL 600.2301 allows for the amendment of NOIs and requires the court to disregard "any error or defect" when the substantial rights of the parties are not affected and the amendment is in the furtherance of justice. Because defendants actually received the forwarded copies of the NOI, they were not prejudiced by the fact that plaintiff timely mailed notice to the previous address, and no substantial right of any party was affected. Moreover, it is in the furtherance of justice to disregard any error or defect in the NOI in this instance.

Accordingly, we conclude that the Court of Appeals erred by finding that plaintiff's notice was ineffective to toll the period of limitations. We reverse the judgment of the Court of Appeals affirming the dismissal of

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[15] *DeCosta*, unpub op at 1-2 (JANSEN, J., dissenting).

plaintiff's complaint and remand this case to the trial court for further proceedings.

Reversed and remanded for reinstatement of plaintiff's complaint.

HATHAWAY, J. concurred with WEAVER, J.

KELLY, C.J., and CAVANAGH, J. We concur in the result.

MARKMAN, J. (*dissenting*). Because I believe the plurality opinion disregards the language of MCL 600.2912b(2), I respectfully dissent. Contrary to the plurality opinion, I would affirm the judgment of the Court of Appeals, which, along with the trial court, correctly held that the statute of limitations barred plaintiff's medical malpractice action.

I. NOTICE OF INTENT

Generally, medical malpractice actions must be brought within two years from the date that the alleged medical malpractice occurred or within six months of when the plaintiff discovered or should have discovered the claim. MCL 600.5805(6); MCL 600.5838a. However, MCL 600.5856(c) allows for the tolling of the period of limitations[1] when the plaintiff has provided a notice of intent to bring a medical malpractice action to the

[1] MCL 600.5856 provides in relevant part:

> The statutes of limitations or repose are tolled in any of the following circumstances:
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> * * *
>
> (c) At the time notice is given in compliance with the applicable notice period under [MCL 600.2912b], if during that period a claim would be barred by the statute of limitations or repose; but in this

defendant in order to accommodate the required "waiting period" between the time of the notice and the time of the filing of the complaint.[2] In the instant case, plaintiff filed her complaint two years and five months after the alleged malpractice had occurred, well beyond the period of limitations. Thus, in order for plaintiff not to be barred from bringing her claim, the period of limitations must have been tolled. To toll it, plaintiff was required to provide defendants with a notice of intent before the limitations period expired, and MCL 600.2912b(2) requires that the notice be mailed to the "last known professional business address or residential address" of defendants.

Here, defendants moved their practice from 46 S. Howell Street to 50 W. Carleton Road, both in Hillsdale, in February 2004. The alleged malpractice occurred at the new address on June 3, 2004, four months after defendants moved their practice. Nevertheless, plaintiff mailed copies of the notice of intent to defendants' old business address on June 1, 2006, two days before the two-year limitations period expired on June 3, 2006. An unidentified person at 46 S. Howell Street signed for them on June 5, 2006, and forwarded the notices to defendants. However, defendants did not receive the forwarded notices until June 6, 2006.[3]

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case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

[2] MCL 600.2912b(1) provides:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

[3] Plaintiff also mailed copies of a second notice that were properly addressed on June 7, 2006, after the limitations period had expired.

Thus, the question here is whether the requirement of MCL 600.2912b(2) that the notice of intent be mailed to the "last known professional business address" is satisfied when the notices were mailed to the wrong address—an address at which defendants had not practiced for almost $2^1/_2$ years—before the limitations period expired, but received by defendants after the limitations period expired. The plurality states that the requirement has been satisfied because defendants actually received the notices, albeit after the expiration of the limitations period. I disagree because I do not believe that the limitations period was tolled by plaintiff's faulty notices, and, accordingly, plaintiff's action was barred.

In interpreting statutes, this Court is obligated "to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). "If the statutory language is clear and unambiguous, then we conclude that the Legislature intended the meaning it clearly and unambiguously expressed, and the statute is enforced as written." *Huggett v Dep't of Natural Resources*, 464 Mich 711, 717; 629 NW2d 915 (2001). As we stated in *Koontz*, "[b]ecause the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute." *Koontz*, 466 Mich at 312. In determining the common and ordinary meaning of a nonlegal word or phrase, consulting a lay dictionary is appropriate. *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 522; 676 NW2d 207 (2004).

MCL 600.2912b(2), which is in dispute, provides:

> The notice of intent to file a claim required under [MCL 600.2912b(1)] shall be mailed to the last known profes-

> sional business address or residential address of the health professional or health facility who is the subject of the claim. Proof of the mailing constitutes prima facie evidence of compliance with this section. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered.

The phrase "last known professional business address" means the last address from which the defendant operated a business; this language is clear and requires no further construction. The plaintiff "shall" mail the notice of intent to that address. Only if this address cannot be "reasonably" ascertained may the plaintiff alternatively satisfy MCL 600.2912b(2) by mailing the notice to the "health facility where the care that is the basis for the claim was rendered."

Here, plaintiff claims that defendants' last known professional business address was 46 S. Howell Street. To support this claim, plaintiff provided a letter from defendants with 46 S. Howell Street on the letterhead. However, this letter was from 2002. It merely demonstrates that in 2002 defendants' business address was 46 S. Howell Street. It does not demonstrate what defendants' professional business address was when the notices of intent were mailed on June 1, 2006. Additionally, plaintiff claims that "online materials indicate that Dr. Gossage still maintains a practice" on Howell Street and supports this claim with a printout from a web site called "LocateADoc.com." However, there is nothing to indicate that this website was created or maintained by defendants, and plaintiff makes no showing that this website is routinely updated or constitutes a reliable source of information.[4] None of this, individually or

[4] Plaintiff also presented letters from a doctor addressed to defendants at 46 S. Howell Street in 2004, after defendants had moved their office.

taken together, is nearly enough to demonstrate that plaintiff undertook steps to reasonably ascertain defendants' last known professional business address.

Further, as the trial court correctly observed, defendants' last known professional business address was "easy to look up" in the phone book.[5] Plaintiff herself visited the Carleton Road office on numerous occasions. In fact, defendants treated plaintiff exclusively at 50 W. Carleton Road for *all* visits relevant to the asserted malpractice. And plaintiff went to 50 W. Carleton Road to pick up her medical records. Finally, there is nothing in the record to indicate that defendants continued to maintain any practice at 46 S. Howell Street after February 2004 or, contrary to the assertions of the plurality and the Court of Appeals dissent, that plaintiff believed in any way that defendants had more than one professional business address.[6] Plaintiff cannot credibly

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This shows nothing more than that another person, not under any legal obligation to reasonably ascertain an address, as was plaintiff, also sought to communicate with defendants at a then incorrect address.

[5] The trial court also observed that while the Hillsdale Community Health Center, the hospital at which plaintiff's surgery occurred and that was apparently identified as a potential defendant, has been located at 168 S. Howell Street in Hillsdale for more than 30 years, the notice of intent for the hospital was addressed to 50 W. Carleton Road. There is nothing in the record that explains what happened to the notice that was mailed to the hospital other than that someone signed for it. The trial court speculated that a letter carrier may have delivered the hospital's notice to the proper address because the location of the hospital is common knowledge.

[6] The Court of Appeals dissent "perceive[d] no evidence to suggest that plaintiff was aware that the new address was defendants' *sole* or *exclusive* address" and asserted that "[t]he language of [MCL] 600.2912b(2) simply does not take into account the fact that some . . . health care professionals maintain more than one professional address at any given time." *DeCosta v Gossage*, unpublished per curiam opinion of the Court of Appeals, issued September 2, 2008 (Docket No. 278665), p 2 (JANSEN, J., dissenting) (emphasis in original). The plurality agrees. However, this assessment is irrelevant. First, it can just as easily be said that there is no

claim that she reasonably believed that defendants' last known address was anything but 50 W. Carleton Road.

The plurality asserts that proof of mailing the notices of intent was prima facie evidence that plaintiff complied with MCL 600.2912b(2), and since defendants eventually received the notices, even though they were mailed to the wrong address, they were nonetheless timely.[7] However, Black's Law Dictionary (8th ed) defines "prima facie evidence" as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." Accordingly, while proof of mailing may well provide prima facie evidence that the notice of intent was mailed to the last known professional business address, this evidence may be rebutted, as it clearly was in this case.[8]

While the plurality asserts that proof of mailing constitutes prima facie evidence of compliance with MCL 600.2912b(2), it altogether ignores that MCL 600.2912b(2) requires a plaintiff to "reasonably" ascertain the "last known professional business address" and

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evidence to suggest that plaintiff was aware that defendants *still* maintained a practice at 46 S. Howell Street. Second, and more to the point, the extent of plaintiff's subjective knowledge does not define the statutory test; rather, it is whether the plaintiff took steps to reasonably ascertain the last known address.

[7] MCL 600.2912b(2) provides that "[p]roof of the mailing constitutes prima facie evidence of compliance with this section."

[8] The plurality also asserts that because the United States Postal Service delivered the copies of the notice and an unidentified person at 46 S. Howell Street signed for them and forwarded the copies to defendants, it cannot be inferred that defendants' new address was their sole business address. I see no logical connection between these facts and the plurality's conclusion. Again, these facts are at most prima facie evidence that the notices were mailed. There is no evidence to indicate who actually signed for the notices or that this person was in any way associated with defendants. Further, the fact that someone at 46 S. Howell Street signed for the notices is irrelevant to whether defendants' practice was located there. It indisputably was not.

to mail the notice of intent to *that* address. Instead of adhering to ordinary rules of interpretation, the plurality asserts that "rigid," "strained," and "[e]xceedingly exacting interpretations" of the notice of intent requirements "frustrate the legislative goal," which is presumably something other than what was actually stated by the Legislature. However, this Court is obligated to determine legislative intent "from the words expressed in the statute." *Koontz*, 466 Mich at 312. In my judgment, the plurality's interpretation of MCL 600.2912b(2) "venture[s] [far] beyond the unambiguous text of the statute." *Id*.

Plaintiff also claims that defendants received actual notice and that this Court should hold that such notice is a legally adequate substitute for the statutorily required notice. Plaintiff cites California and Florida law, claiming that their medical malpractice statutes are similar to Michigan's and that both states allow for actual notice as an adequate substitute. However, the cases on which plaintiff relies are clearly distinguishable because they provide that actual notice is sufficient if the notice of intent has either been received,[9] or if the notice has been mailed via regular mail in a *properly addressed* envelope,[10] before the limitations period has

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[9] In *Jones v Catholic Healthcare West*, 147 Cal App 4th 300, 307-308; 54 Cal Rptr 3d 148 (2007), the court held that a notice of intent delivered via fax on the day the limitations period expired was sufficient notice because California's notice of intent statute did not require a specific method of service. In *Patry v Capps*, 633 So 2d 9, 10-11 (Fla, 1994), the plaintiff hand-delivered the notice of intent, contrary to the statute's requirement to serve the notice by certified mail, before the limitations period expired. The court concluded that certified mail was a "method for verifying significant dates in the process" and the "defendant acknowledge[d] timely receipt of written notice . . . ." *Id*. at 12.

[10] In *Silver v McNamee*, 69 Cal App 4th 269, 272; 81 Cal Rptr 2d 445 (1999), the plaintiff mailed two notices of intent to the defendant, one by regular mail and one by certified mail, three days before the limitations

expired. In the case at bar, the notices of intent were not received until after the limitations period had expired, and plaintiff failed to properly address the envelopes.

In summary, plaintiff failed to reasonably ascertain defendants' last known professional business address as required under MCL 600.2912b(2) and, as a consequence, mailed the notices of intent to the wrong address. Although the notices were mailed before the limitations period expired, defendants did not receive the notices until after the limitations period had expired. Accordingly, the notices of intent were not timely and did not toll the period of limitations.

II. *BUSH v SHABAHANG*

In its application of MCL 600.2301, the plurality purports to extend *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), another decision according little consideration to the actual language of relevant statutes, to a notice of intent mailed to the wrong address.[11] *Bush* formulated a test to determine whether MCL 600.2301 is applicable when the substantive content of

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period expired. While the certified letter was returned unclaimed, the regular mail letter was not. *Id*. at 274. Because the notices of intent were properly addressed, the court concluded that the plaintiff complied with the statute and that the defendant had actual notice. *Id*. at 280.

[11] MCL 600.2301 provides:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

The purpose of MCL 600.2301 is "to abolish technical errors in proceedings and to have cases disposed of as nearly as possible in accordance with the substantial rights of the parties." *M M Gantz Co v Alexander*, 258 Mich 695, 697; 242 NW 813 (1932).

the notice of intent is defective, *id*. at 177, and held that "when [a notice of intent] is *timely*, the statute of limitations is tolled despite defects contained therein," *id*. at 185 (emphasis added). Here, the plurality would sustain even an *untimely* notice of intent.

To determine whether MCL 600.2301 should be applied to a defective notice of intent, the majority established a two-pronged test in *Bush*:

> [F]irst, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice. If both of these prongs are satisfied, a cure will be allowed "on such terms as are just." . . . Defendants who receive these notices are sophisticated health professionals with extensive medical background and training. . . . Accordingly, we conclude that no substantial right of a health care provider is implicated. Further, we hold that the second prong of the test, which requires that the cure be in the furtherance of justice, is satisfied when a party makes a good-faith attempt to comply with the content requirements of [MCL 600.2912b]. Thus, only when a plaintiff has not made a good-faith attempt to comply with [MCL 600.2912b(4)] should a trial court consider dismissal of an action without prejudice. [*Bush*, 484 Mich at 177-178.]

In my dissent in *Bush*, I observed that the majority had provided no guidance for the application of its new test, *id.* at 199 n 10, and such guidance has still not been provided. Concerning the first prong, the plurality simply declares that even though plaintiff failed to comply with MCL 600.2912b(2), and even though defendants did not receive the notices of intent until after the limitations period expired, defendants' substantial rights have not been affected and the notices were "timely" because defendants received actual notice. According to the plurality, because the purpose of MCL 600.2912b is to promote settlements of medical malpractice claims, it is in the "furtherance of justice" to

disregard the defect here. The plurality also disregards the second prong of the *Bush* test, namely, that plaintiff has made a "good-faith attempt" to comply with the law. *Id*. at 178. In defining its own test, it is clear that nothing really matters except that the plurality dislikes medical malpractice reforms and that it will not permit such reforms, or any other contrary determinations of the Legislature, to impede the progress of this lawsuit.

Applying the test in *Bush*, MCL 600.2301 is inapplicable to the instant case. First, defendants' substantial rights, in particular, the right not to be sued beyond the expiration of the limitations period, *are* affected. In *Bigelow v Walraven*, 392 Mich 566, 576; 221 NW2d 328 (1974), this Court explained the purpose behind the statutes of limitations:

> Statutes of limitations are intended to "compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend"; "to relieve a court system from dealing with 'stale' claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured"; and to *protect "potential defendants* from protracted fear of litigation." [Citation omitted; emphasis added.][12]

Statutes of limitations have multiple purposes, among which are the maintenance of the psychological well-being of potential defendants by setting forth time limits on their exposure to litigation and the protection of defendants' practical interests in being able to effectively defend themselves against lawsuits that are not

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[12] See also *O'Brien v Hazelet & Erdal*, 410 Mich 1, 14; 299 NW2d 336 (1980) (stating that statutes of limitations "serve the permissible legislative objective of relieving defendants of the burden of defending claims brought after the time so established"), and *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995) ("Statutes of limitation are procedural devices intended to promote judicial economy and the rights of defendants.").

excessively stale and in which evidence has not been lost over time. While a plaintiff has a right to sue a defendant *before* the limitations period expires, a defendant has an equivalent right not to be sued *after* the limitations period expires. So the question here is whether this right constitutes a "substantial right." *Bush*, 484 Mich at 177. Black's Law Dictionary (8th ed), p 1349, defines "substantial right" as "[a]n essential right that potentially affects the outcome of a lawsuit and is capable of legal enforcement and protection, as distinguished from a mere technical or procedural right." In *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), we explained that to demonstrate that substantial rights are affected "generally requires a showing of prejudice . . . ."[13]

Statutes of limitations are not procedural; rather, they "are substantive in nature." *Gladych v New Family Homes, Inc*, 468 Mich 594, 600; 664 NW2d 705 (2003). A defendant's right to not be sued after the limitations period has expired is not a mere procedural right. Rather, this right pertains to matters that are dispositive and outcome-determinative. If the limitations period has expired, then a plaintiff is barred from pursuing an action, regardless of its merits. Defendants' entirely substantial rights were affected because the limitations period expired before plaintiff properly mailed the notices of intent to defendants. Absent authority, a majority of justices have revived a lawsuit that became null and void the moment the period of limitations expired without the statutorily required notice of intent having been properly sent by plaintiff.

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[13] In *Carines*, substantial rights were discussed in the context of the "plain error rule." This Court explained that a showing of prejudice means "that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763.

Second, even if defendants' substantial rights had not been affected under the first prong of *Bush*, plaintiff clearly did not make a good-faith attempt to comply with the statute as required by *Bush*'s second prong. Specifically, plaintiff did not make a good-faith attempt to comply with MCL 600.2912b(2). As already discussed, plaintiff was well aware that defendants' last known professional business address was 50 W. Carleton Road because all office visits related to the alleged malpractice had occurred at this address. Plaintiff asserts that she was not aware that defendants only had one place of business; that is, she asserts that she believed that defendants conducted business at 46 S. Howell Street *and* 50 W. Carleton Road. However, the facts here indicate that plaintiff also mailed the notice of intent to Hillsdale Community Health Center at 50 W. Carleton. The hospital's address is 168 S. Howell Street, and it has never been located at 50 W. Carleton.[14] This fact tends to disprove plaintiff's claim that she engaged in a good-faith effort to determine defendants' address, or that she believed defendants had more than one address. Plaintiff not only mailed the notices of intent for defendants to the wrong address, but she also mailed the notice for the hospital to the wrong address. Moreover, it is clear that plaintiff was aware of defendants' new address because she mailed the *hospital's* notice to that address. Thus, plaintiff neither made a reasonable effort to ascertain defendants' address, as required by MCL 600.2912b(2), nor a good-faith effort to "reasonably" ascertain defendants' address, as required under the rule in *Bush*. Plaintiff was not earnest or conscientious in any way in

[14] The trial court took "judicial notice to the fact that the Hillsdale Community Health Center has been located in the same place . . . for over 30 years, and that [it] is located at 168 S. Howell Street, Hillsdale. . . . It's not 50 W. Carleton."

her effort to locate defendants' address in the small community of Hillsdale, Michigan; she was simply careless and this carelessness is legally relevant under the statute.

The plurality concludes that *when* a defendant receives notice is irrelevant under MCL 600.2912b(2) because this provision does not require that a defendant actually receive notice before the limitations period has expired. Rather, the plurality appears to believe it is the law of this state that as long as a plaintiff mailed the notice of intent before the limitations period expired, such notice is timely—without regard to whether the plaintiff took steps to reasonably ascertain the defendant's last known professional business address, without regard to whether the defendant's substantial rights were affected, and without regard to whether the plaintiff made a good-faith effort to comply with MCL 600.2912b(2). In the end, the plurality would rewrite MCL 600.2912b(2) in a way that not only disregards this Court's prior decisions, but also frustrates the express intentions of the Legislature.

III. CONCLUSION

In sum, I disagree with the plurality because it disregards the language of MCL 600.2912b(2) and would create an "actual notice" rule that allows the period of limitations to be tolled as long as an improperly addressed notice was mailed before the limitations period expired and the notice is eventually received by a defendant. Furthermore, I disagree with the plurality's efforts to extend *Bush* to MCL 600.2912b(2) in which the plurality does not even adhere to its own test formulated only last year. The plurality has reached their desired result with little serious analysis and with

nothing offered in the way of a legal roadmap of how they arrived there and where they might arrive in the next case.

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

In re MASON

Docket No. 139795. Decided May 26, 2010.

The Department of Human Services (DHS) petitioned the Macomb Circuit Court for the removal of Richard Mason and Clarissa Smith's two minor children from Smith's care following allegations of neglect. At the time of the removal, Mason was in jail for a drunk-driving conviction. When his jail term expired, he was returned to prison for violating his probation conditions. The DHS subsequently petitioned the court for termination of Mason's and Smith's parental rights. Although the court and the DHS knew of Mason's incarceration, they did not include him in most of the hearings that followed or inform him of his right under MCR 2.004 to participate in the hearings by telephone. The court, Tracey A. Yokich, J., authorized the termination petition. Smith did not appear for the termination hearing, but Mason did. The court terminated both respondents' parental rights. It terminated Mason's parental rights after finding grounds for termination under MCL 712A.19b(3)(c)(*i*), (g), (h), and (j). Mason appealed, and the Court of Appeals, M. J. KELLY, P.J., and K. F. KELLY and SHAPIRO, JJ., affirmed in an unpublished memorandum opinion, issued September 15, 2009 (Docket No. 290637). The Supreme Court ordered and heard oral argument on whether to grant Mason's application for leave to appeal or take other peremptory action. 485 Mich 993 (2009).

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

The circuit court clearly erred by terminating Mason's parental rights under each of the grounds alleged. Termination was premature because the court and the DHS failed to adhere to several duties under the statutes and the court rules. In particular, neither the court nor the DHS properly facilitated Mason's right to participate in the proceedings, ensured that he had a meaningful opportunity to comply with a case service plan, or considered the effect of the children's placement with Mason's family.

1. The circuit court and the DHS failed to facilitate Mason's participation in the proceedings by telephone, as required by MCR 2.004 for a parent who is incarcerated and whose children are the

subject of child protective proceedings. MCR 2.004(F) prohibits the court from granting the moving party's request for relief unless the incarcerated respondent actually participated in a telephone call. The court arranged for Mason's participation by phone in only one hearing during his incarceration, and Mason was not informed of his right to continue to participate in the proceedings by this means. Participation through a telephone call during one proceeding will not suffice to allow the court to enter an order at another proceeding for which the incarcerated parent was not offered the opportunity to participate. Thus, Mason was not offered the opportunity to participate in the proceedings, and MCR 2.004(F) precluded the court from granting the relief the DHS required.

2. The circuit court and the DHS also violated their statutory duties to involve Mason in the reunification process and provide the services necessary to reunify Mason and his children. The state is not relieved of its duties to engage an absent parent merely because that parent is incarcerated. Reasonable efforts to reunify the child and family must be made in all cases except those involving certain aggravated circumstances not present here. When the court orders placement of a child outside the child's home, MCL 712A.13a requires the DHS to prepare an initial services plan, and before the court enters an order of disposition, MCL 712A.18f requires the court to consider a case service plan that includes provisions to facilitate the child's return to his or her home or a permanent placement. Under MCL 712A.19(6)(a) and (c), compliance with the case service plan is something the court must consider at review hearings. Neither the foster care worker nor the court ever facilitated Mason's access to services or discussed updating the plan. The foster care worker apparently did not talk to a prison social worker about Mason's need for services. The DHS focused on reuniting the children with Smith and, in doing so, disregarded Mason's statutory right to services. The state failed to involve or evaluate Mason, but then terminated his parental rights, in part because of his failure to comply with the case service plan.

3. The circuit court essentially terminated Mason's parental rights because he was incarcerated. Incarceration alone is not a sufficient reason for termination, nor is the mere present inability to personally care for one's children as the result of incarceration. MCL 712A.19b(3)(h) permits an incarcerated parent to provide for a child's care and custody without doing so personally and requires consideration of whether he or she will be able to provide proper care and custody within a reasonable time. The court clearly erred by relying on the foster care worker's largely unsupported opinion that it would take Mason six months to be ready to care for the

children after his release and by failing to evaluate Mason's parenting skills or facilitating his access to services. Mason had completed some elements of the case service plan while in prison. The circuit court never considered whether Mason could fulfill his duty to provide proper care and custody by giving his relatives legal custody of the children during his incarceration. Under MCL 712A.19a(6), termination may be avoided when the children are being cared for by relatives. The children's placement with Mason's family during the proceedings was a factor that weighed explicitly against termination, but was never considered in this regard.

4. Termination under MCL 712A.19b(3)(c)(*i*) and (g) was also improper because, as it did under MCL 712A.19b(3)(h), the circuit court erred in evaluating whether Mason would be able to provide proper care, either personally or through relatives, within a reasonable time.

Reversed and remanded.

Justice MARKMAN, joined by Justice HATHAWAY, dissenting, would hold that the circuit court did not clearly err by terminating Mason's parental rights. That is, the circuit court did not clearly err by concluding that the conditions of MCL 712A.19b(3)(h) were satisfied. The children had already been deprived of a normal home for 18 months and, as a result of Mason's incarceration, would have been deprived of a normal home for at least another 11 months. Therefore, Mason's incarceration would have led to the children being deprived of a normal home for well over 2 years. In addition, there was testimony that there was no reasonable expectation that Mason would be able to provide proper care within a reasonable time given the ages of the children. These children are very young, Mason had been in prison since before the youngest child was even born, and he has never had the sole responsibility of taking care of young children. There was no evidence that Mason did anything to provide for the children while they were living with their unfit mother, their foster parents, or their paternal aunt and uncle. The children's interest in a safe, secure, and stable home should not be placed in abeyance while Mason is afforded yet another opportunity to become a minimally acceptable parent. Further, as required by MCR 2.004, Mason received adequate notice of the ongoing proceedings and an opportunity to participate in each, was represented by counsel at each proceeding, and was informed that he could participate by way of telephone calls in all future proceedings, and he did in fact participate by speakerphone during at least two proceedings and attended the termination hearing. Given that Mason received all the process to which he was entitled under the law, Mason's due process rights were not violated.

Justice WEAVER, dissenting, disagreed that the trial court clearly erred by terminating Mason's parental rights. The majority created an issue in this case that was not raised in the trial court or in the Court of Appeals and found clear error where there was none, with a tragic result for the children. Justice WEAVER agreed with Justice MARKMAN that Mason did virtually nothing to demonstrate that he was willing or able to take responsibility for the care or custody of the children and that Mason's due process rights were not violated.

1. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — INCARCERATED PARENTS — CHILD PROTECTIVE PROCEEDINGS — PARTICIPATION IN CHILD PROTECTIVE PROCEEDINGS.

The court and the petitioning party must arrange for an incarcerated parent whose child is the subject of child protective proceedings to participate in the proceedings by telephone; if the incarcerated parent is not offered the opportunity to participate in the proceedings, the court may not grant the moving party's request for relief unless the parent actually participated in a telephone call; participation through a telephone call during one proceeding, however, will not suffice to allow the court to enter an order at another proceeding for which the parent was not offered the opportunity to participate (MCR 2.004).

2. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — PARTICIPATION IN CHILD PROTECTIVE PROCEEDINGS.

When a parent has not been afforded his or her right under the statutes and the court rules to participate in child protective proceedings, it is clear error for the court to terminate parental rights on the basis of the parent's lack of participation and missing information directly attributable to the parent's lack of meaningful participation.

3. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — INCARCERATED PARENTS.

Incarceration alone is not a sufficient ground for terminating parental rights; the record must show that the parent's incarceration will deprive a child of a normal home for more than two years, that the parent has not provided for the child's proper care and custody, and that the parent will not be able to provide proper care and custody within a reasonable time; an incarcerated parent need not personally care for the child but may provide proper care and custody through placement with relatives (MCL 712A.19b[3][h]).

Eric J. Smith, Prosecuting Attorney, and *Robert John Berlin* and *Jurij Fedorak*, Assistant Prosecuting Attorneys, for the Department of Human Services.

John J. Bologna for Richard Mason.

Becker & Lundquist, PLC (by *Eric Lundquist, Jr.*), for the minor children.

CORRIGAN, J. We reverse the judgment of the Court of Appeals, which affirmed the circuit court's order terminating the parental rights of Richard Mason, the respondent-father (respondent), to his two sons, J. and C. The circuit court committed several legal errors and the Department of Human Services (DHS) failed in its duties to engage respondent in the proceedings against him. First, the court and the DHS failed to facilitate respondent's participation in the child protective action by telephone in light of his incarceration, as required by MCR 2.004. The DHS further abandoned its statutory duties to involve him in the reunification process and to provide services necessary for him to be reunified with his children. The court effectively terminated respondent's parental rights merely because he was incarcerated during the action without considering the children's placement with relatives or properly evaluating whether placement with respondent could be appropriate for the children in the future. Incarceration alone is not a sufficient reason for termination of parental rights. Accordingly, we reverse and remand the case to the circuit court for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

Respondent is the father of J., born March 13, 2004, and C., born December 12, 2006. Clarissa Smith is the boys' mother. The parents were never married, but

respondent testified that they shared responsibility for J.'s care. The DHS's Child Protective Services (CPS) program first became involved with the family in April 2006; it provided services to Smith, but never to respondent. Until respondent was jailed for drunk driving in October 2006, shortly before C.'s birth, he did construction work to support the family.

While respondent was in jail, Smith brought the boys to visit him every week. On June 19, 2007, the DHS temporarily removed J. and C. from Smith's care. CPS had investigated Smith after the police found J. wandering outside the home unsupervised. The removal petition filed by the DHS also accused respondent of neglect, citing his criminal history and alleging that he "has failed to provide for the children physically, emotionally and financially."

The court authorized the petition on June 20, 2007, at a hearing where respondent was represented by court-appointed counsel. The court notified respondent that the children had been removed and arranged for him to participate by telephone in a July 24, 2007, pretrial hearing. At the July 24 hearing, both respondent and Smith pleaded no contest to the allegations in the petition. The DHS planned to provide services to Smith with a goal of reunification. With regard to respondent, the court ordered supervised visits following his anticipated release from jail.

The DHS foster care worker, Steven Haag, later created a parent-agency treatment plan and service agreement (the "service plan") requiring respondent and Smith to submit to substance-abuse and psychological assessments, complete parenting classes, maintain contact with the children, and establish legal sources of income and suitable homes. The court adopted the service plan with regard to both parents at

an August 14, 2007, hearing, at which respondent was not present.[1] Smith had requested placement of the children with respondent's family and the court ordered placement with the children's paternal aunt and uncle.

Respondent's incarceration did not end in August 2007 as expected, however. Rather, when his jail term expired, he was sentenced to prison for a prior larceny conviction because the drunk driving conviction violated his probation conditions. Respondent's earliest release date became July 1, 2009. The court then restricted his contact with the children to cards or letters. Although the DHS and the court knew of respondent's incarceration, they did not include him in subsequent hearings on November 13, 2007, February 11, 2008, May 8, 2008, July 8, 2008, and October 7, 2008. Nor did they inform him of his right under MCR 2.004 to participate in hearings by telephone. At the July 8, 2008, hearing, respondent—who had corresponded with his attorney—expressed through counsel that he was "extremely concerned with what is going on with this case." He "truly want[ed] what's best for [his] children, as well as to be a part of their lives." He did "very much want to be a part of any and all court proceedings." His request to participate was apparently overlooked.

Finally, more than 16 months after he last participated, the court arranged for respondent to participate by phone in the December 3, 2008, permanency planning hearing. DHS worker Haag acknowledged at the hearing that respondent had provided proof that he completed an educational class and a business education technology course while in prison. Respondent also attended weekly Alcoholics Anonymous meetings and

[1] It is unclear from the record whether the DHS provided a copy of the service plan to respondent.

was on waiting lists for enrollment in parenting classes and counseling. But Smith had tested positive for drugs and acknowledged that her current residence was not suitable for her sons. Because the boys had been in care for almost 18 months, Haag contended that both parents' rights should be terminated. Both parents objected. Respondent's attorney observed that respondent was doing what he could and might be released by July 2009.

The court nevertheless authorized the termination petition. Smith did not appear for the termination hearing and has not appealed. With regard to respondent, the entirety of the petition's allegations was as follows:

> Mr. Mason has been in prison since the boys were removed. His earliest release date is July 2009 and he could be incarcerated until July 2016. During his current incarceration, Mr. Mason has been participating in weekly 12-step meetings and completed a Business Education Technology program. He is waiting to be enrolled in parenting classes.

The petition sought termination of respondent's rights on the following grounds listed in MCL 712A.19b(3):

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds . . . :
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
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> * * *
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> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no

reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

At the February 3, 2009, termination hearing, respondent opposed termination because of his imminent release from prison. He requested a one-month adjournment until March 2009 to ascertain whether the parole board would release him the following July. The children's attorney supported respondent's request to adjourn to assess the situation since the children were living with respondent's family. Respondent had arranged a construction job with his brother and housing with his mother in anticipation of his release from prison.

Only Haag and respondent testified at the hearing. Haag candidly admitted that he had never spoken with respondent. Haag stated that respondent had not provided verification of completion of any programs required by the service plan. In particular, respondent had not completed a substance-abuse program or received an evaluation by a psychologist. Haag opined that termination was in the children's best interests because, even if respondent were to be released from prison in July 2009, it would take him another six months to comply with the service plan and his parole conditions.

Respondent testified regarding the classes he completed in prison. He was not using drugs or alcohol, as a drug test confirmed. He stated that a prisoner could not request a psychological evaluation. He did paid work while in prison. With regard to his criminal past, he explained that a 1997 criminal sexual conduct conviction involved consensual sexual behavior with his 16-year-old girlfriend when he was 17. He also described brief jail sentences and probationary periods resulting from this and his other past offenses. Finally, respondent expressed his desire to care for his sons. He had employment with his brother waiting for him upon his release. He planned to live with his mother, who had a three-bedroom home with "substantial room for the boys."

The court nonetheless terminated respondent's parental rights on the basis of each of the grounds alleged. It faulted him because he had not personally cared for the children for at least the past two years. And his incarceration precluded him from taking advantage of services offered by the DHS. Even if he were to be released in July, the court concluded that he would need at least 6 months to comply with the service plan and bond with the children, requiring at least 11 more months in state-supervised care for the children after the termination hearing.

Respondent appealed as of right. The Court of Appeals affirmed in a memorandum opinion. *In re Mason*, unpublished memorandum opinion of the Court of Appeals, issued September 15, 2009 (Docket No. 290637).[2] On December 3, 2009, we granted oral argument to consider whether to grant leave to appeal or take other peremptory action.

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[2] Because it is relevant to the relief available in this case, we note that respondent was paroled on September 22, 2009, one week after the Court of Appeals issued its opinion.

II. STANDARD OF REVIEW

We review for clear error a trial court's factual findings as well as its ultimate determination that a statutory ground for termination of parental rights has been proved by clear and convincing evidence. MCR 3.977(J); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). " 'A finding is "clearly erroneous" [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.' " *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (citation omitted). We review de novo the interpretation and application of statutes and court rules. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

III. ANALYSIS

The state is not relieved of its duties to engage an absent parent merely because that parent is incarcerated. In this case, once again, the DHS's efforts focused exclusively on the custodial mother and essentially ignored the father. "Reasonable efforts to reunify the child and family must be made in *all* cases" except those involving aggravated circumstances not present in this case. MCL 712A.19a(2) (emphasis added). Here, because the DHS and the court failed to adhere to court rules and statutes, respondent was not afforded a meaningful and adequate opportunity to participate. Therefore, termination of his parental rights was premature.

A. THE RIGHT TO PARTICIPATE BY TELEPHONE UNDER MCR 2.004

MCR 2.004 requires the court and the petitioning party to arrange for telephonic communication with incarcer-

ated parents whose children are the subject of child protective actions. See MCR 2.004(A) to (C). The express purposes of the rule include ensuring "adequate notice . . . and . . . an opportunity to respond and to participate," in part by determining "how the incarcerated party can communicate with the court . . . during the pendency of the action, and whether the party needs special assistance for such communication, including participation in additional phone calls." MCR 2.004(E)(1) and (4). The court must consider "the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate." MCR 2.004(E)(5). Significantly, MCR 2.004(F) provides:

> A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule. This provision shall not apply if the incarcerated party actually does participate in a telephone call . . . .

Although the court here arranged for respondent to participate in the July 24, 2007, pretrial hearing, no one informed him of his right to continue to participate in the proceedings with facilitation by the court.[3] The court and the DHS were well aware that respondent was in prison and thus needed "special assistance"[4] to participate in "future proceedings."[5] Yet the court arranged for respondent's phone participation in only one additional proceeding before the termination hearing—the December 3, 2008, permanency planning hearing.

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[3] Even respondent's appointed attorney appears not to have recognized the court's duty to facilitate respondent's participation by phone. The attorney reported merely informing respondent by letter that "perhaps" respondent's participation could be arranged.

[4] MCR 2.004(E)(4).

[5] MCR 2.004(E)(5).

When a respondent is not "offered the opportunity to participate in the proceedings," MCR 2.004(F) prohibits the court from granting the moving party's request for relief unless the respondent actually participated in "a telephone call." The DHS argues that the protection of MCR 2.004(F) is not applicable here because respondent participated in two telephone calls—at the July 24, 2007, pretrial hearing and the December 3, 2008, permanency planning hearing. We disagree.

A child protective action such as this consists of a series of proceedings, including a preliminary hearing at which the court may authorize a petition for removal of a child from his home, MCL 712A.13a(2), review hearings to evaluate the child's and parents' progress, MCL 712A.19, permanency planning hearings, MCL 712A.19a, and, in some instances, a termination hearing, MCL 712A.19b.[6] Each proceeding generally involves different issues and decisions by the court. Thus, to comply with MCR 2.004, the moving party and the court must offer the parent "the opportunity to participate in" each proceeding in a child protective action. For this reason, participation through "a telephone call" during one proceeding will not suffice to allow the court to enter an order at another proceeding for which the parent was not offered the opportunity to participate.

This case illustrates the point well. Although respondent participated by phone in the July 24, 2007, pretrial hearing, he was not offered the opportunity to participate in the review or permanency planning hearings

[6] Child protective actions, in general, are also divided into two "phases": the adjudicative phase, during which the trial court determines whether it "may exercise jurisdiction over the child," and the dispositional phase, during which the court "determines what action, if any, will be taken on behalf of the child." *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993).

held from August 2007 through July 2008. By the time respondent participated in the December 3, 2008, permanency planning hearing—16 months after he last participated—the court and the DHS were ready to move on to the termination hearing. Thus, respondent missed the crucial, year-long review period during which the court was called upon to evaluate the parents' efforts and decide whether reunification of the children with their parents could be achieved. Indeed, respondent was practically excluded from almost every element of the review process, as is further detailed below.

In sum, respondent was not "offered the opportunity to participate in the proceedings," MCR 2.004(F), by the moving party and the court as required by MCR 2.004(B).[7] Further, he did not actually participate in a telephone call relevant to each proceeding. Although he participated in two calls before the termination hearing, neither call took place during the review period when the DHS made efforts to reunify the children with their parents. Accordingly, the court was precluded from granting the relief requested by the moving party at the close of the review period—specifically, the DHS's request for termination of respondent's parental rights. Respondent's absence affected both his ability to participate and the information available for the court's consideration. Accordingly, as will be discussed, the circuit court's resultant findings in relation to the statutory grounds for termination were clearly erroneous.

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[7] MCR 2.004(B) imposes several specific duties, including the moving party's duties to notify the respondent, contact the department of corrections, and notify the court that telephonic participation is required. The court must then order the department to make arrangements for the call.

B. STATUTORY RIGHTS TO PARTICIPATE IN THE DHS SERVICE PLAN

The failures of the DHS and the court also directly violated their statutory duties. If the court orders placement of a child outside the child's home, the DHS must prepare an initial services plan within 30 days of the child's placement. MCL 712A.13a(8)(a). Before the court enters an order of disposition, the DHS must prepare a case service plan, which must include, among other things, a "[s]chedule of services to be provided to the parent, child, and if the child is to be placed in foster care, the foster parent, to facilitate the child's return to his or her home or to facilitate the child's permanent placement." MCL 712A.18f(3)(d). "If a child continues in placement outside of the child's home, the case service plan shall be updated and revised at 90-day intervals . . . ." MCL 712A.18f(5). Further, at each review hearing, the court is required to consider, among other things, "[c]ompliance with the case service plan with respect to services provided or offered to the child and the child's parent, . . . whether the parent . . . has complied with and benefited from those services," and "[t]he extent to which the parent complied with each provision of the case service plan, prior court orders, and an agreement between the parent and the agency." MCL 712A.19(6)(a) and (c). The court may then modify the case service plan, including by "[p]rescribing additional services" and "[p]rescribing additional actions to be taken by the parent . . . to rectify the conditions that caused the child to be placed in foster care or to remain in foster care." MCL 712A.19(7)(a) and (b).

The only documented service plan in this case listed respondent's obligations and stated that the DHS "worker will refer the family to the appropriate agencies in order to meet the goals" of the service plan. It is unclear, however, whether the DHS sent a copy of the

service plan to respondent; although a copy appears in the circuit court record, the section reserved for respondent's signature is notably blank. In any event, neither Haag nor the court ever facilitated respondent's access to services and agencies or discussed updating the plan. Although Haag testified that as a matter of general policy the DHS "tr[ies] to make contact with the prison social worker that might be able to help [a respondent] fulfill some of [the service plan requirements] and get into the services in the prison," Haag did not assert that he complied with this policy here. At a minimum, there is no evidence that Haag spoke to a prison social worker about respondent's need for services. Indeed, Haag admitted that respondent could not comply with the service plan as written while in prison, but provided no explanation for his failure to update the plan or to contact respondent,[8] particularly after Smith's noncom-

[8] Failures such as these by the caseworker do not only prejudice parents' rights. The DHS's deficiencies in these regards can be the cause of millions of dollars in federal funding losses as a penalty for failing to meet state child welfare requirements addressed by the United States Department of Health and Human Services Child and Family Services review (CFSR) and review under subchapter IV, part E, of the United States Social Security Act, 42 USC 670 *et seq.*, which provides significant funds for Michigan's foster care system. See 42 USC 674(d) (providing a system for reducing a state's funding as a penalty for noncompliance with program requirements). Indeed, on March 2, 2010, the Children's Bureau of the federal Administration for Children and Families informed the DHS that Michigan's noncompliance with federal requirements will result in an estimated minimum funding loss of $2,836,189 for fiscal year 2009 if the failures are not remedied through a program improvement plan. See the letter from Joseph L. Bock, Acting Associate Commissioner, Children's Bureau, Administration for Children and Families, United States Department of Health and Human Services, to Ismael Ahmed, Director, Michigan Department of Human Services (March 2, 2010) (on file with the author and the recipient); the memorandum from Kelly Howard, Michigan State Court Administrative Office, regarding the 2009 CFSR final report (March 18, 2010), available at <http://courts.michigan.gov/scao/services/CWS/CFSR-Memo03-10.pdf> (accessed May 25, 2010). As is reflected in the current DHS Childrens

pliance with the plan became evident. Haag first reported Smith's noncompliance and the DHS's intent to seek termination at the December 3, 2008, permanency planning hearing. Yet the DHS and the court still failed to address respondent's right to services or updating the service plan. Respondent's parental rights were terminated a mere two months later, on February 3, 2009.

Under these circumstances, the circuit court was required to consider MCL 712A.19a(6), which provides:

> If the court determines at a permanency planning hearing that a child should not be returned to his or her parent, the court may order the agency to initiate proceedings to terminate parental rights. Except as otherwise provided in this subsection, if the child has been in foster care under the responsibility of the state for 15 of the most recent 22 months, the court shall order the agency to initiate proceedings to terminate parental rights. *The court*

Foster Care Manual (also called the "FOM"): "Casework service **requires** the engagement of the family in development of the service plan. This engagement must include an open conversation between all parents/guardians and the [foster care] worker . . . ." FOM 722-6, p 1 (emphasis in original). The FOM is publicly available at <http://www.mfia.state.mi.us/olmweb/ex/fom/fom.pdf> (accessed May 25, 2010). Indeed, the

> family is to be extensively involved in case planning and have a clear understanding of all the conditions which must be met prior to the child's return home, how these relate to the petition necessitating removal, and what the supervising agency will do to help the family meet these conditions. [*Id.* at 1-2.]

Further, "[i]f the parents are not involved in developing or refuse to sign the case plan, the reasons must be documented . . . ." *Id.* at 2. "The [foster care] worker must also identify and document additional actions needed to secure the parent's participation in service planning and compliance with the case plan." *Id.* Haag clearly did not take any of these actions here, and respondent's signature is conspicuously absent from the service plan.

> *is not required to order the agency to initiate proceedings to terminate parental rights if 1 or more of the following apply*:
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> * * *
>
> (c) The state has not provided the child's family, consistent with the time period in the case service plan, with the services the state considers necessary for the child's safe return to his or her home, if reasonable efforts are required. [Emphasis added.]

Although the initial conditions of MCL 712A.19a(6) were met—the children could not yet be returned to respondent and they had been placed out of their home for more than 15 months—the court and the DHS failed to consider that respondent had *never* been evaluated as a future placement or provided with services. Rather, the DHS had focused on its attempts to reunify the children with Smith and, in doing so, disregarded respondent's statutory right to be provided services and, as a result, extended the time it would take him to comply with the service plan upon his release from prison—which was potentially imminent at the time of the termination hearing. The state failed to involve or evaluate respondent, but then terminated his rights, in part because of his failure to comply with the service plan,[9] while giving him no opportunity to comply in the future. This constituted clear error. As we observed in *In re Rood*, a court may not terminate parental rights on the basis of "circumstances and missing information directly attributable to respondent's lack of meaningful

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[9] MCL 712A.19a(5) provides for the court's consideration of a parent's failure to comply with a service plan as follows:

> [T]he court shall view the failure of the parent to substantially comply with the terms and conditions of the case service plan prepared under [MCL 712A.18f] as evidence that return of the child to his or her parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being.

prior participation." *In re Rood*, 483 Mich 73, 119; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.); see also *id.* at 127 (YOUNG, J., concurring in part) (stating that, as a result of the respondent's inability to participate, "there is a 'hole' in the evidence on which the trial court based its termination decision").

C. INCARCERATION ALONE IS NOT GROUNDS FOR TERMINATION

As the earlier discussion suggests, the state's failures in this case (which are all too common in this type of case) appear to stem primarily from the fact of respondent's incarceration. Not only did the state fail to properly include him in the proceedings, but the circuit court's ultimate decision in the case was replete with clear factual errors and errors of law that essentially resulted in the termination of respondent's parental rights solely because of his incarceration.[10] The mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination.

MCL 712A.19b(3)(h) authorizes termination only if *each* of three conditions is met:

> The parent is imprisoned for such a period that [1] the child will be deprived of a normal home for a period exceeding 2 years, *and* [2] the parent has not provided for the child's proper care and custody, *and* [3] there is no

[10] Notably, the termination petition practically confirms that the state was focused almost exclusively on the mere fact of respondent's incarceration. Two of the scant four sentences in the petition containing allegations against him state: "Mr. Mason has been in prison since the boys were removed. His earliest release date is July 2009 and he could be incarcerated until July 2016." The other two sentences do not establish grounds for termination; to the contrary, they appear to weigh in respondent's favor: "During his current incarceration, Mr. Mason has been participating in weekly 12-step meetings and completed a Business Education Technology program. He is waiting to be enrolled in parenting classes."

> reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age. [Emphasis added.]

The combination of the first two criteria—that a parent's imprisonment deprives a child of a normal home for more than two years *and* the parent has not provided for proper care and custody—permits a parent to provide for a child's care and custody *although the parent is in prison*; he need not *personally* care for the child.[11] The third necessary condition is forward-looking; it asks whether a parent "will be able to" provide proper care and custody within a reasonable time. Thus, a parent's past failure to provide care because of his incarceration also is not decisive.[12] The court here failed to consider these provisions separately in at least three regards.

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[11] Michigan traditionally permits a parent to achieve proper care and custody through placement with a relative. *In re Taurus F*, 415 Mich 512, 535; 330 NW2d 33 (1982) (opinion by WILLIAMS, J.) (equally divided decision) ("[I]f a mother gives custody to a sister, that can be 'proper custody'."); *In re Maria S Weldon*, 397 Mich 225, 296; 244 NW2d 827 (1976) (opinion by LEVIN, J.) ("Some parents, . . . because of illness, incarceration, employment or other reason, entrust the care of their children for extended periods of time to others. This they may do without interference by the state as long as the child is adequately cared for."), overruled in part on other grounds by *Bowie v Arder*, 441 Mich 23, 47; 490 NW2d 568 (1992); *In re Curry*, 113 Mich App 821, 823-826; 318 NW2d 567 (1982) (observing that incarcerated parents may achieve proper custody by placing a child with relatives); *In re Carlene Ward*, 104 Mich App 354, 360; 304 NW2d 844 (1981) (holding that a child "who was placed by her natural mother in the custody of a relative who properly cared for her, is not a minor 'otherwise without proper custody or guardianship' and thus she was not subject to the jurisdiction of the probate court" under MCL 712A.2). Michigan's Estates and Protected Individuals Code includes an extensive statutory scheme designed to establish guardians for minors—including guardians who are relatives—by appointment of the court *or by appointment of the minor's parents*. MCL 700.5201 *et seq*.

[12] The Court of Appeals consistently adheres to this approach, having stated that the trial court must consider "whether the imprisonment will deprive a child of a normal home for two years in the future, and not whether past incarceration has already deprived the child of a normal

First, as discussed in part earlier, the court failed to account for the fact that the DHS did not seek termination of respondent's or Smith's parental rights until December 3, 2008. At that time, respondent anticipated being paroled in less than two years; indeed, he was paroled less than one year later, on September 22, 2009.

Second, on a related point, the court clearly erred by concluding, on the basis of Haag's largely unsupported opinion, that it would take at least six months for respondent to be ready to care for his children after he was released from prison. As noted, throughout the proceedings the DHS and the court failed to evaluate respondent's parenting skills or facilitate his access to services.[13] Accordingly, as previously discussed, the court's conclusion that respondent could not care for his children within a reasonable time in the future was improperly rooted in "circumstances and missing information directly attributable to respondent's lack of meaningful prior participation." *Rood*, 483 Mich at 119 (opinion by CORRIGAN, J.); see also *id.* at 127 (YOUNG, J., concurring in part). Moreover, respondent *did* engage in activities while in prison that amounted to compli-

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home." *In re Neal*, 163 Mich App 522, 527; 414 NW2d 916 (1987). See also *In re Perry*, 193 Mich App 648, 650; 484 NW2d 768 (1992), quoting *Neal*, 163 Mich App at 527, on this point.

[13] The state also arguably contributed to respondent's lack of a current bond with his children; although the children had previously visited him weekly in jail, on the DHS's recommendation the court prohibited even phone contact with them when he was imprisoned again. The court may have reasonably foreclosed further in-person visits given that, when he was reimprisoned, respondent was relocated to a facility in the Upper Peninsula. But the failure to permit phone contact absent proof that contact would harm the children appears to have violated MCL 712A.13a(11), which establishes that, until a petition for termination is filed, the court must permit "the juvenile's parent to have frequent parenting time" unless visits, "even if supervised, may be harmful to the juvenile . . . ."

ance with elements of the service plan.[14] In Haag's own words at the December 3, 2008, permanency planning hearing, "[W]e do have some of what's expected of him." Respondent also remained in contact with his children through cards and arranged for a home and legal income upon his release from prison. Under these circumstances, the court erred when it accepted Haag's opinion at the termination hearing that respondent had utterly failed to comply with the service plan—a plan that he may not have received in the first place—and had no hope of complying within a reasonable time given the children's ages.[15]

Third, the court never considered whether respondent could fulfill his duty to provide proper care and custody in the future by voluntarily granting legal custody to his relatives during his remaining term of incarceration. At Smith's request, the children had already been successfully placed with respondent's family—presumably the very people with whom respondent would have voluntarily placed them had the DHS

[14] It is impossible to tell from the record before us whether respondent was purposefully acting to comply with the service plan, sought out services simply for his own edification, or acted on the advice of counsel to improve his prospects of regaining custody of his children.

[15] Moreover, the court made several factual errors when it considered the length of the child protective proceedings. The children had been in state-supervised care ("in care") for about 20 months at the time of the termination hearing—from June 2007 through February 2009. For most of that time, they were living with respondent's family. Yet the court stated that, even if respondent were to be released from prison in July 2009—five months after the termination hearing—and then it took six months for him to comply with the service plan, the boys would have been in care for a total of four years. Actually, under this scenario the boys would have been in care for 31 months—just over $2\frac{1}{2}$ years. The court further stated that, at the time of the termination hearing, C. was three years old and J. was almost six years old. Actually, C., who had been removed from his mother's care when he was six months old, was two years old and J. was four years old.

not already taken custody of them by the time respondent was notified of Smith's neglect. This being the case, it was unnecessary for respondent to make ongoing arrangements with the relatives that would permit him to preserve his rights and remain in contact with his sons.[16]

Indeed, a child's placement with relatives weighs against termination under MCL 712A.19a(6)(a), which expressly establishes that, although grounds allowing the initiation of termination proceedings are present, initiation of termination proceedings is not required when the children are "being cared for by relatives." Thus the boys' placement with respondent's family was an explicit factor to consider in determining whether termination was in the children's best interests, yet placement with relatives was never considered in this regard.

Finally, we turn to the substance of the other grounds for termination. Under MCL 712A.19b(3)(c)(*i*), the DHS must show by clear and convincing evidence that "182 or more days have elapsed since the issuance of an initial dispositional order," that the "conditions that led to the adjudication continue to exist," and that "there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." Under MCL 712A.19b(3)(g), the DHS must show that "[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." As under MCL 712A.19b(3)(h), each of these grounds requires clear and convincing proof that the parent has not provided proper care and custody and will not be able to provide

[16] It is troubling that even respondent's lawyer did not raise this point.

proper care and custody within a reasonable time. As such, these additional grounds are factually repetitive and wholly encompassed by MCL 712A.19b(3)(h). Because the court erred in evaluating whether respondent could care for his children in the future, either personally or through his relatives, termination under MCL 712A.19b(3)(c)(*i*) or (g) was also premature.

The only other ground alleged for termination was that in MCL 712A.19b(3)(j): "There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." Termination on this ground was clearly erroneous because no evidence showed that the children would be harmed if they lived with respondent upon his release. Significantly, just as incarceration alone does not constitute grounds for termination, a criminal history alone does not justify termination. Rather, termination solely because of a parent's past violence or crime is justified only under certain enumerated circumstances, including when the parent created an unreasonable risk of serious abuse or death of a child, if the parent was convicted of felony assault resulting in the injury of one of his own children, or if the parent committed murder, attempted murder, or voluntary manslaughter of one of his own children. MCL 712A.19a(2); MCL 722.638(1) and (2). The DHS did not present any evidence suggesting that respondent had ever harmed a child. Indeed, the errors in this case are particularly troubling given that respondent's criminal history consisted largely of short jail stints for comparatively minor offenses. The record shows that he supported his family before his imprisonment and no evaluation was ever conducted to gauge whether he was likely to offend again.

In sum, the circuit court clearly erred both by failing to correctly apply the text of the relevant statutes and, as did the circuit court in *Rood*, by basing its factual findings on a record that was largely undeveloped because of the state's failures to involve respondent. We do not reach the question whether reversal could be independently required under a due process analysis. Rather, consistent with the majority position in *Rood*, under the circumstances of this case it is enough that the court violated several statutes and court rules. Most significantly, because the court engaged in fact-finding despite the resulting holes in the record, it relieved the DHS of its burden to prove by clear and convincing evidence that grounds for termination were present. MCL 712A.19b(3); *Rood*, 483 Mich at 119 (opinion by CORRIGAN, J.) (noting that a court may not terminate parental rights on the basis of "circumstances and missing information directly attributable to respondent's lack of meaningful prior participation"); *id.* at 123-124 (CAVANAGH, J., concurring in part) (stating that "the trial court clearly erred by determining that the DHS had shown that the statutory grounds for termination were established" when the court and the DHS failed to "fulfill their statutory duties and make reasonable efforts to reunite respondent and his child"); *id.* at 126-127 (YOUNG, J., concurring in part) ("The failure of the trial court and the DHS to provide adequate notice to respondent was the root of the trial court's erroneous ruling that petitioner had presented clear and convincing evidence in support of the grounds cited in the termination petition . . . . [T]here is a 'hole' in the evidence on which the trial court based its termination decision.").

IV. RESPONSE TO JUSTICE MARKMAN

Justice MARKMAN aptly observes that respondent has never been an ideal parent. But this fact does not

disentitle respondent to the rights afforded him as a parent in a proceeding involving his children's welfare. Centrally, the majority's view differs from that of Justice MARKMAN in that, as we have explained, we cannot conclude that the circuit court and the DHS afforded respondent the rights to which he was entitled under the terms of the relevant statutes and court rules. Thus, the DHS was effectively relieved of its duty to properly prove by clear and convincing evidence that a statutory ground for termination was satisfied.

Justice MARKMAN's result is also premised on his belief that "nobody but respondent can be blamed for the fact that he was in prison during the pendency of these proceedings." As we have explained, and as Justice MARKMAN professes to agree, a parent's rights to his child may not be terminated merely because he is imprisoned and thus unable to personally care for his children. Further, the record belies Justice MARKMAN's claims that respondent never supported his children and "did virtually nothing to demonstrate that he was willing or able to take responsibility for [their] care and custody . . . ." Although we acknowledge respondent's parenting failures, testimony also established that he shared in J.'s care and supported the family by doing construction work before he was imprisoned. Moreover, he arranged for work and housing in anticipation of his parole.

Most significantly, Justice MARKMAN's interpretations of the relevant statutes and court rules appear to endorse the all too common decisions of the DHS and the circuit courts to cut corners by ignoring the mandates of statutes and court rules when a parent is in prison. Justice MARKMAN posits, for example, that a couple of phone calls between respondent and the court—or the letter from respondent's attorney telling

him that "perhaps" he could participate further in the proceedings—satisfied the requirements of MCR 2.004 that an imprisoned parent have the "opportunity to respond and to participate" and "communicate with the court . . . during the pendency of the action," including by participating in "additional phone calls . . . ." MCR 2.004(E)(1) and (4). Justice MARKMAN further credits the statement of DHS worker Haag that it would take respondent at least six months after his parole to learn to care for his children; yet Haag admitted that no one from the DHS ever spoke to respondent or evaluated his parenting skills.

The overriding error in this case is the failure—of the court, the DHS, and indeed respondent's attorney—to acknowledge and honor respondent's right to participate. Although respondent must take responsibility for his own past failures, the court's largely uninformed presumption of his unfitness is not a sufficient basis for termination. The court may again conclude on remand, after respondent is given a full opportunity to participate, that termination is appropriate. But it must do so by making proper findings of fact based on respondent's participation in the proceedings.

Finally, there is no reason that the children's lives must be disrupted during the proceedings on remand. Justice MARKMAN fears a "potentially catastrophic" delay in fulfilling the children's need for "a safe, secure, and stable home . . . ." But the children will continue to live with their aunt and uncle—both tomorrow and indefinitely—while respondent works with the court and the DHS to establish his ability to safely parent them. If and when the court so orders, he may begin visiting with the children. Significantly, the aunt and uncle may even retain primary custody through a guardianship if the court concludes that

the children should not be returned to respondent but an ongoing relationship with him—rather than termination—is in the children's best interests. See MCL 712A.19a(7)(c). This option adds significance to the court's original failure to consider MCL 712A.19a(6)(a), which establishes that initiation of termination proceedings is not required when the children are "being cared for by relatives" although a parent is not personally able to be a primary caregiver for the children.

V. CONCLUSION

For these reasons, the court clearly erred by terminating respondent's rights under each of the grounds alleged. Because of the state's failures, termination was premature. In the words of the children's lawyer at the close of the termination hearing, respondent was "trying to fulfill an agreement that never really made any accommodations to the fact that he was hamstrung from the beginning [in] trying to get things in order so that he can one day be a father to these children." Neither the court nor the DHS properly facilitated respondent's right to participate in the proceedings, ensured that he had a meaningful opportunity to comply with a case service plan, or considered the effect of the children's placement with his family. Accordingly, we reverse the judgment of the Court of Appeals, which affirmed the circuit court's order terminating respondent's parental rights, and remand this case to the circuit court for further proceedings consistent with this opinion.

We do not retain jurisdiction.

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

MARKMAN, J. (*dissenting).* I respectfully dissent from this Court's opinion reversing the Court of Appeals' affirmance of the order terminating respondent-father's parental rights to his two- and four-year-old sons. I simply cannot support the majority's conclusion that the trial court clearly erred by terminating respondent's parental rights. In addition, given that respondent received *all* the process to which he was *entitled* under the law, I find no "due process" violation in the fact that the majority is able to identify ways in which he *could* have been given still more process. The majority, quoting the children's lawyer-guardian ad litem, asserts that respondent was " 'hamstrung from the beginning [in] trying to get things in order so that he [could] one day be a father to these children.' " However, the majority disregards two quite significant points. First, to the extent that respondent was "hamstrung," this was of his own making—nobody but respondent can be blamed for the fact that he was in prison during the pendency of these proceedings. Second, there is no evidence that respondent did *anything* to provide for his children while they were living with their unfit mother, with foster parents, or with their paternal aunt and uncle.[1] Instead, respondent pleaded 'no contest' to the removal petition that alleged that

[1] In response to the majority's assertion that respondent "supported" his family *before* he was imprisoned, I must note that respondent testified that, before he was imprisoned, he and his "family" lived in his mother's house, his girlfriend's grandmother's house, and a house owned by his brother. In light of this testimony, it is not entirely clear who supported respondent and his "family"—respondent or respondent's mother, his girlfriend's grandmother, and his brother. Respondent also has a third child (who was not the subject of the termination proceedings at issue here), and there is no evidence in the record to suggest that respondent has done anything to provide for *this* child either, before or after his imprisonment. Although respondent did at one point write letters to one child while he was in prison, he admitted that he stopped doing even that. To say the least, I do not believe that the trial court clearly erred in its

"Mr. Mason has failed to provide for the children physically, emotionally and financially." Indeed, although respondent knew that the children's mother was drinking again even before the court did, he still did nothing to try to protect his children from the precarious situation in which this placed his children. In addition, when he knew that his children were being removed from their mother, he did nothing to prevent them from being placed in foster care even though he had relatives who were willing and able to care for the children.

Despite respondent's repeated failures in these regards, the majority reverses the judgment of the Court of Appeals, which affirmed the trial court's termination of his parental rights, on the basis that the Department of Human Services (DHS) and the trial court did not do enough to help respondent become a better parent. I believe that the majority has it exactly backwards—respondent is the one who did not do enough to become a better parent. He did virtually nothing to demonstrate that he was willing or able to take responsibility for the care and custody of these children. It is potentially catastrophic for these children that their interest in a safe, secure, and stable home must again be placed in abeyance while respondent is afforded yet another opportunity to become a minimally acceptable parent.[2]

Respondent has been incarcerated since 2006, and although he has now been released on parole, he was

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conclusion that the fact that respondent allegedly "arranged for work and housing in anticipation of his parole" was too little, too late.

[2] The majority contends that "there is no reason that the children's lives must be disrupted during the proceedings on remand." Unlike the majority, I believe that not knowing where they may be living *tomorrow* (maybe with their father, maybe with their aunt and uncle, or maybe with new foster parents) very much constitutes a "disruption" in young children's lives.

still incarcerated both when the trial court terminated his parental rights and when the Court of Appeals affirmed that decision. Respondent has been convicted of criminal sexual conduct, failure to report as a registered sex offender, larceny, and drunk driving (twice). Respondent does not deny that the children's mother, who was caring for the children before the DHS removed them, was an unfit parent. Indeed, respondent admits that "he knew that the mother had fallen off the wagon before the court knew" because "she had called him [and] told him she was drinking again"; yet he did absolutely nothing to protect his children from this situation. Respondent's then two-year-old child was twice found by the police wandering around outside the home completely unsupervised. On one of these occasions, the mother was found inside asleep. She had inadequate housing, substance-abuse issues, problems with depression, no job, and an admitted inability to handle her children. She has been arrested for drunk driving twice and, as a result, has spent time in jail. She also refused to stop smoking around the children even though her smoking caused them to suffer severe asthma attacks, and both the DHS and the children's doctor had counseled her not to smoke around them.

The mother has not appealed her own loss of parental rights, and the children are currently being cared for by their paternal aunt and uncle. At the time of termination, the children had already been living with foster parents and their paternal aunt and uncle for 18 months and all the trial court knew about respondent's situation was that he would be eligible for parole in 5 months. The trial court obviously did not know that respondent would, in fact, be paroled in 5 months. There was also testimony from the DHS that it would take at least 6 months after parole was granted for respondent to demonstrate that he was capable of

caring for the children.[3] So that would have been at least another 11 months of the children living in limbo.[4]

The majority concludes that the trial court clearly erred by terminating respondent's parental rights. " 'A finding is "clearly erroneous" [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.' " *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.) (citation omitted). MCL 712A.19b(3)(h) permits termination when

> [t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

Those conditions were clearly satisfied here: the children had already been deprived of a normal home

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[3] Although the majority is critical of me for relying on this testimony, I think that it is a matter of common sense that it would take significant time for an imprisoned father, with respondent's background, who has *never* had the sole responsibility of taking care of young children to demonstrate that he is capable of doing so.

[4] The majority, in my judgment, mischaracterizes the trial court's ruling as an "uninformed presumption of [respondent's] unfitness . . . ." There had been at least nine proceedings preceding the termination of respondent's parental rights. Respondent was represented by counsel, and the trial court inquired about respondent, at *every single one* of these proceedings. Therefore, if the trial court was "uninformed," this is respondent's own fault. Further, it does not appear that the trial court was "uninformed" about anything because respondent has certainly not done anything to more fully inform *this* Court concerning his ability to properly care for these children. Moreover, the trial court did not "presume[e]" that respondent was an unfit parent. To the contrary, the trial court reached this conclusion only after being involved with this case for more than $2\frac{1}{2}$ years, conducting nine proceedings, listening to the testimonies of the DHS and respondent, and reviewing and applying the pertinent laws.

for 18 months and, as a result of respondent's incarceration, would have been deprived of a normal home for at least another 11 months. Therefore, respondent's incarceration would have led to the children being deprived of a normal home for well over 2 years.[5] In addition, there was testimony that there was no reasonable expectation that respondent would be able to provide proper care within a reasonable time given the ages of the children.

Respondent had been in prison for more than two years (almost three years by the time he was released), and he had done absolutely nothing to provide for the children's care. They had to be removed from their mother's care because she was unable to properly care for them. They were then placed in foster care until their mother indicated that she would like a relative to care for the children. Some time thereafter, the children were placed with their paternal aunt and uncle. Although respondent's relatives are currently caring for the children, respondent had absolutely nothing to do with this arrangement.[6] As he has been since his youngest was born, he was 'missing in action' in the lives of these children as they were shuttled from one home to another. In addition, there is no evidence that

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[5] Although I agree with the majority that MCL 712A.19b(3)(h) does have a "forward-looking" component to it, if the majority interprets this to mean that courts must ignore the amount of time a respondent has already spent imprisoned, I disagree. Rather, MCL 712A.19b(3)(h) requires us to examine both a respondent's past and future ability to provide proper care and custody of the children, including the amount of time he has already spent imprisoned and the amount of time he will spend imprisoned in the future.

[6] Respondent should be treated no differently from an incarcerated father who has *no* relatives who could provide his children with proper care. Once again, respondent himself did nothing at any juncture to ensure that proper care was provided to these children, despite the fact that he clearly could have.

respondent will be able to properly care for these children within a reasonable time. These children are very young, and respondent has been in prison since before the youngest child was even born. The foster care worker testified that it would take at least 6 months after being paroled for respondent to establish that he could properly care for the children; by the time the trial court terminated his parental rights, the children had already been living with foster parents and their paternal aunt and uncle for 18 months. These children need stability in their lives and they need it now; they cannot sit around indefinitely and wait to see if respondent, after interminable grants of supposed "due process" nowhere required in the law, can somehow become a responsible parent.[7] For these reasons, I simply cannot conclude that the trial court here clearly erred by terminating respondent's parental rights.

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[7] Even if the DHS had "facilitated respondent's access to services," as the majority contends the DHS should have done, it would still have taken respondent an uncertain amount of time after being paroled to demonstrate that he was capable of staying out of trouble outside of prison and capable of maintaining employment and suitable housing and caring for these children. Furthermore, MCL 712A.19a(6)(c) provides that if the state has not provided adequate services, "[t]he court is *not required to* order the agency to initiate proceedings to terminate parental rights . . . ." (Emphasis added.) Contrary to the majority's contention, the language "not required to" is not synonymous with "shall not." Indeed, given that a lack of adequate services does "not require[]" the court to terminate parental rights, a lack of adequate services also would not "not require" the court to maintain parental rights. The same is true of MCL 712A.19a(6)(a), which provides that the court is "not required to" order the agency to initiate termination proceedings if the children are being cared for by relatives. Finally, in response to the majority's suggestion that respondent may never have received a copy of the parent-agency agreement, I must note that, at the termination hearing, respondent's counsel asked respondent questions pertaining to his compliance with this agreement and respondent answered these questions. Neither respondent nor his counsel said anything that suggested that respondent had not received a copy of the agreement.

In *Rood*, the lead opinion concluded that the respondent-father's due process rights were violated when his parental rights were terminated even though he had received no notice of the ongoing proceedings. In the instant case, respondent *himself* has not raised any due process issue, and this Court does not normally address issues that were not raised before the lower courts. *Naccarato v Grob*, 384 Mich 248, 255; 180 NW2d 788 (1970). However, because the majority gratuitously raises and addresses this issue, I will address it as well. Because respondent was incarcerated, he was not present at all the proceedings, but his *counsel was always present on his behalf*. Respondent's counsel indicated that although he wrote to respondent and notified him of the proceedings and of the fact that respondent could participate by way of speakerphone, respondent did not initially respond. That is, contrary to the majority's repeated contention that respondent was not informed of his right to participate in the hearings by telephone, respondent's attorney *did*, in fact, inform respondent of this right. In addition, when asked whether he had had any contact with respondent, a foster care worker testified, "We send copies of the requirements up and try to make contact with the prison social worker that might be able to help them fulfill some of this and get into the services in the prison." Finally, respondent *did* also, in fact, participate by way of speakerphone during at least two of the proceedings, and he did physically attend the termination hearing. Therefore, unlike the respondent in *Rood*, respondent was notified of the ongoing procedures and was represented by counsel at every one of these proceedings. Thus, contrary to the majority's contention, this case is significantly distinguishable from *Rood*.

That is, unlike the respondent in *Rood*, respondent here was fully afforded due process. Yet the majority does not believe that the due process he received was enough.

One can always identify more process that a person can receive under these circumstances or in the criminal justice context. However, all that is required by the law is *due* process—the process that one is entitled to under the law—and that is exactly what respondent here received. Respondent received notice of the ongoing proceedings, he received an attorney who represented him at each of the proceedings, and he received an opportunity to participate in each of these proceedings. Given that respondent received *all* the process to which he was entitled under the law, I find no due process violation.[8]

MCR 2.004 provides, in pertinent part:

> (A) This rule applies to
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> * * *
>
> (2) . . . actions involving . . . the termination of parental rights, in which a party is incarcerated under the jurisdiction of the Department of Corrections.

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[8] There is no support in this dissent for the majority's assertion that, because respondent was not an ideal parent, I believe he is "disentitle[d]" to "the rights afforded him as a parent in a proceeding involving his children's welfare." Respondent obviously was entitled to the rights afforded to him under the law, as would be any other person. The majority also asserts that I am improperly taking into consideration respondent's imprisonment. Apart from the fact that the law itself takes into consideration whether "[t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years," MCL 712A.19b(3)(h), it is the *majority* who seems most preoccupied with respondent's incarceration, by excusing and rationalizing conduct that would never be viewed as acceptable in the case of a parent who is not incarcerated. If respondent had not been imprisoned, his disregard for the welfare of his children, his lack of diligence in securing for them a stable home, his toleration of an unacceptable home environment, and his nearly total dereliction of ordinary parental duties would almost certainly be seen as contrary to the best interests of these children and sufficient to justify the trial court's order terminating his parental rights. Although the majority is certainly correct that an imprisoned parent is entitled to equal rights under the law, he is not entitled to special, and more favorable, consideration on account of this status.

(B) The party seeking an order regarding a minor child shall

* * *

(3) file with the court the petition or motion seeking an order regarding the minor child, stating that a party is incarcerated and providing the party's prison number and location; the caption of the petition or motion shall state that a telephonic hearing is required by this rule.

(C) When all the requirements of subrule (B) have been accomplished to the court's satisfaction, the court shall issue an order requesting the department, or the facility where the party is located if it is not a department facility, to allow that party to participate with the court or its designee by way of a noncollect and unmonitored telephone call in a hearing or conference, including a friend of the court adjudicative hearing or meeting. The order shall include the date and time for the hearing, and the prisoner's name and prison identification number, and shall be served by the court upon the parties and the warden or supervisor of the facility where the incarcerated party resides.

* * *

(E) The purpose of the telephone call described in this rule is to determine

(1) whether the incarcerated party has received adequate notice of the proceedings and has had an opportunity to respond and to participate,

(2) whether counsel is necessary in matters allowing for the appointment of counsel to assure that the incarcerated party's access to the court is protected,

(3) whether the incarcerated party is capable of self-representation, if that is the party's choice,

(4) how the incarcerated party can communicate with the court or the friend of the court during the pendency of

> the action, and whether the party needs special assistance for such communication, including participation in additional telephone calls, and
>
> (5) the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate.
>
> (F) A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule. This provision shall not apply if the incarcerated party actually does participate in a telephone call, or if the court determines that immediate action is necessary on a temporary basis to protect the minor child.

Not only did respondent not raise the issue of MCR 2.004 below, he did not even raise it in this Court until after we mentioned the rule in our order directing that oral argument be heard on the application for leave to appeal. *In re Mason*, 485 Mich 993 (2009). There is no question that respondent was served with the petition to terminate his parental rights, and there is equally no question that respondent did participate at least twice by way of a telephone call. Further, MCR 2.004(E) expressly lays out "[t]he purpose of the telephone call," and it appears that each relevant purpose listed was satisfied in this case—respondent received adequate notice of the proceedings, respondent was represented by counsel, and respondent was informed that he could participate by way of telephone calls in all future hearings.

MCR 2.004(F) further states, "A court may not grant relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings . . . ." In this case, respondent *was* afforded the opportunity to participate in the proceedings, as shown

by his own counsel's statement that counsel had notified respondent that he could participate by way of speakerphone. As a result, the trial court was not precluded from terminating respondent's parental rights. Moreover, MCR 2.004(F) provides that the provision prohibiting the court from granting relief if the incarcerated party was not offered the opportunity to participate "shall not apply if the incarcerated party actually does participate in a telephone call . . . ." Because respondent *did* actually participate in at least two telephone calls and was physically present at the termination hearing, the trial court was not precluded from terminating his parental rights.

For these reasons, I do not believe that the trial court clearly erred by terminating respondent's parental rights, that respondent's due process rights were in any way violated, or that MCR 2.004 prohibited the trial court from terminating respondent's parental rights. Thus, I dissent from this Court's opinion reversing the Court of Appeals' affirmance of the order terminating respondent's parental rights.

HATHAWAY, J., concurred with MARKMAN, J.

WEAVER, J. (*dissenting*). I dissent from the majority's reversal of the Court of Appeals' affirmance of the termination of respondent's parental rights. As Justice MARKMAN correctly and clearly states:

> I respectfully dissent from this Court's opinion reversing the Court of Appeals' affirmance of the order terminating respondent-father's parental rights to his two- and four-year-old sons. I simply cannot support the majority's conclusion that the trial court clearly erred by terminating respondent's parental rights. In addition, given that respondent received *all* the process to which he was *entitled* under the law, I find no "due process" violation in the fact

that the majority is able to identify ways in which he *could* have been given still more process. The majority, quoting the children's lawyer-guardian ad litem, asserts that respondent was " 'hamstrung from the beginning [in] trying to get things in order so that he [could] one day be a father to these children.' " However, the majority disregards two quite significant points. First, to the extent that respondent was "hamstrung," this was of his own making—nobody but respondent can be blamed for the fact that he was in prison during the pendency of these proceedings. Second, there is no evidence that respondent did *anything* to provide for his children while they were living with their unfit mother, with foster parents, or with their paternal aunt and uncle.[1] Instead, respondent pleaded 'no contest' to the removal petition that alleged that "Mr. Mason has failed to provide for the children physically, emotionally and financially." Indeed, although respondent knew that the children's mother was drinking again even before the court did, he still did nothing to try to protect his children from the precarious situation in which this placed his children. In addition, when he knew that his children were being removed from their mother, he did nothing to prevent them from being placed in foster care even though he had relatives who were willing and able to care for the children.

Despite respondent's repeated failures in these regards, the majority reverses the judgment of the Court of Appeals, which affirmed the trial court's termination of his parental rights, on the basis that the Department of Human Services (DHS) and the trial court did not do enough to help respondent become a better parent. I believe that the majority has it exactly backwards—respondent is the one who did not do enough to become a better parent. He did virtually nothing to demonstrate that he was willing or able to take responsibility for the care and custody of these children. It is potentially catastrophic for these children that their interest in a safe, secure, and stable home must again be placed in abeyance while respondent is afforded yet another opportunity to become a minimally acceptable parent.[2]

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[1] In response to the majority's assertion that respondent "supported" his family *before* he was imprisoned, I must note that respondent testified that, before he was imprisoned, he and his "family" lived in his mother's house, his girlfriend's grandmother's house, and a house owned by his brother. In light of this testimony, it is not entirely clear who supported respondent and his "family"—respondent or respondent's mother, his girlfriend's grandmother, and his brother. Respondent also has a third child (who was not the subject of the termination proceedings at issue here), and there is no evidence in the record to suggest that respondent has done anything to provide for *this* child either, before or after his imprisonment. Although respondent did at one point write letters to one child while he was in prison, he admitted that he stopped doing even that. To say the least, I do not believe that the trial court clearly erred in its conclusion that the fact that respondent allegedly "arranged for work and housing in anticipation of his parole" was too little, too late.

[2] The majority contends that "there is no reason that the children's lives must be disrupted during the proceedings on remand." Unlike the majority, I believe that not knowing where they may be living *tomorrow* (maybe with their father, maybe with their aunt and uncle, or maybe with new foster parents) very much constitutes a "disruption" in young children's lives.

The clear error in this case is not the Court of Appeals' unanimous decision affirming the termination of the imprisoned father's parental rights or the trial court's decision to do so. The clear error is the Supreme Court majority's unrestrained reaching out and the creation of an issue that was not raised in the trial court or the Court of Appeals and that takes 26 pages to find clear error by the trial court where there is none, with the tragic result for these two little boys, two and four years old, who will be deprived of the only parents they

have ever known and the security of a stable and loving home that they so need and deserve. Indeed, the majority's decision and opinion clearly and tragically have this case "backwards."

PEOPLE v FEEZEL

Docket No. 138031. Argued October 7, 2009 (Calendar No. 8). Decided June 8, 2010.

A Washtenaw Circuit Court jury convicted George E. Feezel of operating a motor vehicle while intoxicated (second offense), MCL 257.625(1); operating a motor vehicle with the presence of a schedule 1 controlled substance in his body, causing death, MCL 257.625(4) and (8); and failing to stop at the scene of an accident that resulted in death, MCL 257.617(3), after he struck and killed an intoxicated pedestrian who was walking down the middle of the road. Defendant appealed, claiming that the court, Archie C. Brown, J., abused its discretion by excluding evidence of the victim's intoxication, that the court erred by failing to instruct the jury on proximate cause, and that basing his conviction of operating a motor vehicle with a schedule 1 controlled substance in his body on the presence of 11-carboxy-tetrahydrocannabinol (11-carboxy-THC) in his blood violated due process. The Court of Appeals, FORT HOOD and BORRELLO, JJ., (SAAD, C.J., concurring in part and dissenting in part), affirmed in an unpublished opinion, issued November 13, 2008 (Docket No. 276959). The Court of Appeals held that the victim's intoxication was not relevant to the critical issue in the proximate cause analysis: whether the victim's death was a foreseeable consequence of defendant's driving while intoxicated. The Court also concluded that proximate causation is not an element of failing to stop at the scene of an accident that resulted in death and that any error related to the lack of a proximate cause instruction to the jury with respect to MCL 257.625(8) was harmless. Finally the Court concluded that the Supreme Court had rejected defendant's due process arguments in *People v Derror*, 475 Mich 316 (2006). The Supreme Court granted defendant leave to appeal. 483 Mich 1001 (2009).

In separate opinions, the Supreme Court *held*:

Evidence of a victim's intoxication may be relevant to the element of proximate causation found in MCL 257.617(3) and MCL 257.625(4) and (8) if the trial court determines as a threshold matter that there is a question of fact for the jury about whether

the victim acted in a grossly negligent manner. 11-carboxy-THC is not a schedule 1 controlled substance.

1. In the criminal law context, causation has two parts: factual causation and proximate causation. Factual causation exists if a finder of fact determines that "but for" the defendant's conduct the result would not have occurred. Proximate causation is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural. If an intervening cause supersedes a defendant's conduct, so that the causal link between the defendant's conduct and the victim's injury is broken, proximate cause is lacking and criminal liability cannot be imposed. Whether an intervening cause supersedes a defendant's conduct is a question of reasonable foreseeability. Ordinary negligence is reasonably foreseeable and thus is not a superseding cause that would sever proximate causation. Gross negligence or intentional misconduct on the victim's part is sufficient to do so because it is not reasonably foreseeable. Gross negligence means wantonness and disregard of the consequences that may ensue. It is conduct indicating that the actor is aware of the risks but indifferent to the results.

2. Under the facts of this case, evidence of the victim's intoxication was relevant to the element of causation, and the trial court abused its discretion by excluding evidence of the victim's blood alcohol level. MCL 257.625(4) and MCL 257.617(3) contain elements of causation. Evidence of the victim's blood alcohol content was relevant for the jury to consider when it determined whether the prosecution had proved the element of proximate causation beyond a reasonable doubt. The evidence was both material and probative, as required by MRE 401. To be probative, evidence of a victim's blood alcohol content must merely have any tendency to make gross negligence on the part of the victim more or less probable. In this case, the victim's high level of intoxication was highly probative of the issue of gross negligence, and therefore causation, because the victim's intoxication would have affected his ability to perceive the risks posed by his conduct and diminished his capacity to react to the world around him. The superseding cause asserted in this case was the victim's alleged gross negligence in walking down the middle of the road with his back to traffic during a rainstorm at night. The probative value of the evidence was not substantially outweighed under MRE 403 by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Because the proofs were sufficient to create a question of fact for the jury regarding gross negligence, the trial court erred by refusing to admit the evidence. This error undermined the reli-

ability of the verdict and resulted in a miscarriage of justice, requiring reversal under MCL 769.26. Defendant's convictions of failing to stop at the scene of accident that resulted in death and operating a motor vehicle with the presence of a schedule 1 controlled substance in his body, causing death, must be vacated.

3. Defendant's conviction of operating a motor vehicle with the presence of a schedule 1 controlled substance in his body, causing death, should be vacated on an additional basis. Marijuana is a schedule 1 controlled substance under MCL 333.7212(1)(c). While the definition of "marijuana" in MCL 333.7106(3) includes derivatives of marijuana, 11-carboxy-THC is a metabolite of the psychoactive ingredient of marijuana. It is not a derivative and thus is not included in the definition of "marijuana." It has no pharmacological effect. Under the statutory scheme related to controlled substances, 11-carboxy-THC is not a schedule 1 controlled substance, and a person cannot be prosecuted under MCL 257.625(8) for operating a motor vehicle with any amount of 11-carboxy-THC in his or her system. *Derror* erred by holding to the contrary and must be overruled to the extent that it is inconsistent with the opinion in this case. It is unnecessary to reach the constitutional issues defendant raised.

Justice CAVANAGH, joined by Chief Justice KELLY and Justice HATHAWAY, wrote the lead opinion, setting forth the Supreme Court's holding.

Justice WEAVER, concurring, concurred in Justice CAVANAGH's opinion, with the exceptions of footnote 14 and certain citations of authority in part II(A)(3) of his opinion.

Reversed; convictions vacated and case remanded.

Justice YOUNG, joined by Justices CORRIGAN and MARKMAN, concurring in part and dissenting in part, concurred in the portion of Justice CAVANAGH's opinion that concluded that there may be circumstances in a criminal case that support introducing evidence of a victim's intoxication when there is a jury-submissible question of fact regarding gross negligence. He disagreed, however, with the decision to overrule *Derror*. In enacting MCL 333.7212, the Legislature made a policy decision to include marijuana and any of its derivatives in schedule 1. Overruling *Derror* usurped the clear policy choices of the people of the state. *Derror* was correctly decided. Most important, because defendant's blood actually contained trace amounts of THC itself, the psychoactive ingredient of marijuana, there was no reason for the lead and concurring opinions to reach the *Derror* issue regarding whether the statute

also criminalizes operating a motor vehicle with the presence of a derivative of THC in the operator's body in this case and overturn a recent precedent.

1. CRIMINAL LAW — DRUNK DRIVING CAUSING DEATH — LEAVING THE SCENE OF AN ACCIDENT THAT RESULTED IN DEATH — CAUSATION — PROXIMATE CAUSE — GROSS NEGLIGENCE — VICTIM'S INTOXICATION — EVIDENCE OF BLOOD ALCOHOL LEVEL.

Evidence of a victim's intoxication may be relevant to the element of proximate causation in the crime of leaving the scene of an accident that resulted in death, MCL 257.617(3), or the crime of operating a motor vehicle while intoxicated or with any amount of a schedule 1 controlled substance in his or her body, causing death, MCL 257.625(4) and (8), if the trial court determines as a threshold matter that there is a question of fact for the jury about whether the victim acted in a grossly negligent manner.

2. CONTROLLED SUBSTANCES — SCHEDULE 1 CONTROLLED SUBSTANCES — MARIJUANA — 11-CARBOXY-TETRAHYDROCANNABINOL.

11-carboxy-tetrahydrocannabinol is not a schedule 1 controlled substance (MCL 333.7212).

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

Douglas R. Mullkoff and *F. Mark Hugger* for defendant.

Amici Curiae:

Brian A. Peppler, *David S. Leyton*, *Kym L. Worthy*, *Donald A. Kuebler*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

John R. Minock and *Christine A. Pagac* for the Criminal Defense Attorneys of Michigan.

CAVANAGH, J. Defendant struck and killed a pedestrian when he was operating his vehicle while intoxicated. A jury convicted defendant of failing to stop at

the scene of an accident that resulted in death, MCL 257.617(3), operating while intoxicated (OWI), second offense, MCL 257.625(1), and operating a motor vehicle with the presence of a schedule 1 controlled substance in his body, causing death, MCL 257.625(4) and (8). The Court of Appeals affirmed defendant's convictions. We granted leave to appeal. *People v Feezel*, 483 Mich 1001 (2009).

We hold that the trial court abused its discretion by failing to admit evidence of the victim's intoxication because it was relevant to the element of causation in MCL 257.617(3) and MCL 257.625(4) and (8). We hold that the error resulted in a miscarriage of justice, which therefore requires reversal under MCL 769.26. In addition, defendant's conviction under MCL 257.625(4) and (8) was based on an improper interpretation of MCL 257.625(8) and must be vacated on that ground also. We overrule *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006), to the extent that it is inconsistent with this opinion. Accordingly, we reverse the judgment of the Court of Appeals, vacate defendant's convictions under MCL 257.617(3) and MCL 257.625(4) and (8), and remand the case to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Shortly before 2:00 a.m. on July 21, 2005, defendant struck and killed a pedestrian, Kevin Bass, with his car while traveling on Packard Road in Ypsilanti Township in Washtenaw County. At the time of the accident, Packard Road was an unlit, five-lane road, and it was dark outside and raining heavily. Although there was a sidewalk adjacent to Packard Road, the victim was walking down the middle of the road, with his back to oncoming traffic. The victim was extremely intoxicated,

and his blood alcohol content (BAC) was at least 0.268 grams per 100 milliliters of blood. Although defendant initially left the scene of the accident after hitting the victim, he later returned while the police were investigating the incident and was arrested. Defendant's BAC at the time of the accident was an estimated 0.091 to 0.115 grams per 100 milliliters. There were also 6 nanograms of 11-carboxy-tetrahydrocannabinol (11-carboxy-THC) per milliliter in defendant's blood. Defendant was charged with several offenses, including OWI causing death; operating a motor vehicle with the presence of a schedule 1 controlled substance in his body, causing death; and failure to stop at the scene of an accident that resulted in death.

Before trial, the prosecutor filed a motion in limine to preclude evidence related to the victim's intoxication. The prosecutor argued that the victim's intoxication was irrelevant to whether defendant caused the accident or caused the victim's death. The trial court agreed and suppressed the evidence.

At trial, testimony revealed that defendant had been at two bars earlier that evening. At one bar, defendant was accompanied by Nicole Norman. Norman testified that she and defendant were at the bar from 11 p.m. to 1:30 a.m. At no time did she see defendant smoke marijuana, and defendant did not smell of marijuana. Norman further testified that after they left the bar, defendant drove her to Stephanie Meyers's house. After picking up Meyers, defendant dropped Norman and Meyers off at Norman's car.

Meyers testified that she was a passenger in Norman's car and Norman was driving down Packard Road moments before the accident. Meyers stated that it was pouring outside, and she did not see the victim until he was alongside the driver's side door. It was then that

Meyers and Norman "snapped [their] necks backwards noticing him . . . ." Meyers also recalled that when Norman saw the victim, she stated, "That man's going to get killed." In addition, Norman testified that had she been driving in the lane that the victim was walking in, she probably would not have been able to stop her vehicle in time to avoid hitting him. Defendant was traveling down Packard Road moments after Norman's car had passed the victim.

Defendant's accident reconstruction expert found that defendant would have had to have been driving 15 miles per hour to avoid hitting the victim. The prosecution's accident reconstruction expert agreed with defense counsel that if defendant first saw the victim from 30 feet away, then defendant would have had to have been traveling at a rate of 10 to 15 miles per hour to avoid the accident.

Defendant was convicted of failing to stop at the scene of an accident that resulted in death; OWI, second offense; and operating a motor vehicle with the presence of a schedule 1 controlled substance in his body, causing death. Defendant appealed, claiming, in relevant part, that the trial court abused its discretion by refusing to admit evidence of the victim's BAC, that the trial court erred by failing to instruct the jury on proximate cause with respect to the charges of failing to stop at the scene of an accident that resulted in death and operating a motor vehicle with a schedule 1 controlled substance, causing death, and that his conviction of operating a motor vehicle, causing death, based on the presence of 11-carboxy-THC in his body violated his due process rights under the Fifth and Fourteenth amendments of the United States Constitution.

In a divided decision, the Court of Appeals affirmed defendant's convictions. Noting that it is foreseeable for

a pedestrian to be in a roadway, the majority reasoned that the trial court did not abuse its discretion by suppressing the evidence of the victim's BAC because the victim's level of "intoxication was not relevant to the critical issue in the proximate cause analysis, which is whether the victim's death was a foreseeable consequence of defendant's conduct of driving while intoxicated . . . ." *People v Feezel*, unpublished opinion per curiam of the Court of Appeals, issued November 13, 2008 (Docket No. 276959), p 12. Moreover, the majority concluded that the trial court did not err by failing to reinstruct the jurors on proximate causation because proximate causation is not an element of MCL 257.617(3) and any error related to MCL 257.625(8) was harmless. Finally, the majority concluded that defendant's due process arguments had been rejected by this Court in *Derror*.

The partial dissent argued that the trial court's deficient instruction with respect to MCL 257.625(8) and its incorrect evidentiary ruling deprived defendant of a substantial defense and thus denied defendant his right to a fair trial. *Feezel*, unpub op at 1, 6 (SAAD, C.J., concurring in part and dissenting in part). We granted defendant's application for leave to appeal. 483 Mich 1001 (2009).

II. ANALYSIS

A. THE CAUSATION ELEMENT

The first issue presented in this appeal is whether the trial court abused its discretion by refusing to admit evidence of the victim's BAC. We hold that, under the facts of this case, the trial court abused its discretion by refusing to admit the evidence because it was relevant to the element of proximate causation in MCL

257.617(3) and MCL 257.625(4) and (8). Moreover, because the error resulted in a miscarriage of justice, it requires reversal under MCL 769.26.

1. STANDARD OF REVIEW

A trial court's decision to either admit or exclude evidence "will not be disturbed absent an abuse of . . . discretion." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when its decision falls "outside the range of principled outcomes." *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

If a reviewing court concludes that a trial court erred by excluding evidence, under MCL 769.26 the verdict cannot be reversed "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." In examining whether a miscarriage of justice occurred, the relevant inquiry is "the 'effect the error had or reasonably may be taken to have had upon the jury's decision.' " *People v Straight*, 430 Mich 418, 427; 424 NW2d 257 (1988), quoting *Kotteakos v United States*, 328 US 750, 764; 66 S Ct 1239; 90 L Ed 1557 (1946). If the evidentiary error is a nonconstitutional, preserved error, then it "is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative." *People v Krueger,* 466 Mich 50, 54; 643 NW2d 223 (2002). An error is "outcome determinative if it undermined the reliability of the verdict"; in making this determination, this Court should "focus on the nature of the error in light of the weight and strength of the untainted evidence." *Id.* (quotation marks and citations omitted).

2. OVERVIEW OF CAUSATION

Three of the offenses with which defendant was charged contain an element of causation, so the prosecution was required to prove causation beyond a reasonable doubt for each offense. The Court of Appeals erred to the extent that it held otherwise. The plain language of the statutes that prohibit OWI causing death, MCL 257.625(1) and (4), and the statutes that prohibit operating a motor vehicle with the presence of a schedule 1 controlled substance in one's body, causing death, MCL 257.625(4) and (8), requires that the defendant's operation of a motor vehicle have *caused* the death of another person.[1] Likewise, the plain language of MCL 257.617(3) contains an element of causation.

[1] MCL 257.625 states, in relevant part:

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. . . .
>
> * * *
>
> (4) A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle *causes* the death of another person is guilty of a crime . . . .
>
> * * *
>
> (8) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(*iv*) of the public health code, 1978 PA 368, MCL 333.7214. [Emphasis added.]

Specifically, the statute imposes criminal liability if an individual fails to stop "following an accident *caused* by that individual and the accident results in the death of another . . . ." MCL 257.617(3) (emphasis added).[2] Thus, because the statute specifically requires the prosecution to establish that the accident was "caused" by the accused, the Court of Appeals ignored the plain language of the MCL 257.617(3) and erred by holding that it does not contain a causation element. Having determined that each of the statutes contains a causation element, we now turn to the definition of the term "cause."

In *People v Schaefer*, we stated that, in the criminal law context, the term " 'cause' has acquired a unique, technical meaning." *People v Schaefer*, 473 Mich 418, 435; 703 NW2d 774 (2005). Specifically, the term and concept have two parts: factual causation and proximate causation. *Id.* at 435-436. Factual causation exists if a finder of fact determines that "but for" defendant's

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[2] The statute provides, in relevant part:

> (1) The driver of a vehicle who knows or who has reason to believe that he or she has been involved in an accident upon public or private property that is open to travel by the public shall immediately stop his or her vehicle at the scene of the accident and shall remain there until the requirements of [MCL 257.619] are fulfilled or immediately report the accident to the nearest or most convenient police agency or officer to fulfill the requirements of [MCL 257.619(a)] and (b) if there is a reasonable and honest belief that remaining at the scene will result in further harm. The stop shall be made without obstructing traffic more than is necessary.
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> * * *
>
> (3) If the individual violates subsection (1) following an accident *caused* by that individual and the accident results in the death of another individual, the individual is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both. [MCL 257.617 (emphasis added).]

conduct the result would not have occurred. *Id.* A finding of factual causation alone, however, is not sufficient to hold an individual criminally responsible. *Id.* at 436. The prosecution must also establish that the defendant's conduct was a proximate cause of, in this case, the accident or the victim's death. *Id.*[3]

Proximate causation "is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural." *Id.* If the finder of fact determines that an intervening cause supersedes a defendant's conduct "such that the causal link between the defendant's conduct and the victim's injury was broken," proximate cause is lacking and criminal liability cannot be imposed. *Id.* at 436-437. Whether an intervening cause supersedes a defendant's conduct is a question of reasonable foreseeability. *Id.* at 437. Ordinary negligence is considered reasonably foreseeable, and it is thus not a superseding cause that would sever proximate causation. *Id.* at 437-438. In contrast, "gross negligence" or "intentional misconduct" on the part of a victim is considered sufficient to "break the causal chain between the defendant and the victim" because it is not reasonably foreseeable. *Id.* Gross negligence, however, is more than an enhanced version of ordinary negligence. *Id.* at 438. "It means wantonness and disregard of the consequences which may ensue . . . ." *People v Barnes*, 182 Mich 179, 198; 148 NW 400 (1914).[4]

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[3] While there are competing positions regarding the law of proximate causation, and I personally remain committed to my position regarding proximate causation presented in *Schaefer*, 473 Mich at 450-452 (CAVANAGH, J., concurring in part and dissenting in part), and *People v Tims*, 449 Mich 83, 110-125; 534 NW2d 675 (1995) (CAVANAGH, J., dissenting), this Court's decision in *Schaefer* is the current law in the state of Michigan.

[4] This case is distinguishable from *Barnes*, in which this Court defined "gross negligence" as "wantonness and disregard of the consequences which may ensue, *and indifference to the rights of others that is*

"Wantonness" is defined as "[c]onduct indicating that the actor is aware of the risks but indifferent to the results" and usually "suggests a greater degree of culpability than recklessness . . . ." Black's Law Dictionary (8th ed). Therefore, while a victim's negligence is not a defense, it is an important factor to be considered by the trier of fact in determining whether proximate cause has been proved beyond a reasonable doubt. See, e.g., *People v Campbell*, 237 Mich 424, 430-431; 212 NW 97 (1927).[5]

3. SUPPRESSION OF THE EVIDENCE

We must examine whether, in this case, the victim's BAC was a relevant and admissible fact for the jury's consideration when determining whether the prima facie element of proximate causation was proved beyond a reasonable doubt. We hold that it was. However, we caution that trial courts must make a threshold determination that there is a jury-submissible question of fact regarding gross negligence before such evidence becomes relevant and admissible.

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equivalent to a criminal intent." *Barnes*, 182 Mich at 198 (emphasis added). In that case, the issue was whether a *defendant's* conduct amounted to gross negligence, therefore warranting a conviction for involuntary homicide. *Id.* Thus, the Court's definition of "gross negligence" provided the appropriate standard to hold a defendant criminally responsible for his or her careless acts. *Id.* The operative question here is whether the victim's conduct was grossly negligent and, therefore, cut off proximate cause and relieved defendant of criminal liability. Thus, because the conduct of the victim is at issue when determining whether there was a superseding cause, the latter portion of the Court's definition of "gross negligence" in *Barnes* is not applicable.

[5] Whether, in a multiple vehicle accident, a victim-driver's intoxication raises a presumption of gross negligence is a question that we need not and do not reach in this case. See *People v Lardie*, 452 Mich 231, 251; 551 NW2d 656 (1996), overruled on other grounds by *Schaefer*, 473 Mich at 422.

Under the Michigan Rules of Evidence, evidence is admissible only if it is relevant as defined by MRE 401 and is not otherwise excluded under MRE 403.[6] In *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998), we explained that "[p]ursuant to MRE 401, evidence is relevant if two components are present, materiality and probative value." "Materiality is the requirement that the proffered evidence be related to 'any fact that is of consequence' to the action." *Id.*, quoting MRE 401. This Court has stated that "[b]ecause the prosecution must carry the burden of proving every element beyond a reasonable doubt, . . . the elements of the offense are always 'in issue' and, thus, material." *Crawford,* 458 Mich at 389. When examining whether the proffered evidence is probative, a court considers whether the "evidence tends 'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence,' " and "[t]he threshold is minimal: 'any' tendency is sufficient probative force." *Id.* at 389-390 (citations omitted).

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[6] MRE 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

MRE 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

MRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Moreover, MRE 403 excludes evidence, even if relevant, only if its probative value is "substantially outweighed" by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Thus, MRE 403 "does not prohibit prejudicial evidence; only evidence that is unfairly so." *Crawford*, 458 Mich at 398. Further, "[e]vidence is unfairly prejudicial when there exists a danger that *marginally* probative evidence will be given undue or preemptive weight by the jury." *Id.* (emphasis added).

Under these rules of evidence, a court must make a threshold determination in cases such as this of whether evidence of the victim's intoxication is relevant to the element of proximate causation. If the evidence is relevant, a court must also determine whether the evidence is nevertheless inadmissible under MRE 403. We conclude that, under the facts of this case, the evidence of the victim's BAC was relevant because it was both material and probative. In addition, its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury because the evidence was highly probative of the element of proximate causation.

First, the materiality requirement of MRE 401 was met because, as explained earlier, the charges at issue required the prosecution to prove an element of causation beyond a reasonable doubt. See *Crawford*, 458 Mich at 389. In addition, under the broad definition of "probative," evidence of the victim's BAC must merely have *any* tendency to make gross negligence on the part of the victim more or less probable. See *id.* at 389-390. Depending on the facts of a particular case, there may be instances in which a victim's intoxication is not sufficiently probative, such as when the proofs are insufficient to create a question of fact for the jury

about whether the victim was conducting himself or herself in a grossly negligent manner. Generally, the mere fact that a victim was intoxicated at the time a defendant committed a crime is not sufficient to render evidence of the victim's intoxication admissible. While intoxication may explain why a person acted in a particular manner, being intoxicated, by itself, is not conduct amounting to gross negligence. In this case, however, the victim's extreme intoxication was highly probative of the issue of gross negligence, and therefore causation, because the victim's intoxication would have affected his ability to perceive the risks posed by his conduct and diminished his capacity to react to the world around him.[7] Indeed, in this case, the proffered superseding cause was the victim's presence in the middle of the road with his back to traffic at night during a rain storm with a sidewalk nearby. Thus, the proofs were sufficient to create a jury-submissible question about whether the victim was grossly negligent, and the victim's high level of intoxication would have aided the jury in determining whether the victim acted with "wantonness and a disregard of the consequences which may ensue . . . ." *Barnes*, 182 Mich at 198.

Second, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The evidence was not unfairly prejudicial because, as ex-

[7] The National Highway Traffic Safety Administration has stated that at a BAC of 0.08 percent a person's "[m]uscle coordination becomes poor (e.g., balance, speech, vision, reaction time, and hearing)," it is "[h]arder to detect danger," and a person's "[j]udgment, self-control, reasoning, and memory are impaired[.]" National Highway Traffic Safety Administration, *The ABCs of BAC*: *A Guide to Understanding Blood Alcohol Concentration and Alcohol Impairment*, available at <http://www.stopimpaireddriving.org/ABCsBACWeb/images/ABCBACscr.pdf> (accessed June 2, 2010).

plained earlier, the victim's high level of intoxication went to the heart of whether the victim was grossly negligent; thus, the evidence was not merely marginally probative, but instead was highly probative of the element of causation.

In addition, the probative value of the evidence was not, as the prosecution argues, substantially outweighed by the danger of confusion of the issues or misleading the jury. The prosecution's argument that the admission of evidence of the victim's BAC would "shift responsibility" from defendant ignores that under the circumstances of this case, the victim's conduct directly related to the disputed element of proximate causation and, therefore, whether the victim's actions amounted to ordinary or gross negligence. See, e.g., *May v Goulding,* 365 Mich 143, 148; 111 NW2d 862 (1961) (describing the difference between wanton misconduct and ordinary negligence as " 'faults of different hues in the spectrum of human conduct' ") (citation omitted). As a result, the probative value of the victim's high level of intoxication was not *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury because, under the facts of this case, the victim's BAC was highly probative of the element of proximate causation, which necessarily required the trier of fact to determine whether the victim's own behavior amounted to a superseding cause.[8]

For all these reasons, we disagree with the conclusion of the Court of Appeals that the evidence was irrelevant

[8] We stress that ordinary negligence on the part of a victim is insufficient to exculpate an intoxicated driver. See *Schaefer*, 473 Mich at 437-438 (stating that "gross negligence" or "intentional misconduct" on the part of a victim is sufficient to "break the causal chain between the defendant and the victim" because it is not reasonably foreseeable).

because the "victim's intoxication, or lack thereof, does not impact the foreseeability of an intoxicated driver striking a pedestrian in the road." *Feezel,* unpub op at 11. While it is true that when a person drives intoxicated it is foreseeable that the person *may* cause an accident or *possibly* strike a pedestrian, this general premise ignores the fact that proximate causation must be decided on a case-by-case basis. See *Stoll v Laubengayer*, 174 Mich 701, 705; 140 NW 532 (1913) (stating that "[w]hile this court has never apparently attempted to accurately define the term 'proximate cause,' it has in many cases *applied the principle* as enunciated in the authorities *to the particular facts under consideration*") (emphasis added).[9] Indeed, this principle is embedded within the concept of proximate causation, which requires the trier of fact to determine whether the victim's own conduct amounted to a superseding cause. See *Schaefer*, 473 Mich at 438-439 (stating that gross negligence "by *the victim* . . . will generally be considered a superseding cause") (emphasis added). Thus, to hold defendant criminally responsible, the trier of fact must find beyond a reasonable doubt that defendant's conduct was a proximate cause of *this* victim's death or of *this* accident given the particular facts of the case.

Therefore, while the victim's intoxication is not a defense, under the facts of this case it should have been a factor for the jury to consider when determining whether the prosecution proved beyond a reasonable

[9] In fact, this Court has previously stated that while "[p]edestrians in a public highway have a right to assume that the driver of an automobile will use ordinary care for their protection, . . . they may not rest content on that assumption and take no care for their own safety." *Campbell*, 237 Mich at 432. Thus, "[t]he driver of an automobile has a right to assume that a pedestrian will use ordinary care for his own safety, and any assumption that he has a right to indulge in may be considered by the jury with the other facts . . . ." *Id.* at 431-432.

doubt that defendant's conduct was a proximate cause of the accident, under MCL 257.617(3), or a proximate cause of the victim's death, under MCL 257.625(4) and (8).

We emphasize, however, that evidence of a victim's intoxication may not be relevant or admissible in all cases. Indeed, the primary focus in a criminal trial remains on the defendant's conduct. Accordingly, any level of intoxication on the part of a victim is not automatically relevant, and the mere consumption of alcohol by a victim does not automatically amount to a superseding cause or de facto gross negligence. Instead, under MRE 401, a trial court must determine whether the evidence tends to make the existence of gross negligence more probable or less probable than it would be without the evidence and, if relevant, whether the evidence is inadmissible under the balancing test of MRE 403.

Thus, when determining whether evidence of a victim's intoxication is admissible, the trial court must make a threshold determination that evidence of the victim's conduct is sufficiently probative for a proper purpose—to show gross negligence. In other words, the trial court must determine that the issue of gross negligence is "in issue." See *People v McKinney*, 410 Mich 413, 418; 301 NW2d 824 (1981). The court may allow the admission of evidence of the victim's intoxication to aid the jury in determining whether the victim's actions were grossly negligent only when the proofs are sufficient to create a question of fact for the jury. If a trial court cannot come to the conclusion that a reasonable juror could view the victim's conduct as demonstrating a wanton disregard of the consequences that may ensue, however, then the evidence of intoxication is not admissible.

Applying these standards to the facts of this case, we hold that the trial court abused its discretion by failing to admit the evidence of the victim's BAC. In excluding the evidence, the trial court deprived the jury of its ability to consider an important, relevant factor in determining whether the victim was grossly negligent. As a result, the error undermined the reliability of the verdict. We therefore reverse the judgment of the Court of Appeals and vacate defendant's convictions of those offenses.

4. JURY INSTRUCTIONS

To aid the trial court on remand, we note that in this case, the jury instructions, when read as a whole, may have been confusing. In *Schaefer*, we stated that the term "cause" is "a legal term of art normally not within the common understanding of jurors . . . ." *Schaefer*, 473 Mich at 441. As a result, a jury could not be expected to understand that the term "required the prosecutor to prove *both* factual causation and proximate causation." *Id.*

The trial court instructed the jury and gave the jury a written instruction on the term's unique meaning, but the instruction was buried within the elements of the charge of OWI causing death and not included in the instructions for MCL 257.617(3) and MCL 257.625(4) and (8). Moreover, the instructions for these other charges were separated from the causation instruction by instructions on lesser included offenses and a jury verdict form. Because the potential deprivation of personal rights in criminal cases is extreme and a defendant is "entitled to have all the elements of the crime submitted to the jury in a charge which [is] neither erroneous nor misleading," *People v Pepper*, 389 Mich 317, 322; 206 NW2d 439 (1973), we caution the

trial court on remand to avoid possible confusion by either reinstructing the jury on causation for each crime that contains a causation element or by referring the jurors back to its earlier causation instruction.

B. DEFENDANT'S CONVICTION UNDER MCL 257.625(4) AND (8)

The next issue presented in this appeal is whether defendant's conviction under MCL 257.625(4) and (8) was proper.[10] In *Derror*, a majority of this Court held that 11-carboxy-THC, a byproduct of metabolism created when the body breaks down the psychoactive ingredient of marijuana, is a schedule 1 controlled substance under MCL 333.7212 of the Public Health Code. *Derror*, 475 Mich at 319-320. *Derror* also clarified *Schaefer* by holding that in prosecutions involving a violation of MCL 257.625(8), "the prosecution is not required to prove beyond a reasonable doubt that a defendant knew he or she might be intoxicated" because the section does not require intoxication or impairment. *Id.* at 334. Thus, because the prosecution need only establish that a defendant had any amount of a schedule 1 controlled substance in his or her body while operating a motor vehicle, under *Derror*, a person who operates a motor vehicle with the presence of any

[10] Although this Court is vacating defendant's conviction under MCL 257.625(4) and (8) because the trial court abused its discretion by failing to admit evidence of the victim's intoxication, this Court is not prevented from considering whether *Derror* was wrongly decided because the possibility remains that defendant will be retried under MCL 257.624(4) and (8) on remand. Thus, we disagree with the partial dissent that it is unnecessary to reach this issue. Moreover, although defendant had trace amounts of THC in his system, the amount of THC was below the threshold of the Michigan State Police's reporting protocol, and the prosecution only charged defendant with having 11-carboxy-THC in his system. The partial dissent's statement that "it is undisputed that defendant was guilty of violating this statute by virtue of the presence of actual THC" in his blood is disingenuous at best.

amount of 11-carboxy-THC in his or her system violates MCL 257.625(8). *Id.* at 320.

We hold that 11-carboxy-THC is not a schedule 1 controlled substance under MCL 333.7212 and, therefore, a person cannot be prosecuted under MCL 257.625(8) for operating a motor vehicle with any amount of 11-carboxy-THC in his or her system. As a result, *Derror* was wrongly decided, and because the doctrine of stare decisis supports overruling *Derror*, we overrule *Derror* to the extent that it is inconsistent with this opinion.

1. STANDARD OF REVIEW AND THE RULES OF STATUTORY INTERPRETATION

Questions of statutory interpretation are reviewed de novo. *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009). The primary goal is to give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). When a statute is ambiguous, judicial construction is appropriate to determine the statute's meaning. See *id.* When determining the Legislature's intent, the " 'statutory language is given the reasonable construction that best accomplishes the purpose of the statute.' " *Id.* (citation omitted). Indeed, "[i]t is a well-established rule of statutory construction that provisions of a statute must be construed in light of the other provisions of the statute to carry out the apparent purpose of the Legislature." *Farrington v Total Petroleum, Inc,* 442 Mich 201, 209; 501 NW2d 76 (1993). As a result, "the entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v Crocker*, 219 Mich 178, 182-183; 189 NW 221 (1922).

2. BACKGROUND: MCL 257.625(8) AND *DERROR*

MCL 257.625(8) states, in relevant part:

> A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body *any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code*, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section . . . . [Emphasis added.]

Under § 7212(1)(c) of the Public Health Code, marijuana is listed as a schedule 1 controlled substance. MCL 333.7212(1)(c). "Marijuana" is defined as follows:

> "Marihuana" means all parts of the plant Canabis [sic] sativa L., growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. [MCL 333.7106(3).]

On the basis of these statutes, a majority of this Court concluded in *Derror* that 11-carboxy-THC is a schedule 1 controlled substance. The majority reasoned that "the Public Health Code includes within the definition of marijuana every compound and derivative of the plant . . . ." *Derror*, 475 Mich at 325. After examining several medical dictionaries with diverse definitions, the majority chose the definition of "derivative" that it believed most closely effectuated the Legislature's intent, which was "a chemical substance related structur-

ally to another substance and theoretically derivable from it." *Id.* at 327-329 (quotation marks and citation omitted). Applying this definition of "derivative," the majority concluded that 11-carboxy-THC was included in it because the compound is structurally related to THC. *Id.* at 329. As a result, the majority concluded that MCL 257.625(8) proscribes driving with *any* amount of 11-carboxy-THC in a person's body regardless of whether the person is actually "under the influence" of marijuana while operating the motor vehicle. *Id.* at 333-334, 341. That interpretation, however, was contrary to the statutory language.

3. 11-CARBOXY-THC IS NOT A SCHEDULE 1 CONTROLLED SUBSTANCE BECAUSE IT IS NOT A DERIVATIVE OF MARIJUANA

Derror was wrongly decided. The *Derror* majority erred because it interpreted "derivative" by choosing a definition, out of several divergent definitions, that *seemed* to include 11-carboxy-THC as a derivative when experts were in disagreement about whether 11-carboxy-THC is a derivative. *Derror*, 475 Mich at 327-328; *id.* at 350-351 (CAVANAGH, J., dissenting). More importantly, however, the majority's interpretation ignored and was inconsistent with other relevant statutory provisions. Specifically, the majority failed to interpret MCL 333.7212 in a manner consistent with federal law, ignored the factors the Legislature indicated should be used to determine whether a substance should be classified as a schedule 1 controlled substance, and ignored the Legislature's definition of "marijuana" and the Legislature's list of schedule 1 controlled substances, which do not contain the term "metabolite" or the full or any abbreviated name of 11-carboxy-THC. When MCL 333.7212 is interpreted in the context of the statutory scheme, it does not appear that the Legisla-

ture intended for 11-carboxy-THC to be classified as a schedule 1 controlled substance.

To begin with, our Legislature has declared that the provisions of the Public Health Code are "intended to be consistent with applicable federal and state law and shall be construed, when necessary, to achieve that consistency." MCL 333.1111(1). Notably, while Michigan's definition of marijuana is virtually identical to the relevant portions of the federal definition,[11] no federal court has held that 11-carboxy-THC is a controlled substance. Moreover, federal courts have stated that "the purpose of banning marijuana was to ban the euphoric effects produced by THC." *United States v Sanapaw*, 366 F3d 492, 495 (CA 7, 2004), citing *United States v Walton*, 168 US App DC 305, 306; 514 F2d 201 (1975) (stating that "the 'hallucinogenic' or euphoric effects produced by this agent led to the Congressional ban on possession, importation and distribution of marijuana"). An expert in this case, however, agreed that 11-carboxy-THC has no known pharmacological effect. See, also, *Derror*, 475 Mich at 321, indicating that the experts in that case agreed that 11-carboxy-THC " 'itself has no pharmacological effect on the body and its level in the blood correlates poorly, if at all, to an individual's level of THC-related impairment.' " (Cita-

[11] The federal statute defines "marijuana" as follows:

> The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. [21 USC 802(16).]

tion omitted.) By ignoring federal law, the majority's decision in *Derror* ignored our Legislature's proclamation that the Public Health Code is intended to be consistent with applicable federal law and "*shall* be construed . . . to achieve that consistency." MCL 333.1111(1) (emphasis added).[12]

In addition, in interpreting "derivative" by choosing a definition, out of several divergent definitions, that *seemed* to include 11-carboxy-THC, the *Derror* majority ignored other relevant statutory provisions that suggest that 11-carboxy-THC should not be considered a schedule 1 controlled substance. Our Legislature has indicated that the Michigan Board of Pharmacy must include a controlled substance in schedule 1 if "the substance has high potential for abuse" and has no accepted medical use or lacks accepted safety for use in treatment. MCL 333.7211. In addition, the Legislature has listed other factors to consider when making a determination regarding the classification of a substance:

> (a) The actual or relative potential for abuse.
>
> (b) The scientific evidence of its pharmacological effect, if known.
>
> (c) The state of current scientific knowledge regarding the substance.
>
> d) The history and current pattern of abuse.
>
> (e) The scope, duration, and significance of abuse.
>
> (f) The risk to the public health.

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[12] The partial dissent criticizes our citations of federal authority. As previously stated, however, our Legislature has expressly stated that the Public Health Code is intended to be consistent with federal law and that state law "*shall* be construed" to achieve that consistency. MCL 333.1111(1) (emphasis added). The Legislature did not state that this requirement can be ignored when a majority of this Court believes that federal courts have not properly decided the cases before them.

> (g) The potential of the substance to produce psychic or physiological dependence liability.
>
> (h) Whether the substance is an immediate precursor of a substance already controlled under this article. [MCL 333.7202.]

As the *Derror* dissent indicated, "[*n*]*one* of these factors that are used to determine if a substance should be classified as a schedule 1 controlled substance applies to 11-carboxy-THC." *Derror*, 475 Mich at 349 (CAVANAGH, J., dissenting). Indeed, "11-carboxy-THC has *no* pharmacological effect on a person, and, therefore, it has no potential for abuse or potential to produce dependence." *Id*. Moreover, "it is impossible to take 11-carboxy-THC and make it into THC; therefore, it is not an immediate precursor of a substance already classified as a schedule 1 controlled substance." *Id.* Thus, although MCL 333.7202 does not expressly prohibit the inclusion of particular substances in schedule 1, it would be absurd to suggest that 11-carboxy-THC, which fails to meet the criteria of MCL 333.7202, fits within that schedule. By ignoring the statutory provisions that are used to classify a controlled substance, this Court failed to carry out the purpose of the Legislature. *Farrington*, 442 Mich at 209.

In addition, 11-carboxy-THC is not a schedule 1 controlled substance under MCL 333.7212(1)(d). Under MCL 333.7212(1)(d), "synthetic equivalents" of various marijuana-related substances are included in schedule 1. "Synthetic substances are substances that were altered, sometimes in minor ways, but that can still have pharmacological effects on a person." *Derror*, 475 Mich at 352 (CAVANAGH, J., dissenting). This definition does not include 11-carboxy-THC, which is a metabolite—a natural byproduct that is created when a person's body breaks down THC. *Id.* at 321 (majority opinion). There-

fore, 11-carboxy-THC is not a "synthetic" substance and, thus, not a schedule 1 controlled substance under MCL 333.7212(1)(d).

Finally, the definition of "marijuana," MCL 333.7106(3), and the Legislature's list of schedule 1 controlled substances, MCL 333.7212, do not contain the term "11-carboxy-THC" or any equivalent name. Nor do the statutes contain the term "metabolite." The Legislature, however, "knows how to use the term 'metabolite' when it wants to." *Derror*, 475 Mich at 352 (CAVANAGH, J., dissenting). In fact, MCL 722.623a requires a person to report suspected child abuse if a newborn infant has any amount of a metabolite of a controlled substance in his or her body. *Id.* "It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws." *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). The Legislature's decision to exclude the word "metabolite" from the relevant statutory provisions is further support that the Legislature did not intend that 11-carboxy-THC be classified as a schedule 1 controlled substance.

Therefore, by failing to construe the applicable portions of the Public Health Code to achieve consistency with federal law, and by failing to examine the statute in light of other relevant statutory provisions, the *Derror* majority failed to effectuate the Legislature's intent. We hold that 11-carboxy-THC is not a schedule 1 controlled substance under MCL 333.7212 and, therefore, a person cannot be prosecuted under MCL 257.625(8) for operating a motor vehicle with any amount of 11-carboxy-THC in his or her system. Although the *Derror* majority's interpretation of the statute was probably unconstitutional, because we hold that 11-carboxy-THC

is not a schedule 1 controlled substance, defendant's conviction under MCL 257.625(4) and (8) cannot stand. Thus, we need not address the constitutional issues raised.[13]

4. THE DOCTRINE OF STARE DECISIS

Deciding to overrule precedent is not a decision that this Court takes lightly. Indeed, this Court should respect precedent and not overrule or modify it unless there is substantial justification for doing so. While "*stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law," it is "not a mechanical formula of adherence to the latest decision[.]" *Lawrence v Texas*, 539 US 558, 577; 123 S Ct 2472; 156 L Ed 2d 508 (2003) (citation and quotation marks omitted).

In *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), this Court formally established a test to determine when it is appropriate to depart from stare decisis.[14] First, this Court must consider whether the pre-

[13] Although it is not necessary to reach the constitutional issues raised in this case, I continue to believe that the *Derror* majority's interpretation of the statute is unconstitutional. See *Derror*, 475 Mich at 354-362 (CAVANAGH, J., dissenting), stating that the majority's interpretation of the statute is unconstitutional because it failed to provide an ordinary person with notice of what conduct is prohibited, had the potential for arbitrary and discriminatory enforcement, and was not rationally related to the objective of the statute. And while the partial dissent correctly notes that I personally support the doctrine of legislative acquiescence, that doctrine does not enable this Court to adhere to an unconstitutional interpretation of a statute.

[14] While there are competing tests for determining whether a case should be overruled, I personally remain committed to the stare decisis factors pronounced by Chief Justice KELLY in *Petersen v Magna Corp*, 484 Mich 300, 317-320; 773 NW2d 564 (2009) (opinion by KELLY, C.J.), and, although other justices disagree with this test, I personally believe that this Court should adopt those factors. Nevertheless, *Robinson* is the law

vious decision was wrongly decided. *Id.* at 464. This Court must then apply a three-part test to determine whether the doctrine of stare decisis nonetheless supports upholding the previously decided case. These include (1) whether the decision defies practical workability, (2) whether reliance interests would work an undue hardship if the decision were overturned, and (3) whether changes in the law or facts no longer justify the decision. *Id.*

As previously explained, *Derror* was wrongly decided. Applying the three-part *Robinson* test, we further conclude that the doctrine of stare decisis does not support upholding *Derror*.

The first factor weighs heavily in favor of overruling *Derror* because the decision defies practicable workability given its tremendous potential for arbitrary and discriminatory enforcement based on the "whims of police and prosecutors." *Derror*, 475 Mich at 358-359 (CAVANAGH, J., dissenting). "The United States Supreme Court has recognized that a critical aspect of the vagueness doctrine is ' "the requirement that a legislature establish minimal guidelines to govern law enforcement." ' " *Id.* at 359, quoting *Kolender v Lawson*, 461 US 352, 358; 103 S Ct 1855; 75 L Ed 2d 903 (1983) (citation omitted). In fact, the Court has stated that

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in the state of Michigan. In my personal view, however, application of the *Petersen* factors also demands that *Derror* be overruled because the presumption of upholding the precedent is rebutted by a compelling justification for overturning it—namely *Derror*'s flawed interpretation of the statute, which may have resulted in a violation of the United States and Michigan constitutions. And, as will be discussed, *Derror* defies practical workability because it encourages arbitrary and discriminatory enforcement and federal courts have not interpreted the virtually identical federal definition of "marijuana" as including 11-carboxy-THC in schedule 1. Because *Derror*'s interpretation encourages arbitrary and discriminatory enforcement, it also causes hardship and inequity to the citizens of Michigan.

when "the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " *Kolender*, 461 US at 358 (citation omitted). The *Derror* majority's interpretation of the statute, however, allows a person to be prosecuted for driving with *any* amount of 11-carboxy-THC in the person's system, even though the metabolite has no pharmacological effects. As a result, a prosecutor could "choose to charge a person found to have 0.01 nanograms of 11-carboxy-THC in his system" if the prosecutor so desires. *Derror*, 475 Mich at 359 (CAVANAGH, J., dissenting). In addition, "whether a person is deemed to have any amount of 11-carboxy-THC in his system depends on whatever cutoff standard for detection is set by the laboratory doing the testing." *Id.* at 356. As a result, Michigan citizens cannot be sure of what conduct will be deemed criminal.[15]

Moreover, in 2008 the people of the state of Michigan legalized the use of marijuana in limited circumstances. The Michigan Medical Marihuana Act declared that "changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana." MCL 333.26422(b). Under the majority's interpretation of the statute in *Derror*, however, individuals who use marijuana for medicinal purposes will be prohibited from driving long after the person is no longer im-

[15] In *Derror*, an expert also testified that the presence of 11-carboxy-THC in a person's blood can be the result of passive inhalation. *Derror*, 475 Mich at 357 (CAVANAGH, J., dissenting). In contrast, an expert testified in this case that, considering the studies he had read, it would be improbable for 11-carboxy-THC to be in a person's system through passive inhalation. If the *Derror* expert was correct, however, it further reinforces the fact that *Derror*'s interpretation of the statute could lead to arbitrary and discriminatory enforcement.

paired. Indeed, in this case, experts testified that, on average, the metabolite could remain in a person's blood for 18 hours and in a person's urine for up to 4 weeks. See, also, *Derror*, 475 Mich at 321-322, and *id*. at 356 (CAVANAGH, J., dissenting) (stating that 11-carboxy-THC could remain in a person's blood for a long period after the THC is gone and could remain in a person's system for weeks after the marijuana was ingested). And if scientific testing develops to "detect 11-carboxy-THC from marijuana that was ingested one year ago, ten years ago, or 20 years ago, it is . . . a crime to drive . . . ." *Id.* at 358 (CAVANAGH, J., dissenting). As a result, "long after any possible impairment from ingesting marijuana has worn off, a person still cannot drive according" to the *Derror* majority's interpretation of the statute. *Id.* at 356. Thus, under *Derror*, an individual who only has 11-carboxy-THC in his or her system is prohibited from driving and, at the whim of police and prosecutors, can be criminally responsible for choosing to do so even if the person has a minuscule amount of the substance in his or her system. Therefore, the *Derror* majority's interpretation of the statute defies practicable workability given its tremendous potential for arbitrary and discriminatory enforcement.[16]

The second *Robinson* factor also weighs heavily in favor of overruling *Derror* because *Derror* has not become "so embedded, so accepted, so fundamental, to

[16] We do not, as the partial dissent suggests, imply that the legalization of marijuana for a limited medical purpose is "equated with an intent to allow its lawful consumption in conjunction with driving" or that marijuana itself should no longer be on the list of schedule 1 controlled substances. We merely note that, under the *Derror* holding, those qualified individuals who lawfully use marijuana in accordance with the Michigan Medical Marihuana Act are prohibited from driving for an undetermined length of time given the potential of 11-carboxy-THC to remain in a person's system long after the person has consumed marijuana and is no longer impaired.

everyone's expectations" that overruling the case would result in "significant dislocations." *Robinson*, 462 Mich at 466. To begin with, the case was recently decided. Moreover, as this Court explained in *Robinson*, a citizen normally looks to the words of the statute itself when looking for guidance on how to direct his or her actions. *Id.* at 467. 11-carboxy-THC, however, is not listed anywhere in the statute that lists schedule 1 controlled substances, MCL 333.7212. Indeed, the *Derror* majority's conclusion that 11-carboxy-THC is a schedule 1 controlled substance required this Court to examine and choose from widely divergent dictionary definitions and ignored other statutory language that describes when a substance must be placed in schedule 1. See MCL 333.7202 and MCL 333.7211. Because this Court's interpretation of the statute confounded the legitimate expectations of citizens, it is this Court that "has disrupted the reliance interest[s]." *Robinson*, 462 Mich at 467.

Finally, although the Michigan Medical Marihuana Act represented a change in the law that lends some support to the third *Robinson* factor, overall the first two *Robinson* factors support overruling *Derror*. Because this Court cannot adhere to its previous, distorted reading of the statute under the doctrine of stare decisis, we overrule *Derror* to the extent that it is inconsistent with this opinion.

III. CONCLUSION

We hold that the trial court abused its discretion by failing to admit the evidence of the victim's intoxication because it was relevant to the issue of causation in MCL 257.617(3) and MCL 257.625(4) and (8). Thus, under the facts of this case, the victim's BAC should have been a factor for the jury to consider when determining

whether the prosecution proved beyond a reasonable doubt that defendant's conduct was a proximate cause of the accident and the victim's death. Moreover, we hold that the error resulted in a miscarriage of justice, requiring reversal under MCL 769.26. In addition, defendant's conviction under MCL 257.625(4) and (8) was based on an improper interpretation of MCL 257.625(8) and must be vacated on that ground also. We overrule *Derror* to the extent that it is inconsistent with this opinion.

Accordingly, we reverse the judgment of the Court of Appeals, vacate defendant's convictions under MCL 257.617(3) and MCL 257.625(4) and (8), and remand the case to the trial court for further proceedings consistent with this opinion.

KELLY, C.J., and HATHAWAY, J., concurred with CAVANAGH, J.

WEAVER, J. (*concurring*). I concur in and join Justice CAVANAGH's opinion, with the exceptions of footnote 14 and the citations in part II(A)(3) of *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998), a case in which I dissented.

YOUNG, J. (*concurring in part and dissenting in part*). A majority of justices today reach the correct conclusion that there may be circumstances in a criminal case that support introducing evidence of a victim's intoxication in order to show gross negligence. I concur in this portion of the lead opinion.

However, while I concur in the decision to grant defendant a new trial, I dissent from the gratuitous decision to overrule *People v Derror*.[1] The decision to

[1] *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006).

overrule *Derror* redounds only to the benefit of a marijuana abuser who gets behind the wheel of a motor vehicle. In enacting MCL 333.7212, the Legislature made the policy decision to include marijuana "and *every* . . . derivative" of marijuana[2] in the list of schedule 1 controlled substances. The Legislature, furthermore, forbade anyone to operate a motor vehicle with "*any* amount" of a schedule 1 controlled substance—such as a derivative of marijuana—in his or her body.[3] The decision to overrule *Derror* and rule that the metabolite 11-carboxy-tetrahydrocannabinol (11-carboxy-THC) is not a "derivative" of marijuana nullifies this clear legislative intent. In overruling *Derror*, a majority of justices usurp the role of policymaker from the people and their elected representatives and enact a policy contrary to that articulated in Michigan's controlled substances statutes. Even worse, because there is undisputed evidence that this defendant had trace amounts of *actual tetrahydrocannabinol* in his system, a majority of justices have used this case as a vehicle to overrule a decision with which they disagree even though there is plainly no reason to reach this question. This is a type of judicial overreach and activism of the worst kind.

Accordingly, I dissent from the conclusion that 11-carboxy-THC is not a derivative of marijuana within the meaning of Michigan's controlled substance laws. I likewise dissent from the decision to overrule *Derror*.

I. MICHIGAN'S CONTROLLED SUBSTANCE LAWS

MCL 257.625(8) forbids any person to "operate a vehicle . . . if the person has in his or her body any

[2] MCL 333.7106(3) (emphasis added).

[3] MCL 257.625(8) (emphasis added).

amount of a controlled substance listed in schedule 1 under . . . MCL 333.7212 . . . ." MCL 333.7212(1)(c) lists "marihuana" as a schedule 1 controlled substance. The Public Health Code, within which MCL 333.7212(1)(c) appears, defines "marihuana" as

> all parts of the plant Canabis [sic] sativa L., growing or not; the seeds thereof; the resin extracted from any part of the plant; ***and every*** *compound, manufacture, salt,* ***derivative***, *mixture, or preparation of the plant or its seeds or resin*.[4]

Tetrahydrocannabinol, or "THC," is the main psychoactive substance found in the cannabis plant,[5] and it is undisputed that THC is a schedule 1 controlled substance.[6] The body produces 11-carboxy-THC when it metabolizes THC. Accordingly, it is a "metabolite" of THC.[7] In *Derror*, this Court addressed whether 11-carboxy-THC, as a metabolite of THC, is also a "derivative" of THC.[8] Because "derivative" is undefined in the Public Health Code, the Court in *Derror* used medical dictionaries to define the term and thereby determine whether 11-carboxy-THC is a derivative of THC.[9]

The Court in *Derror* properly concluded that the term "derivative" encompasses metabolites. Although medical dictionaries define multiple senses of the term "derivative," the Court determined that the definition

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[4] MCL 333.7106(3) (emphasis added).

[5] See *Shorter Oxford English Dictionary* (6th ed), p 3221.

[6] Additionally, the Legislature has included "synthetic equivalents" of THC in schedule 1. See MCL 333.7212(1)(d) and (e).

[7] A "metabolite" is " '[a]ny product or substrate (foodstuff, intermediate, waste product) of metabolism, especially of catabolism.' " *Derror*, 475 Mich at 326, quoting *Stedman's Online Medical Dictionary*.

[8] *Derror*, 475 Mich at 326.

[9] *Id*., citing MCL 8.3a and *People v Schaefer*, 473 Mich 418, 435; 703 NW2d 774 (2005).

"chemical substance related structurally to another substance and theoretically derivable from it," contained in *Merriam-Webster's Online Medical Dictionary*, best effectuates the Legislature's intent.[10] In applying this definition, the Court concluded that 11-carboxy-THC is a derivative because "it has an identical chemical structure to THC except for the eleventh carbon atom."[11]

II. THE DECISION TO OVERRULE *DERROR* IS A RETREAT FROM STARE DECISIS

A majority of justices today overrule *Derror* and conclude that 11-carboxy-THC is not a derivative of THC. In doing so, they appear to retreat from their previously stated fidelity to stare decisis.[12] The justices

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[10] *Derror*, 475 Mich at 327-329.

[11] *Id.* at 327.

[12] See, e.g., *Pohutski v City of Allen Park*, 465 Mich 675, 712; 641 NW2d 219 (2002) (KELLY, J., dissenting) ("[I]f each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable."); *People v Hawkins*, 468 Mich 488, 517-518; 668 NW2d 602 (2003) (CAVANAGH, J., dissenting) (" 'We have overruled our precedents when the intervening development of the law has "removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies." . . . Absent those changes or compelling evidence bearing on Congress' original intent, . . . our system demands that we adhere to our prior interpretations of statutes.' "), quoting *Neal v United States*, 516 US 284, 295; 116 S Ct 763; 133 L Ed 2d 709 (1996), quoting *Patterson v McLean Credit Union*, 491 US 164, 173; 109 S Ct 2363; 105 L Ed 2d 132 (1989); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 278; 731 NW2d 41 (2007) (CAVANAGH, J., dissenting) (" 'Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction become precedent and should not be lightly departed.' "), quoting *People v Jamieson*, 436 Mich 61, 79; 461 NW2d 884 (1990); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 622; 702 NW2d 539 (2005) (WEAVER, J., dissenting) ("Correction for correction's sake does not make sense. The case has not been made why the Court should not adhere to the

in the majority can say what they will about their commitment to stare decisis, but the fact that they reach the issue raised in *Derror* when the facts of this case do not require this Court to address it puts to rest any semblance of principle in their positions.[13]

In deciding whether to overturn a precedent of this Court, "[t]he first question, of course, should be whether the earlier decision was wrongly decided."[14] The lead opinion has not shown that *Derror* was wrongly decided. In fact, it merely repeats similar arguments offered by the dissent in *Derror*. These arguments were unpersuasive when *Derror* was decided, and they remain unpersuasive today.

First, the lead opinion claims that the *Derror* Court "failed to interpret MCL 333.7212 in a manner consistent with federal law,"[15] as required under MCL 333.1111(1),[16] because "no federal court has held that 11-carboxy-

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doctrine of stare decisis in this case."); Berg, *Hathaway attacks*, Michigan Lawyers Weekly, October 27, 2008 (" 'People need to know what the law is,' [Supreme Court candidate Diane] Hathaway said. 'I believe in stare decisis. Something must be drastically wrong for the court to overrule.' "); *Lawyers' election guide: Judge Diane Marie Hathaway*, Michigan Lawyers Weekly, October 30, 2006 (quoting Justice HATHAWAY, then running for a position on the Court of Appeals, as saying that "[t]oo many appellate decisions are being decided by judicial activists who are overturning precedent").

[13] This case is yet another example of how the new majority is making good on Chief Justice KELLY's pledge made shortly after the shift in the Court's philosophical majority following the 2008 Supreme Court election:

> We the new majority will get the ship off the shoals and back on course, and we will undo a great deal of the damage that the Republican-dominated court has done. Not only will we not neglect our duties, we will not sleep on the bench. [*She said*, Detroit Free Press, December 10, 2008, p 2A.].

[14] *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000).

[15] *Ante* at 207.

[16] MCL 333.1111(1) provides that the Public Health Code "is intended to be consistent with applicable federal and state law and shall be construed, when necessary, to achieve that consistency."

THC is a controlled substance."[17] However, "no federal court has specifically *excluded* 11-carboxy-THC from the definition of 'marijuana.' "[18] Accordingly, the *Derror* Court's interpretation of MCL 333.7212 is consistent with federal law.[19]

Second, the lead opinion claims that *Derror* "ignored other relevant statutory provisions that suggest that 11-carboxy-THC should not be considered a schedule 1 controlled substance." In particular, the lead opinion claims that the Michigan Board of Pharmacy is not required to include 11-carboxy-THC in schedule 1 because the substance does not have "high potential for abuse."[20] This argument is specious. Although MCL 333.7211 mandates the inclusion of certain substances in schedule 1, "[i]t does not prohibit the inclusion of *other* substances in schedule 1."[21] Moreover, the Legislature expressly listed marijuana as a schedule 1 controlled substance. Because 11-carboxy-THC is a derivative of marijuana, it too constitutes a schedule 1 controlled substance,[22] regardless of whether it "has high potential for abuse" within the meaning of MCL 333.7211.

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[17] *Ante* at 208.

[18] *Derror*, 475 Mich at 330 n 10.

[19] The lead opinion also claims that "federal courts have stated that 'the purpose of banning marijuana was to ban the euphoric effects produced by THC.' " *Ante* at 208, quoting *United States v Sanapaw*, 366 F3d 492, 495 (CA 7, 2004), which in turn cited *United States v Walton*, 168 US App DC 305, 306; 514 F2d 201 (1975). However, as the *Derror* Court explained, and as the dissent in *Derror* acknowledged, "the federal courts that have dealt with similar issues have reached their conclusions by interpreting the legislative history, rather than the plain language of the analogous federal statute." *Derror*, 475 Mich at 330 n 10. Our fidelity must be to the actual text of the statute, and accordingly, the *Derror* Court rightly declined to adopt federal precedents that "do not comport with the actual words that our Legislature used to convey its meaning." *Id.*

[20] *Ante* at 209-210, quoting MCL 333.7211.

[21] *Derror*, 475 Mich at 330 n 9 (emphasis added).

[22] *Id.*

Finally, the lead opinion claims that, because the Legislature did not specifically *include* the terms "11-carboxy-THC" or "metabolite" in the list of schedule 1 controlled substances, it purposely *omitted* them from that list. This argument is also specious and misses the entire point of the *Derror* decision: the Legislature expressly listed marijuana in schedule 1 and then specifically defined "marijuana" as including its derivatives. The Legislature should not have to draft a statute in the manner of a person wearing a belt and suspenders, by expressly banning every conceivable iteration and by-product of marijuana in order to protect the citizens of Michigan from people who drive with marijuana and marijuana by-products in their systems.

Because *Derror* was correctly decided, the decision whether to overrule *Derror* should end there. However, even if *Derror* had been wrongly decided, other relevant factors exist that caution against overruling *Derror*.

Before overruling a wrongly decided precedent, this Court must consider "whether the decision at issue defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision."[23] None of these factors compel overruling *Derror*.

Derror does not defy practical workability merely because of the "*potential* for arbitrary and discriminatory enforcement . . . ."[24] Moreover, the voters' approval of the Michigan Medical Marihuana Act[25] is not, as the lead opinion suggests, relevant to deciding whether to overrule *Derror*.[26] To begin with, legalization of the use

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[23] *Robinson*, 462 Mich at 464.

[24] *Ante* at 213 (emphasis added).

[25] MCL 333.26421 *et seq*.

[26] Of note, defendant's conduct occurred in 2005, three years before the people of Michigan approved the Michigan Medical Marihuana Act.

of marijuana for a limited medical purpose cannot be equated with an intent to allow its lawful consumption in conjunction with driving. The lead opinion's argument, taken to its logical extreme, suggests that *marijuana itself*, not just its derivative, 11-carboxy-THC, should no longer be a schedule 1 controlled substance because of its limited legalization by the Michigan Medical Marihuana Act. It is clear that the act operates *in harmony with* existing controlled substances laws, not *in place of* them.[27] In particular, the act only provides that a "*qualifying* patient who has been issued and possess a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner . . . for the medical use of marihuana in accordance with this act . . . ."[28] Notably, the act also prohibits the operation of a motor vehicle "while under the influence of marihuana."[29]

Finally, the lead opinion expresses concern that *Derror* impermissibly prohibits

> those qualified individuals who lawfully use marijuana in accordance with the Michigan Medical Marihuana Act . . . from driving for an undetermined length of time given the potential of 11-carboxy-THC to remain in a person's system long after the person has consumed marijuana and is no longer impaired."[30]

This concern is a red herring. The act itself provides: "All other acts and parts of acts inconsistent with this act do not apply *to the medical use of marihuana as provided for by this act*."[31] Therefore, to the extent the act's prohibition of driving "under the influence" of

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[27] After all, *alcohol* is a legal substance, and no one would suggest that the Legislature could not restrict from driving those who consume alcohol.

[28] MCL 333.26424(a).

[29] MCL 333.26427(b)(4).

[30] *Ante* at 215 n 16.

[31] MCL 333.26427(e) (emphasis added).

prescribed medical marijuana may be narrower than the statutes at issue in this case and the application of *Derror*, the people of Michigan have determined that the act supersedes Michigan's controlled substances laws. Nevertheless, it does so *only* vis-à-vis prescribed medical marijuana, not in other circumstances, such as those in the case at bar.

The lead opinion's denigration of the reliance interests involved in applying *Derror* is similarly misguided. Some justices in the majority attach significance to the doctrine of "legislative silence" or "acquiescence."[32] But here, the lead opinion's position appears to be inconsistent with this professed adherence to the doctrine that "[i]f a legislature reenacts a statute without modifying a high court's practical construction of that statute, that construction is implicitly adopted."[33] It is noteworthy that the Legislature has reenacted MCL 257.625 *four times* by amending it since this Court decided *Derror*.[34] At none of those times did the Legislature amend the provision that forbids a person to operate a

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[32] "Silence by the Legislature following judicial construction of a statute suggests consent to that construction." *Donajkowski v Alpena Power Co*, 460 Mich 243, 270; 596 NW2d 574 (1999) (KELLY, J., joined by CAVANAGH, J., dissenting). I believe that this is a shallow, incoherent doctrine, as I stated in my *Donajkowski* majority opinion. See *id.* at 259-262. However, it is a doctrine upon which some justices in the majority rely when it is convenient to do so.

[33] *Hawkins*, 468 Mich at 519 (CAVANAGH, J., joined by KELLY, J., dissenting), citing 2B Singer, Statutes & Statutory Construction (2000 rev), § 49.09, pp 103-112.

I continue to adhere to my stated position that "[i]n the absence of a clear indication that the Legislature intended to either adopt or repudiate this Court's prior construction, there is no reason to subordinate our primary principle of construction—to ascertain the Legislature's intent by first examining the statute's language—to the reenactment rule." *Hawkins*, 468 Mich at 508-509 (majority opinion).

[34] See 2006 PA 564; 2008 PA 341; 2008 PA 462; 2008 PA 463.

motor vehicle with "any amount of a controlled substance listed in schedule 1 under . . . MCL 333.7212 . . . ."[35] Furthermore, the Legislature has not amended the list of schedule 1 controlled substances since *Derror* to exclude metabolites of marijuana or 11-carboxy-THC. Thus, for those in the majority who subscribe to the doctrine of legislative acquiescence, the Legislature's multiple reenactments and acquiescence have significance and, accordingly, embarrassingly belie the majority's argument that no reliance interests are involved in overturning *Derror*.

III. AS THERE WAS ACTUAL THC IN DEFENDANT'S BLOOD, THERE IS NO NEED TO REACH THE QUESTION WHETHER DERIVATIVES ARE WITHIN THE AMBIT OF THE STATUTE

Finally, and perhaps most important, the decision to overrule *Derror* is simply unnecessary in the instant case. Not only did defendant's blood contain the derivative 11-carboxy-THC, it *also contained THC itself*. All members of this Court, including those in the majority, agree that having "any amount" of THC in a driver's bloodstream, however slight, is illegal under this statute. Therefore, in a case in which it is undisputed that defendant violated this statute by virtue of the presence of actual THC, it is unnecessary to review whether 11-carboxy-THC is a schedule 1 controlled substance. Consequently, the decision by a majority of justices to overrule *Derror* should be seen for what it is: an unnecessary and exceedingly aggressive act to kill a case with which the new majority of this Court disagrees.

IV. CONCLUSION

In enacting MCL 333.7212, the Legislature made the policy decision to include marijuana "and *every* . . . deriva-

[35] MCL 257.625(8).

tive" of marijuana[36] in the list of schedule 1 controlled substances. The Legislature, furthermore, forbade anyone to operate a vehicle with "*any* amount" of a schedule 1 controlled substance—such as a derivative of marijuana—in his or her body.[37] This Court's decision in *Derror* correctly determined that the metabolite 11-carboxy-THC is a "derivative" of the marijuana. The determination by the majority of justices to overrule *Derror* is not only ill considered, but also usurps the clear policy choices of the people of Michigan. It is undisputed that there was *actual THC* in defendant's bloodstream. Therefore, whether derivatives of THC are also prohibited is not a question that is necessary for this Court to reach *in this case*. This decision is thus indicative of the new majority's willfulness to overrule cases with which it disagrees. Accordingly, I vigorously dissent from the decision to overrule *Derror*.

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

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[36] MCL 333.7106(3) (emphasis added).

[37] MCL 257.625(8) (emphasis added).

WOODMAN v KERA LLC

Docket No. 137347. Argued October 28, 2009 (Calendar No. 9). Decided June 18, 2010.

Trent Woodman, a minor, by his mother and next friend, Sheila Woodman, brought an action in the Kent Circuit Court against Kera LLC, doing business as Bounce Party (a facility that contained a play area with large inflatable playground equipment), alleging negligence, gross negligence, and a violation of the Michigan Consumer Protection Act. Trent had broken his leg while jumping off a slide during his birthday party at the facility. Defendant moved for summary disposition, arguing that the liability waiver Trent's father, Jeffrey Woodman, had signed on Trent's behalf barred the claims against it. Plaintiff also moved for summary disposition, arguing that the waiver was invalid as a matter of law because a parent cannot waive, release, or compromise his or her child's claim. The court, Donald A. Johnston, J., ruled that the waiver barred the negligence claim, but not the gross negligence and consumer protection claims. Both parties sought leave to appeal. In three separate opinions by TALBOT, J., BANDSTRA, P.J., and SCHUETTE, J., the Court of Appeals concluded that the trial court had erred by not dismissing the gross negligence and consumer protection claims and further held that the waiver did not bar the negligence claim. The Court of Appeals reversed and remanded the case for reinstatement of the negligence claim. 280 Mich App 125 (2008). The Supreme Court granted defendant leave to appeal, with consideration limited to the validity and enforceability of the liability waiver. 483 Mich 999 (2009).

In separate opinions, the Supreme Court *held*:

Under Michigan's common law, a parental preinjury liability waiver is unenforceable.

Justice YOUNG wrote the lead opinion, which set forth the holding of the Court. In part III(A) of the opinion, he stated that under Michigan's common law, a minor lacks the capacity to contract. Had Trent signed the waiver, rather than his father, defendant could not have enforced the waiver against him unless Trent confirmed it after he reached the age of majority. Further-

more, under Michigan's common law, a parent cannot contractually bind his or her minor child. Accordingly, the waiver did not bar plaintiff's cause of action. Justice YOUNG further stated in the remainder of his opinion that both the Supreme Court and the Legislature have the authority to change the common law, but whether the Court should do so is a matter of prudence, given that the Court has fewer tools for assessing the societal costs and benefits of those changes than the Legislature. Moreover, the common-law rules regarding minors and limitations on those who would contract on their behalf exist solely for the protection of the minors. Defendant did not identify any existing public policy supporting the change in the common law, and enforcing parental waivers would be contrary to the established public policy of Michigan. Accordingly, Justice YOUNG would decline in this instance to alter the common-law rule. He noted, however, that even without a change in the common-law rule, a defendant would have an alternative for reducing its liability in the form of a parental indemnity agreement.

Justice HATHAWAY, joined by Chief Justice KELLY and Justice WEAVER, concurring, agreed that a preinjury waiver signed by a parent on behalf of his or her minor child is unenforceable for the reasons stated in parts I, II, and III(A) of Justice YOUNG's opinion. As further noted by Justice YOUNG, there are compelling policy reasons not to depart from this longstanding rule, which gives minor children the same protections before and after an injury. A parent may not resolve his or her child's claim or sign a release on behalf of the child without court approval after the child has been injured. Justice HATHAWAY disagreed with Justice YOUNG, however, that the common-law rule prohibiting parental waivers can be circumvented by parental indemnity agreements.

Chief Justice KELLY concurred in full with Justice HATHAWAY and with parts I, II, and III(A) of Justice YOUNG's opinion. She wrote separately to note that the proposition that a defendant can circumvent the unenforceability of a parental preinjury liability waiver simply by entering into a separate indemnity agreement with a parent is problematic for several reasons. The question should not be addressed in this case, and a majority has not accepted Justice YOUNG's conclusions regarding it. The validity of those agreements is questionable because they shift financial responsibility for a tortfeasor's negligent conduct to the parents of the minor victim, producing the same effect as parental liability waivers.

Affirmed and remanded.

Justice CAVANAGH would affirm the Court of Appeals' decision that defendant was not entitled to summary disposition on the basis of the release, but would do so on different grounds. The language of the release waived only the claims of the "undersigned," and the undersigned in this case was Trent's father. Justice CAVANAGH would vacate the portion of the judgment of the Court of Appeals that held that preinjury waivers by parents on behalf of their minor children are not presumptively enforceable because it was unnecessary to reach that issue in this case, just as it was unnecessary to address the effect of indemnity agreements by parents.

Justice MARKMAN, joined by Justice CORRIGAN, agreed that defendant was not entitled to summary disposition, on the grounds that the actual language of the waiver did not waive Trent's claims. The analysis by the Court of Appeals concluding that a parent cannot bind his or her minor child by a preinjury waiver should be vacated because the Court of Appeals answered a question that was not properly before it. The opinions of Justice YOUNG, Justice HATHAWAY, and Chief Justice KELLY do the same. Were the question properly before the Supreme Court, pursuant to the Court's authority under Const 1963, art 3, § 7, Justice MARKMAN would clarify that Michigan common law, consistent with the prevailing customs and practices of Michigan's citizens, does allow the enforcement of a parental preinjury waiver. No previous Michigan case has held that parental preinjury waivers are unenforceable, and many relevant considerations support clarifying that the common law permits enforcement of parental preinjury waivers, including (1) statutes and caselaw that have enhanced the legal autonomy of minors, (2) statutes and caselaw that have recognized parents' authority to make important decisions regarding their children, (3) caselaw of the United States Supreme Court recognizing a constitutional basis for that authority, (4) statutes and caselaw that have granted protections to recreational providers, (5) freedom-of-contract principles, (6) recent trends in the growth of litigation, and (7) persuasive decisions from other jurisdictions. The majority's decision will have significant consequences that will be felt widely throughout this state, including both an increase in litigation and a reduction in sporting and recreational opportunities for children.

PARENT AND CHILD — WAIVER OF CHILDREN'S CLAIMS — CONTRACTS TO WAIVE CHILDREN'S CLAIMS — COMMON LAW.

A preinjury liability waiver by a parent on behalf of his or her child is unenforceable and does not bar the child's cause of action.

Rhoades McKee PC (by *Paul A. McCarthy* and *Stephen J. Hulst*) for plaintiff.

Feuer & Kozerski, P.C. (by *Scott L. Feuer*), for defendant.

Amici Curiae:

Eardley Law Offices, P.C. (by *Eugenie B. Eardley*), for the Michigan Association for Justice.

Kreis, Enderle, Hudgins & Borsos, P.C. (by *James D. Lance*) for the Michigan Association of United Ways, the Michigan Nonprofit Association, and the Michigan Association of Community Mental Health Boards.

YOUNG, J. I believe this Court must determine whether a preinjury liability waiver signed by a parent on behalf of his child is enforceable under the common law and, if not, whether this Court should change the common law to enforce such a waiver. I would hold that a parental preinjury waiver is unenforceable under Michigan's common law because, absent special circumstances, a parent has no authority to bind his child by contract. I would further decline to change the common law rule.

While this Court unquestionably has the *authority* to modify the common law,[1] such modifications should be made with the utmost caution because it is difficult for the judiciary to assess the competing interests that may be at stake and the societal trade-offs relevant to one modification of the common law versus another in relation to the existing rule.

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[1] Const 1963, art 3, § 7 ("The common law and the statute laws now in force . . . shall remain in force until they expire by their own limitations, or are changed, amended or repealed."); *Longstreth v Gensel*, 423 Mich 675, 686; 377 NW2d 804 (1985) ("[T]he common-law rule remains the law until modified by this Court or the Legislature.").

Ironically, defendant has consistently *denied* that the common law explicitly precluded use of parental preinjury waivers. As a result, defendant has never advocated a *specific* change in the common law, much less provided the Court with any analytic framework concerning such an alternative rule or any meaningful assessment of possible consequences that might attend a change in the existing rule. Particularly in light of the historic duration of the common law rule generally precluding parental waivers, and because the proponent requiring the change has essentially failed to provide any critical argument and analysis in support of the change, I would decline to alter the existing rule.[2] Accordingly, I would affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.[3]

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[2] I note that a bill to modify the common law rule at issue here has been introduced in the Legislature. HB 4970, introduced May 19, 2009, would add § 5109 to the Estates and Protected Individuals Code. The added section would provide:

> (1) A parent or guardian of a minor who participates in recreational activity may release a person in advance from liability for economic or noneconomic damages for personal injury sustained by the minor as a result of the activity.
>
> (2) One or more of the following may be released from liability under this section:
>
> (a) A sponsor or organizer of the recreational activity.
>
> (b) An owner or lessee of the property on which the recreational activity occurs.
>
> (3) A release under this section shall be in writing signed by the parent or guardian.

On March 10, 2010, the House Judiciary Committee reported the bill with a substitute and recommended that the House of Representatives adopt the substitute.

[3] This is a case in which the competing policy interests are closely balanced. The common law and positive law that inform my understand-

I. FACTS AND PROCEDURAL HISTORY

The underlying facts are simple and likely familiar to many parents with young children. Five-year-old Trent Woodman's parents had his birthday party at Bounce Party, which defendant Kera LLC operates and which is an indoor play area that contains inflatable play equipment. Before the party, Trent's father, Jeffrey Woodman, signed a liability waiver on Trent's behalf. The waiver provided in pertinent part:

> THE UNDERSIGNED, by his/her signature herein affixed does acknowledge that any physical activities involve some element of personal risk and that, accordingly, in consideration for the undersigned waiving his/her claim against BOUNCE PARTY, and their agents, the undersigned will be allowed to participate in any of the physical activities.
>
> By engaging in this activity, the undersigned acknowledges that he/she assumes the element of inherent risk, in consideration for being allowed to engage in the activity, agrees to indemnify and hold BOUNCE PARTY, and their agents, harmless from any liability for personal injury, property damage or wrongful death caused by participation in this activity. Further, the undersigned agrees to indemnify and hold BOUNCE PARTY, and their agents, harmless from any and all costs incurred including, but not limited to, actual attorney's fees that BOUNCE PARTY, and their agents, may suffer by an action or claim brought against it by anyone as a result of the undersigned's use of such facility.

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ing uniformly promote the protection of children and require that parents not be permitted to waive any future claims of their children. I am sympathetic to the arguments that Justice MARKMAN and the Court of Appeals concurrences offer that this view of the common law rule may promote litigiousness in our modern society. However, given the cases and positive law cited, I believe that this closely balanced social question is one best handled by the Legislature—particularly given that members of this Court, rather than the parties themselves, have offered stronger rationales for the common law rule that Justice MARKMAN favors.

Participant:_____Signature:_____
PRINTED NAME Parent or Legal Guardian's signature if participate [sic] is under age 18.

Date: _____

BE SURE YOU COMPLETE THIS CARD AND SEND IT WITH THE PARTY GUEST!

Mr. Woodman signed the form as the parent and Trent's name was printed on the form as the "participant."[4]

During the party, Trent jumped off a slide and broke his leg. Trent, by his mother, Sheila Woodman, as next friend, filed suit against defendant, alleging negligence, gross negligence, and violation of the Michigan Consumer Protection Act (MCPA).[5] Defendant sought summary disposition, arguing, in pertinent part, that plaintiff's claims were barred by the liability waiver. Plaintiff filed a cross-motion for summary disposition, arguing that the waiver was invalid as a matter of law because a parent cannot waive, release, or compromise his child's claims. The trial court ruled that the waiver barred plaintiff's negligence claim,[6] but not plaintiff's gross negligence or MCPA claims.

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[4] As noted in footnote 6, given the language of the waiver, the fact that Mr. Woodman signed as "parent" rather than as the "participant" on the waiver raises questions about whether Trent's rights were waived at all.

[5] MCL 445.901 *et seq*.

[6] Ironically, the question whether the waiver at issue here actually bound the child was raised by members of this Court at oral argument, as the challenged waiver appears to bind only the "undersigned," who is Mr. Woodman, not the "participant," Trent. Indeed, it appears that the "undersigned" is bound to indemnify defendant for any liability that might occur. Notwithstanding this, plaintiff has argued throughout this litigation that the release *bound Trent*.

Plaintiff appealed the waiver issue, and defendant appealed the gross negligence and MCPA issues. The Court of Appeals reversed and held that the waiver was invalid to bar the negligence claim.[7] The lead opinion, authored by Judge TALBOT, provided a thorough discussion of the validity of parental waivers in foreign jurisdictions as well as under Michigan law. The lead opinion concluded that under Michigan common law, " 'a parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims of his or her child.' "[8] Thus, the lead opinion concluded, "the release signed on behalf of [Trent] cannot be construed as valid"[9] and "the designation or imposition of any waiver exceptions is solely within the purview of the Legislature."[10] Judges BANDSTRA and SCHUETTE "reluctantly" concurred, noting their hope that this Court or the Legislature would address the

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Following the trial court's determination that the waiver precluded plaintiff's suit, plaintiff subsequently moved for summary disposition and argued that the waiver language was ineffective to waive plaintiff's claim. Plaintiff conceded that the waiver "operate[d] between" defendant and Trent, but argued that the agreement was *insufficiently clear* to effectuate a valid waiver of Trent's rights. The trial court denied that motion, and plaintiff has not appealed *on the basis that the waiver language was ineffective*. An issue not advanced or appealed is deemed waived. *Lawrence v Will Darrah & Assoc Inc*, 445 Mich 1, 4 n 2; 516 NW2d 43 (1994). Because plaintiff never argued that the waiver bound Mr. Woodman, I do not address the obvious problems with the waiver language, which, in contradiction to the argument specifically advanced by plaintiff before the trial court, appears to bind only Mr. Woodman, rather than Trent.

[7] *Woodman v Kera, LLC*, 280 Mich App 125; 760 NW2d 641(2008). The Court of Appeals also held that defendant was entitled to summary disposition on plaintiff's gross negligence and MCPA claims.

[8] *Id.* at 144 (opinion by TALBOT, J.), quoting *Tuer v Niedoliwka*, 92 Mich App 694, 698-699; 285 NW2d 424 (1979).

[9] *Woodman*, 280 Mich App at 151 (opinion by TALBOT, J.).

[10] *Id.* at 149.

issue and change the common law to permit a parent to waive the tort claims of their minor children.[11]

Defendant sought leave to appeal, and this Court granted defendant's application, limited to considering "whether the parental preinjury liability waiver was valid and enforceable."[12]

II. STANDARD OF REVIEW

This Court reviews de novo the grant or denial of summary disposition.[13]

III. DISCUSSION

Defendant seeks to have this Court enforce the parental preinjury waiver that Mr. Woodman signed on behalf of his son. As stated, I believe that this Court must determine whether a parental preinjury waiver is enforceable under the common law and, if not, whether we should exercise our authority to change the common law and enforce such a waiver.

A. THE COMMON LAW

A parental preinjury waiver is a contract. Mr. Woodman purportedly signed the contract on behalf of his son. Consequently, defendant necessarily asserts that the contract is enforceable against Trent because Mr. Woodman had authority to bind his son to the contract.

The well-established Michigan common law rule is that a minor lacks the capacity to contract.[14] It is undis-

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[11] *Id.* at 157 (opinion by BANDSTRA, P.J.); *id.* at 161 (opinion by SCHUETTE, J.).

[12] *Woodman v Kera, LLC*, 483 Mich 999 (2009).

[13] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[14] See *Holmes v Rice*, 45 Mich 142; 7 NW 772 (1881) ("The law in recognizing the incapacity of infants to enter into certain contracts and

puted that if five-year-old Trent had signed the waiver, defendant could not enforce the waiver against him unless Trent confirmed it after he reached the age of majority.[15]

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declaring such contracts voidable does so for the infant's protection. Their contracts are not void but voidable, and it is for the infant to avoid the contract or ratify it . . . ."); *Minock v Shortridge*, 21 Mich 304, 315 (1870) ("The executory contract of an infant, such as a promissory note, is not void in the sense of being a nullity, because it may be confirmed, but it has no binding force until it is confirmed."); *Carrell v Potter*, 23 Mich 377, 378-379 (1871); *Dunton v Brown*, 31 Mich 182, 183 (1875); *Reynolds v Garber-Buick Co*, 183 Mich 157, 162; 149 NW 985 (1914) ("After reaching his majority one may disaffirm a contract made by him during infancy and recover what he paid or parted with pursuant to such contract, if he return what he received."); *Lawrence v Baxter*, 275 Mich 587, 589; 267 NW 742 (1936) ("Authority need not be cited in support of the uniform holdings that a minor may rescind a contract of this character. The contract for the house and lot was not for a necessity.").

The common law exception to this rule is that a minor can bind himself by contract for "necessaries." See *In re Dzwonkiewicz's Estate*, 231 Mich 165, 167; 203 NW 671 (1925) (defining "necessaries" as items that " 'answer[] the bodily needs of the infant, without which the individual cannot reasonably exist' " and holding that medical services are "necessaries") (citation omitted); *Squier v Hydliff*, 9 Mich 274, 277 (1861) ("It has, we believe, always been held that a minor might bind himself by contract for necessaries, and that such contract when executed, if reasonable under all the circumstances, or not so unreasonable as to be evidence of fraud or undue advantage, can not be repudiated by him."); *Lynch v Johnson*, 109 Mich 640, 643; 67 NW 908 (1896) ("These clothes were within the class known as 'necessaries.' "); *Wood v Losey*, 50 Mich 475, 477-478; 15 NW 557 (1883).

There are, of course, also express statutory exceptions to the common law. See, e.g., MCL 600.1404(2) (educational loans); MCL 600.1403 (willful misrepresentation of age); MCL 500.2205 (life or disability insurance); MCL 333.5127(1) (consent to medical care for a minor infected with venereal disease or HIV); MCL 333.6121(1) (consent to substance abuse related medical care); MCL 333.9132(1) (consent to prenatal and pregnancy related health care).

[15] See *Minock*, 21 Mich at 315. The age of majority in Michigan is 18. MCL 722.52.

At issue is whether a minor can be bound by a contract signed on his behalf by a third party.[16] Specifically, can a parent bind his child by contract if the child could not otherwise be bound? Defendant insists that, under the common law, a parental waiver is enforceable to bar the claim of a minor child. However, the Michigan common law rule is clear: a guardian, including a parent, cannot contractually bind his minor ward.[17]

That point of law was firmly established more than 130 years ago by this Court in *Armitage v Widoe*.[18] In that case, the plaintiff was a minor when his father signed a land purchase contract on behalf of his son. After reaching majority, the plaintiff sought to disaffirm

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[16] Justice MARKMAN cites numerous instances in which the Legislature has permitted "parents to provide consent to their children's participation in numerous significant activities" as a basis for concluding that parental preinjury waivers are enforceable. *Post* at 285, 288-290.

However, the issue presented in this case is *not* whether parents have the authority to consent to their child's participation in various activities. Certainly, parents generally have such authority, and nothing in this opinion should be read as attempting to limit a parent's authority to provide consent to the *activity*. The issue in this case is whether a parent may bind his child by contract when the child is injured as a result of participating in the consented-to activity.

[17] See *Reynolds*, 183 Mich at 166, in which this Court stated:

> Of the power of guardians to contract for their wards, it is stated as a general proposition that:
>
> "Guardians cannot by their contracts bind either the person or estate of their wards. Such contracts bind the guardians personally, and recovery must be had in an action against them, not against the ward." [Citation omitted.]

See also *Burt v McBain*, 29 Mich 260, 265 (1874) ("In this case the plaintiff was an infant, and she could not be bound by any relinquishment or attempted relinquishment by another of her rights."); *Bearinger v Pelton*, 78 Mich 109, 114; 43 NW 1042 (1889) ("The general guardian had no right to bind the infants by a consent decree.").

[18] *Armitage v Widoe*, 36 Mich 124 (1877).

the contract and recover the money his father had paid toward the purchase price on his behalf. Justice COOLEY, writing for a unanimous Court, held that the plaintiff had no interest in the contract because his father was *without authority* to bind him to the contract:

> Had the infant in the first place undertaken to make another his agent to enter into the contract for him, the appointment would not have been valid. On the authorities no rule is clearer than that an infant cannot empower an agent or attorney to act for him. But if he cannot appoint an agent or attorney, it is clear he cannot affirm what one has assumed to do in his name as such. He cannot affirm what he could not authorize. It would be extraordinary if a party who has no power to do a particular act could yet do it indirectly by the mere act of adoption. Such a doctrine would deprive the infant wholly of his protection; for one has only to change the order of proceeding, assume to act for the infant first and get his authority afterwards, and the principle of law which denies him the power to give the authority is subverted. But such a doctrine is wholly inadmissible. The protection of infancy is a substantial one, and is not to be put aside and overcome by indirect methods.[19]

In *Lothrop v Duffield*,[20] an attorney who represented several infants in obtaining shares of their grandfather's estate sought to recover his fee from the minors' estates. This Court held that the attorney could not recover directly from the minors' estates because

> [w]hatever contract relations he had were with their guardian, *who could not bind the infants personally or their estate by contract* (except by authority of the probate court, in accordance with law), so as to subject their estates to claims filed by third parties for expenses incurred by the guardian.[21]

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[19] *Id.* at 129 (citations omitted).

[20] *Lothrop v Duffield*, 134 Mich 485; 96 NW 577 (1903).

[21] *Id.* at 487 (emphasis added).

This Court set forth ample authority supporting the proposition that the guardian was without authority to bind the minors to a contract.[22]

The fact that the guardian in the instant case is the child's father does not alter this bedrock legal principle. Parents, as natural guardians of a child,[23] enjoy the same authority over a child as legal guardians.[24] Indeed, in *Power v Harlow*,[25] Justice THOMAS M. COOLEY made clear that a parent's authority is limited to the care and custody of his child and that a parent is without authority to waive the rights of the child. In *Power*, the plaintiff child was injured while playing with an explosive on the defendant's property. The defense sought to use the mother's admission that the child had been warned of the danger as an admission binding on the child. The trial court held that the statement was inadmissible, and Justice COOLEY, writing for the Court, affirmed:

> The natural guardian has no power to admit away the rights of the ward whose person is committed to his custody. He is guardian of the person only, having no control of any estate the ward may possess, and could not be given a control except on judicial proceedings and after giving security for responsible care. This being so, it cannot be plausibly claimed that by an irresponsible admission he

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[22] See *id.* at 487-489 and the numerous authorities cited therein.

[23] See *In re Knott*, 162 Mich 10, 16; 126 NW 1040 (1910); *In re Rosebush*, 195 Mich App 675, 686; 491 NW2d 633 (1992), quoting *In re LHR*, 253 Ga 439, 446; 321 SE2d 716 (1984).

[24] See *Gott v Culp*, 45 Mich 265, 271-272; 7 NW 767 (1881) ("The law is entirely well settled that the guardian's discretion in such matters stands on a very similar footing with a parent's, and that he is not compellable to prefer mere economy of cost to the welfare and comfort of his ward."); MCL 700.5215 ("A minor's guardian has the powers and responsibilities of a parent who is not deprived of custody of the parent's minor and unemancipated child . . . .").

[25] *Power v Harlow*, 57 Mich 107; 23 NW 606 (1885).

> may deprive his ward of important rights. *A right of action is as much property as is a corporeal possession, and, in the case of a minor, is protected by the law in the same way and under the same securities. The mother could not release it even for full consideration and by the most formal instrument*; much less, therefore, could she, by mere word of mouth, when not under oath, or otherwise chargeable with responsibility, destroy his right of action by her admissions.[26]

The longstanding and undisturbed common law rule that a parent lacks authority to bind his child by contract[27] was recently acknowledged by this Court in a case in which the Legislature had abrogated the general common law rule in the medical malpractice context. In *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*,[28] the pregnant mother signed a medical waiver requiring arbitration of any claim on behalf of her unborn child. However, the mother contested the validity of that waiver after her child was injured during delivery. The Court considered the effect of MCL 600.5046(2) (since repealed by 1993 PA 78), which provided:

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[26] *Id.* at 111 (emphasis added).

[27] See footnote 17 of this opinion; *Lothrup*, 134 Mich at 487; *Reliance Ins Co v Haney*, 54 Mich App 237, 242; 220 NW2d 728 (1974) ("A parent has no authority merely by virtue of the parental relation to waive, release, or compromise claims by or against his child."), citing 67 CJS, Parent & Child, § 58, p 764, and *Schofield v Spilker*, 37 Mich App 33; 194 NW2d 549 (1971); *Tuer*, 92 Mich App at 698-699 (holding that an agreement between parents purporting to release the father of child support obligation was not binding on the child); *In re Kinsella Estate*, 120 Mich App 199, 203; 327 NW2d 437 (1982) (mother's consent to annulment with putative father was not was not binding on children seeking to establish paternity); *Smith v YMCA of Benton Harbor/St Joseph*, 216 Mich App 552, 554; 550 NW2d 262 (1996) (parental release in exchange for $3,275 after child fell at swimming pool was not binding on child).

[28] *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167; 405 NW2d 88 (1987).

> A minor child shall be bound by a written agreement to arbitrate disputes, controversies, or issues upon the execution of an agreement on his behalf by a parent or legal guardian. The minor child may not subsequently disaffirm the agreement.

This Court concluded that the statute mandated that the arbitration agreement signed by the mother bind her child. In so doing, we acknowledged that the agreement would not have been binding under the general common law rule:

> Our interpretation of [MCL 600.5046(2)] is a departure from the common-law rule that a parent has no authority to waive, release, or compromise claims by or against a child. However, the common law can be modified or abrogated by statute. Thus, a child can be bound by a parent's act when a statute grants that authority to a parent. We believe that [MCL 600.5046(2)] changes the common law to permit a parent to bind a child to an arbitration agreement.[29]

Accordingly, we reaffirmed that, under the consistent and well-established Michigan common law, a parent is without authority to bind his child by contract.

In support of its claim that parental preinjury waivers are valid, defendant first contends that general freedom of contract principles render these agreements enforceable.[30] This contention is entirely unpersuasive. The issue at hand is not whether a *competent adult* is free to contract. Rather, the relevant issue is the *subject matter* of the contract. This Court does not, under

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[29] *Id.* at 192-193 (citations omitted).

[30] See *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002) (" 'The general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.' "), quoting *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 356; 51 S Ct 476; 75 L Ed 1112 (1931).

freedom of contract principles, enforce contracts that the parties otherwise have no authority to enter.[31] Mr. Woodman possesses no greater authority to waive the property rights of his son Trent than he possesses to waive the property rights of any other nonconsenting third party, such as his neighbor or a coworker. Thus, the answer to defendant's freedom of contract argument is simple: the freedom to contract does not permit contracting parties to impose obligations upon and waive the rights of third parties in the absence of legally cognizable authority to do so.

Relying on *O'Brien v Loeb*,[32] defendant's second contention is that a parent is only prohibited from waiving a tort claim *after* the injury and may freely waive a tort claim *before* the injury. In *O'Brien*, this Court rejected a parent's authority to waive her minor son's tort claim after the injury occurred because "[t]he transaction was carried on entirely with the mother, who was without authority to bind him in the release of his cause of action against the defendants."[33] Rather than supporting defendant's claim, *O'Brien* is in accord with the general common law rule that a parent is

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[31] See, e.g., *Atlas Mining Co v Johnston*, 23 Mich 36, 47 (1871) (holding that the defendant was not bound by its agent's agreement to purchase property sold at a public auction for $400 more than he was authorized to bid because "[i]t would be simply preposterous to hold that [the agreement] . . . assented to by [the agent], could in any way bind or affect the defendant, if [the agent] had no authority thus to bind them and the defendant did not ratify his action."); *Miller v Frost's Detroit Lumber & Wooden Ware Works*, 66 Mich 455, 458-459; 33 NW 406 (1887) (holding that the defendant was not bound by the agreement of an unauthorized agent to purchase lumber); *Deffenbaugh v Jackson Paper Mfg Co*, 120 Mich 242; 79 NW 197 (1899) (holding that the defendant company was not bound by an employment contract with the plaintiff that its agents were not authorized to enter into on the defendant's behalf).

[32] *O'Brien v Loeb*, 229 Mich 405; 201 NW 488 (1924).

[33] *Id.* at 408. The Court further quoted the rule from 22 Cyc L & Proc at 584:

without authority to bind his child by contract. *O'Brien* in no way creates an exception to the general common law rule, and no limiting principle or rationale may be extracted from its holding. I conclude that there is no basis to support defendant's contention that a parent is only prohibited from waiving the child's tort claims after the injury.[34]

The application of the common law in this case is simple and straightforward. The waiver at issue is a contractual release. Mr. Woodman signed the waiver on behalf of his son, thereby intending to bind Trent to that contract. Under the common law, Mr. Woodman was without authority to do so. Accordingly, the waiver is not enforceable against Trent and does not bar his cause of action. Defendant's effort to enforce the waiver must therefore be viewed as a request that this Court modify the common law.

B. SHOULD THE COMMON LAW BE CHANGED?

The Michigan Constitution provides that "[t]he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."[35] Both this Court and the Legislature have authority to change the common law.[36]

> "An infant is not bound by a contract made for him or in his name by another person purporting to act for him, unless such person has been duly appointed his guardian or next friend and authorized by the court to act and bind him." [*O'Brien*, 229 Mich at 408.]

[34] See *McKinstry*, 428 Mich at 192-193, in which this Court acknowledged that a *pre*injury arbitration agreement was not enforceable under the common law.

[35] Const 1963, art 3, § 7.

[36] *Myers v Genesee Co Auditor*, 375 Mich 1, 7; 133 NW2d 190 (1965).

In this case, we are (impliedly) asked to alter a common law doctrine that has existed undisturbed for well over a century. There is no question that, if this Court were inclined to alter the common law, we would be *creating* public policy for this state. Just as "legislative amendment of the common law is not lightly presumed,"[37] this Court does not lightly exercise its authority to change the common law.[38] Indeed, this Court has acknowledged the prudential principle that we must "exercise caution and . . . defer to the Legislature when called upon to make a new and potentially societally dislocating change to the common law."[39] Whether to alter the common law is a matter of prudence and, because we share this authority with the Legislature, I believe we must consider whether the prudent course is to take action where the Legislature has not.

1. THE SUPERIORITY OF THE LEGISLATURE TO MAKE POLICY DECISIONS

This Court has recognized that the Legislature is the superior institution for creating the public policy of this state:

> "As a general rule, making social policy is a job for the Legislature, not the courts. See *In re Kurzyniec Estate*, 207 Mich App 531, 543; 526 NW2d 191 (1994). This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: 'The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing

[37] *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006).

[38] See *Bott v Natural Resources Comm*, 415 Mich 45; 327 NW2d 838 (1982).

[39] *Henry v Dow Chem Co*, 473 Mich 63, 89; 701 NW2d 684 (2005).

> alternatives—is the Legislature's, not the judiciary's.' *O'Donnell v State Farm Mut Automobile Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979)."[40]

The superiority of the Legislature to address matters of public policy is positively correlated with the complexity of the government's role in our society. During the nineteenth century, courts exercising their authority to alter the common law did so within the context of a simpler, agrarian economy. The legislatures of that era exercised a more limited regulatory role. In contrast, today's modern legislatures exercise robust regulation of all facets of our modern, internationalized economy and the rights and responsibilities of citizens. The need for a judiciary responsive to perceived public policy needs of the state has been correspondingly reduced by the development of the Legislature as a full-time institution and its pervasive statutory regulation of our increasingly complex society.

This case illustrates why this Court should frequently defer policy-based changes in the common law to the Legislature. When formulating public policy for this state, the Legislature possesses superior tools and means for gathering facts, data, and opinion and assessing the will of the public.[41] The Legislature can hold hearings, gather the opinions of experts, procure studies, and generally provide a forum for all societal factions to present their competing views on a particular question of public policy.

The judiciary, by contrast, is designed to accomplish the discrete task of resolving disputes, typically be-

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[40] *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999), quoting *Van v Zahorik*, 227 Mich App 90, 95; 575 NW2d 566 (1997).

[41] See *Henry*, 473 Mich at 92 n 24, quoting Schwartz & Lorber, *State Farm v Avery: State court regulation through litigation has gone too far*, 33 Conn L R 1215, 1219-1220 (2001).

tween two parties, each in pursuit of the party's own narrow interests. We are " 'limited to one set of facts in each lawsuit, which is shaped and limited by arguments from opposing counsel who seek to advance purely private interests.' "[42] We do not generally consider the views of nonparties on questions of policy,[43] and we are limited to the record developed by the parties. The reality of our judicial institutional limitations is a significant liability in regard to our ability to make informed decisions when we are asked to create public policy by changing the common law.

This case demonstrates these institutional limitations. Defendant openly concedes that the principal impetus for seeking enforcement of parental preinjury waivers is the protection that waivers afford its business in the face of the increasingly litigious nature of society. But for the perceived increased likelihood of a lawsuit and accompanying litigation costs, businesses such as defendant would not need parental preinjury waivers.[44] Accordingly, in seeking to have its waiver

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[42] *Henry*, 473 Mich at 93 n 24, quoting Schwartz & Lorber, 33 Conn L R at 1220.

[43] Our authority to entertain the positions of nonparties through briefs of amici curiae, MCR 7.306(D), is a far inferior alternative to the legislative process, in which hearings on policy questions broadly permit all citizens to give testimony and otherwise participate by petitioning their government and lobbying their representatives. See Const 1963, art 1, § 3. While appropriate in the legislative branch, such conduct is unethical in the judicial branch.

This very case shows the limit of this Court's ability to consider positions other than the ones advanced by the parties. Although the question whether parents may waive their children's rights is one of obvious public policy significance, only two amicus curiae briefs were submitted, and one urged this Court to defer to the Legislature. See amicus curiae brief of the Michigan Association for Justice at 7.

[44] Judge BANDSTRA, concurring with the lead opinion in the Court of Appeals, observed that "this case amply demonstrates [that] ours is an

enforced, defendant requires a modification of the common law rule and thus necessarily (but only impliedly) asserts that the societal benefits of enforcing the waiver —saving defendant litigation costs—outweigh the societal costs of abrogating the common law. Defendant, however, has not provided this Court with anything beyond mere conjecture that this is true.[45]

This is a purely policy-driven matter with numerous costs, benefits, and trade-offs—none of which defendant has bothered to raise, much less explicate. Certainly, enforcing the common law would protect minors' contractual and property rights and presumably encourage greater care in preventing negligent injuries to children. These are, without question, admirable societal goals with significant societal benefits that have a long provenance in this state's jurisprudence. Changing the common law would arguably save litigation costs for businesses offering recreational activities for children and concomitantly promote the availability of a wide range of activities for children. These too are admirable societal goals.[46] Of concern, however, are the potential

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extremely and increasingly litigious society" and that "[c]hildren have routinely jumped off playground slides for generations; lawsuits seeking to impose damages on someone else for resulting injuries are only a recent phenomenon." *Woodman*, 280 Mich App at 160 & n 2.

[45] Again, defendant does not even acknowledge that it seeks to change the common law rule. Consequently, defendant offers no analysis of what change this Court should make to the existing rule or the consequences of such a change.

[46] Fostering the stability of Michigan's businesses is also an important policy objective. In fact, given Michigan's persistently poorly performing economy, an argument could be made that fostering businesses that create more job opportunities is of primary social and economic importance to this state. See Gallagher, *CEOs expect slow state recovery*, Detroit Free Press, October 28, 2009, at 13A; *The State of Joblessness*, Wall St J, October 20, 2009, at A20; United States Department of Commerce, Bureau of Economic Analysis, *News Release: Economic Slowdown Widespread Among States in 2008*, June 2, 2009 (showing that Michigan's

hidden costs that might occur if the common law were changed. For example, if parental preinjury waivers were to be enforced, there would be a possibility that business owners will have diminished incentives to maintain their property appropriately, resulting in an increased number of injuries to children. Moreover, the enforcement of preinjury waivers might result in an increased burden on taxpayers for children whose parents waived their children's right to pursue a tort remedy but cannot afford their necessary medical care.[47]

These are but two illustrations of possible unintended consequences that a change in the common law here might occasion. Undoubtedly, there are many others. How are we as jurists to determine whether enforcing or changing the common law rule will result in a net benefit to society? Here we would only be able to make an uneducated guess without even a substantial analysis from the party that requires (but has not asked for) changes in the common law.[48] When engaging in such rank guesswork, the weight of common law authority that has existed for more than a century must be preferred. In accord with Hippocrates' admonition, maintaining the status quo has the significant benefit of doing no greater harm.

As stated previously, the Legislature is not similarly constrained to make policy on the basis of blind specu-

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gross domestic product has declined each year since 2005), available at <http://www.bea.gov/newsreleases/regional/gdp_state/2009/pdf/gsp0609.pdf> (accessed June 3, 2010).

[47] See *Kirton v Fields*, 997 So 2d 349, 357 (Fla, 2008). ("If the parent cannot afford to bear that burden, the parties who suffer are the child, other family members, and the people of the State who will be called on to bear that financial burden.").

[48] Cf. *Henry*, 473 Mich at 90 ("In effect, we have been asked to craft public policy in the dark.").

lation. Thus, if changing the common law to permit a parent to bind his child to a preinjury waiver is deemed to result in a net societal benefit, the Legislature can determine that fact with reasonable assurance before subjecting the public to such a change.

Illustratively, defendant's proffered rationale for a revision of what a majority of justices have concluded is the existing rule is the argument that a parent is presumed to act in his child's best interests and has a "fundamental right . . . to make decisions pertaining to the care, custody, and control of [that] minor child[]."[49] That rationale, however, is not discretely limited to preinjury waivers. Under defendant's proffered analysis, a parent would be able to bind the child in *any* contract, no matter how detrimental to the child. Thus, defendant's rationale would arguably completely abrogate the common law prohibition of guardians contractually binding their minor wards.

As explained, the common law rules regarding minors and limitations on those who would contract on their behalf exist solely for the protection of the minors.[50] As unfortunate as it may be, a parent does not always act in his child's best interests. For example, in *Wood v Truax*,[51] the defendant's guardian entered into a mortgage and bond when the defendant was a minor. After the mortgage went into foreclosure, the plaintiff "procured a decree for the deficiency" against the defendant. However, *Wood* applied the common law rules to invalidate a judgment against the defendant

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[49] *Troxel v Granville*, 530 US 57, 66; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (opinion by O'Connor, J.); see also *Parham v J R*, 442 US 584, 602; 99 S Ct 2493; 61 L Ed 2d 101 (1979).

[50] See *Holmes*, 45 Mich at 142 ("The law in recognizing the incapacity of infants to enter into certain contracts and declaring such contracts voidable does so for the infant's protection.").

[51] *Wood v Truax*, 39 Mich 628 (1878).

because the mortgage was entered into when she was a minor and she had done nothing to affirm the contract after reaching adulthood.[52] Similarly, in *Tuer v Niedoliwka*,[53] the mother agreed on her infant child's behalf to release the father from all child support obligations in return for $2,000. However, the Court held that a "child's right to support from a putative father cannot be contracted away by its mother, and that any release or compromise executed by the mother is invalid to the extent that it purports to affect the rights of the child."[54] Thus, as noted in our caselaw, there have been instances in which a parent did not act in his child's best interests, and it is certainly not unimaginable that such agreements could recur and be enforced in the absence of the common law rule that serves to protect the minor child.

As occurred in oral argument on this case, those favoring the modification of the common law rule might reflexively respond to the fact that parents do not always act in the best interests of their children by adding a qualifier to the modification of the common law rule: a parental waiver is binding on the child only if the waiver is in the "*child's best interests*." However, this effort to avoid eviscerating the protection of children now recognized in the common law rule would undoubtedly create as many problems as it would resolve. Certainly, such an approach would create ancillary litigation over whether the parental waiver was in the child's best interests. While society might generally benefit from allowance of parental waivers for minor children, it could reasonably be asked: Is *any* preinjury waiver that is later asserted against a particular minor

[52] *Id.* at 633.

[53] *Tuer*, 92 Mich App at 696.

[54] *Id.* at 699.

ever in the best interests of the *injured child*? The existing common law is well established, clear, and easy to apply and consistently protects children; it must be preferred over a chaotic, ad hoc alternative.

2. PUBLIC POLICY ENACTED BY THIS COURT MUST BE CONSISTENT WITH THE EXISTING PUBLIC POLICY OF THIS STATE

For the reasons discussed in the preceding section, this Court must practice restraint when considering a change in the common law. I believe we must limit the exercise of our authority by creating public policy that is consistent with the existing public policy of this state. Doing so protects against unwarranted and unwanted "societally dislocating change[s]" to the public policy of this state.[55] We have previously defined the proper sources of public policy to guide our analysis:

> In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law.[56]

a. POSITIVE LAW

The preferred practice is to follow the lead of the institution best suited to make public policy for the state. Accordingly, I begin with the positive law enacted by the Legislature to determine whether public policy supports the change in the common law sought by defendant.

The Legislature has affirmatively acted to protect and preserve minors' property interests.[57] With respect

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[55] *Henry*, 473 Mich at 89.

[56] *Terrien*, 467 Mich at 66-67.

[57] See, e.g., MCL 700.5401(2) (permitting a court to appoint a conservator or enter a protective order "if the court determines that the minor

to a minor's cause of action, the Legislature has taken two significant steps. Pursuant to MCL 600.5851, the minority tolling provision, the period of limitations for a cause of action that accrued during minority is tolled. The minor is permitted to bring his cause of action within one year of reaching majority.[58] Thus, the Legislature has acted to preserve a minor's ability to pursue and control the minor's own claim.

Furthermore, although a parent as next friend of his child may settle a claim with the approval of the court,[59] the parent's authority to receive settlement proceeds on the child's behalf is strictly limited. Under MCL 700.5102, a guardian or person with the care and custody of a minor may receive no more than $5,000 each year on that minor's behalf,[60] and

> an individual receiving money or property for a minor is obligated to apply the money to the minor's support and education, but shall not pay himself or herself except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the minor's support. An excess amount shall be preserved for the minor's future support

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owns money or property that requires management or protection that cannot otherwise be provided, has or may have business affairs that may be jeopardized or prevented by minority, or needs money for support and education and that protection is necessary or desirable to obtain or provide money"); Michigan Uniform Transfers to Minors Act, MCL 554.521 *et seq*.

[58] MCL 600.5851 contains exceptions for medical malpractice claims, but provides in pertinent part:

> [I]f the person first entitled to make an entry or bring an action under this act is under 18 years of age . . . at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. [MCL 600.5851(1).]

[59] MCR 2.420; *O'Brien*, 229 Mich at 408.

[60] MCL 700.5102(1)(b) and (c).

> and education. A balance not used for those purposes and property received for the minor shall be turned over to the minor when majority is attained.[61]

Notably, the Court of Appeals has held that MCL 700.5102 does not authorize a parent to *settle* his child's tort claims.[62] Furthermore, in recognizing these legislative policy choices, this Court has provided by court rule that all settlements in favor of minors for payments of less than $5,000 in a single year are controlled by MCL 700.5102 and all greater settlements require the appointment of a conservator.[63]

These statutes evince a public policy firmly at odds with the autonomous parental control over a minor's property rights that defendant asserts. The Legislature has consistently acted to preserve a minor's property interest in his tort claims, and nothing in Michigan's positive law indicates a legislative intent to abrogate the common law or extend a parent's authority. Accordingly, positive law does not provide an anchor for altering the common law rules.

b. COMMON LAW

The common law is also a valid source for identifying the public policy of this state.[64] If the change required

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[61] MCL 700.5102(3).

[62] *Smith*, 216 Mich App at 555 ("The statute does not provide parents the authority to compromise their children's claims; it merely permits a debtor of a minor to make payments directly to the minor's parents without seeking judicial approval for each payment as long as the aggregate amount of the payments is less than $5,000 a year."). *Smith* interpreted MCL 700.403, a predecessor of MCL 700.5102 with essentially the same provisions.

[63] MCR 2.420(B)(4); see MCL 700.5401 through MCL 700.5433 (providing for the appointment of a conservator to protect the property of a minor).

[64] See *Terrien*, 467 Mich at 66-67.

by defendant in order to have the parental waiver upheld were consistent with other common law doctrines, this Court could consider creating consistent public policy. Here, however, the change necessitated to validate the parental waiver is at odds with other pertinent common law doctrines.

Defendant, in seeking to enforce a parental right to bind his child by contract, requires the abrogation of not one, but two common law tenets. First, as stated, a minor lacks the capacity to contract: "Their contracts are not void but voidable, and it is for the [minor] to avoid the contract or ratify it . . . ."[65] Second, a guardian cannot contractually bind his minor ward.

It should be noted that the modification defendant requires would not merely give a parent the *same* authority as the minor, given that a minor has no contractual authority and the minor's waiver would not bar this action. Rather, defendant requires a modification of the common law rule that would give the parent authority to contractually bind the minor *superior* to that the minor *himself* enjoys. In short, defendant requires that the common law be changed to permit a parent to do what a minor could not do on his own behalf—enter into a contract that binds the minor. As we have previously stated, the rule that a minor lacks capacity to contract exists solely for the minor's protection.[66] "The protection of infancy is a substantial one, and is not to be put aside and overcome by indirect methods."[67] The exception required by defendant does precisely that: it removes the protections of a minor's incapacity to contract by the indirect means of permit-

[65] *Holmes*, 45 Mich at 142.

[66] *Id.*

[67] *Armitage*, 36 Mich at 129.

ting the guardian to enter into a binding and enforceable contract for the minor.

Moreover, under the common law, minors are generally protected by the placement of greater burdens and increased potential liability on those coming into contact with minors. Thus, permitting the waiver of liability for negligent harm done to a child is inconsistent with public policy broadly recognized in the common law.

For example, a landowner is generally not liable for injuries suffered by a trespasser,[68] but the attractive nuisance doctrine imposes liability for injuries suffered by trespassing children.[69] Thus, the common law doctrine protects children by imposing *greater* liability on landowners when minors are involved.[70] Also, under the common law, a minor under seven years old was incapable of contributory negligence.[71] For minors older than seven, contributory negligence was based on "whether the child had conducted himself as a child of his age, ability, intelligence and experience would reasonably have been expected to do under like circum-

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[68] The exception is for injuries caused by the landowner's willful and wanton misconduct. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000).

[69] *Murday v Bales Trucking, Inc*, 165 Mich App 747, 751-752; 419 NW2d 451 (1988); 2 Restatement Torts, 2d, § 339, p 197.

[70] See Justice COOLEY writing for the Court in *Powers v Harlow*, 53 Mich 507, 515; 19 NW 257 (1884):

> Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken.

[71] *Baker v Alt*, 374 Mich 492, 505; 132 NW2d 614 (1965).

stances."[72] Accordingly, the common law protects children by creating an incentive to exercise *greater* care for minors because it *limits* a defendant's ability to escape liability on the basis of the child's contributory negligence.[73]

The public policy of this state reflected in these common law liability doctrines is to protect children by imposing *greater liability* on adults for conduct involving potential harm to children. It would therefore require an extremely compelling argument to change the common law and permit defendant to *limit* its liability involving children.[74] Defendant has offered none.

IV. CONCLUSION

The relief impliedly sought by defendant requires the creation of a new public policy for this state by modification of the common law. Although this Court has the authority to create public policy through its management of the common law, we share that authority with the Legislature. This Court has fewer tools for assessing the societal costs and benefits of changing the common

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[72] *Burhans v Witbeck*, 375 Mich 253, 255; 134 NW2d 225 (1965); see also 2 Restatement Torts, 2d, § 283A, p 14.

[73] See *Tyler v Weed*, 285 Mich 460, 488-489; 280 NW 827 (1938) (MCALLISTER, J., dissenting in part) ("This ancient bulwark and protection of little children is a vital safeguard of their rights and persons. It warns that no one can negligently cause injury to a child of such tender years with impunity, by casting on his small shoulders the onerous burden of proving his own freedom from negligence.").

[74] I note that, even without a change in the common law rule, defendant has alternatives for reducing its liability. For example, defendant's waiver in this case suggests a suitable, although perhaps less than optimal, alternative: parental indemnity. A parent can contract on the parent's own behalf to indemnify the defendant for any losses arising from injuries his child suffers while participating in the activity offered by the defendant.

law than the Legislature, which is designed to make changes in public policy and the common law. Moreover, defendant has failed to identify *any* existing public policy supporting the change in the common law that it seeks; the existing positive law and common law indicate that enforcing parental waivers is contrary to the established public policy of this state. Accordingly, in matters such as these, I am persuaded that the prudent practice for this Court is conservancy of the common law.

Accordingly, I would decline to change the common law. I would affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

HATHAWAY, J. I concur with the result reached in Justice YOUNG's opinion, that a preinjury waiver signed by a parent on behalf of his or her minor child is unenforceable under longstanding Michigan law, for the reasons stated in parts I, II, and III(A) of the opinion. This rule has been embodied in Michigan law for more than a century, and I find no compelling reason to depart from it now.

The public policy concerns expressed by the concurring opinions in the Court of Appeals presume that such waivers have been enforceable in the past and that if we suddenly stop enforcing them, children's sports programs and activities and the businesses that run them will somehow be fundamentally undermined. However, the fact is that preinjury waivers have never been enforced or considered enforceable by the courts of this state.[1] Despite the fact that Michigan does not enforce these waivers, children still play football, engage in

[1] Please see the analysis contained in parts I, II, and III(A) of Justice YOUNG's opinion.

sports activities, and go to bounce parties, just as they do in other states that do not enforce preinjury waivers.[2]

As noted in the remainder of Justice YOUNG's opinion, there are compelling public policy reasons not to depart from this historic rule.[3] The purpose of the rule is to protect minor children. The rule merely provides the same protections for minor children in their preinjury status as in their postinjury status. The protections afforded injured minor children seeking redress have long been embodied in our court rules, see MCR 2.420, as well as in our probate codes, see, e.g., MCL 700.5102, a provision of the Estates and Protected Individuals Code. There is no question that a parent may not resolve his or her child's claim or sign a release on the

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[2] See, e.g., *Williams v United States*, 660 F Supp 699 (ED Ark, 1987); Hawaii Rev Stat 663-10.95 and 663-1.54 (2006); *Leong v Kaiser Foundation Hosps*, 71 Hawaii 240; 788 P2d 164 (1990); *Douglass v Pflueger Hawaii, Inc*, 110 Hawaii 520; 135 P3d 129 (2006); *Meyer v Naperville Manner, Inc*, 262 Ill App 3d 141; 634 NE2d 411 (1994); *Wreglesworth v Arctco, Inc*, 316 Ill App 3d 1023; 738 NE2d 964 (2000); La Civ Code art 2004 (2006); *Costanza v Allstate Ins Co*, 2002 US Dist LEXIS 21991 (ED La, 2002); *Rice v American Skiing Co*, 2000 Me Super LEXIS 90 (Me Super Ct, 2000); *Hojnowski v Vans Skate Park*, 187 NJ Super 323; 901 A2d 381 (2006); *Childress v Madison Co*, 777 SW2d 1 (Tenn Ct App, 1989); *Munoz v II Jaz Inc*, 863 SW2d 207 (Tx App, 1993); *Fleetwood Enterprises, Inc v Gaskamp*, 280 F3d 1069 (CA 5, 2002); *Hawkins v Peart*, 37 P3d 1062 (Utah, 2001); *Hiett v Lake Barcroft Community Ass'n, Inc*, 244 Va 191; 418 SE2d 894 (1992); *Scott v Pacific West Mountain Resort*, 119 Wash 2d 484; 834 P2d 6 (1992); *Johnson v New River Scenic Whitewater Tours, Inc*, 313 F Supp 2d 621 (SD W Va, 2004).

[3] While I agree with the well-articulated public policy reasons expressed by Justice YOUNG, I do not join in Justice YOUNG's assertion that the rule prohibiting parental waivers can be circumvented by a parental indemnity agreement. This issue is not before the Court, and the assertion would be, at best, dicta. More importantly, if it had been an issue here, it should be recognized that a parental indemnity agreement would directly contravene the compelling policy reasons that exist for the historic rule.

child's behalf without court approval after the child has been injured, and there simply is no justifiable reason to treat preinjury releases any differently. The historic rule is a sensible, logical, and well-reasoned approach that places greater emphasis on the protection of minor children than on hypothetical business concerns that have not materialized in this or any other state that has chosen to follow it.

KELLY, C.J., and WEAVER, J., concurred with HATHAWAY, J.

KELLY, C.J. I concur in full with Justice HATHAWAY and with parts I, II, and III(A) of Justice YOUNG's opinion. I write separately to touch on parental indemnity agreements in the context of liability waivers involving children. Justice YOUNG takes the position that a defendant can circumvent the unenforceability of a parental preinjury liability waiver simply by entering into a separate indemnity agreement with the parent. In footnote 74 of his opinion, he states:

> I note that, even without a change in the common law rule, defendant has alternatives for reducing its liability. For example, defendant's waiver in this case suggests a suitable, although perhaps less than optimal, alternative: parental indemnity. A parent can contract on the parent's own behalf to indemnify the defendant for any losses arising from injuries his child suffers while participating in the activity offered by the defendant.

Justice YOUNG is the only one who has advanced this position and it has not been adopted by this Court. I find his proposition problematic for several reasons.

First, his discussion of the issue is unnecessary to resolve the case. Second, neither of the parties advanced this argument, and this Court did not have a proper opportunity to consider and pass on it. I would be

hesitant to make such a sweeping holding without having briefing on the matter. Also, the Court has not given due consideration to how indemnity agreements by parents interact with parental preinjury liability waivers.

Finally, the validity of such indemnity agreements is questionable. They would require an injured child to seek recovery from his or her parent. Courts in a number of states have held that such indemnity agreements are unenforceable because they produce the same effect as parental preinjury liability waivers. That is, they enable a tortfeasor who is negligent to shift financial responsibility for its tortious conduct to the parent of the minor victim.[1]

The validity of such indemnity agreements is not answered in this case and is left for another day.

CAVANAGH, J. I would affirm the Court of Appeals' decision that defendant was not entitled to summary disposition on the basis of the release. I would do so, however, on different grounds. The actual language of the release at issue did not waive the minor child's claims. Instead, the release only waived the claims of the "undersigned," and the undersigned was the child's father. Although I believe that whether a parental preinjury liability waiver is valid and enforceable is an issue of jurisprudential significance, I find it unnecessary to reach that issue in this case.[1] Accordingly, I

[1] See, e.g., *Johnson v New River Scenic Whitewater Tours, Inc*, 313 F Supp 2d 621 (SD W Va, 2004) (holding that an indemnity agreement with defendant whitewater rafting company was unenforceable and against public policy).

[1] For the reasons stated in Chief Justice KELLY's opinion, I would also find it unnecessary to address whether a defendant could circumvent a parental preinjury liability waiver by entering into a separate indemnity agreement with a parent.

would vacate the portion of the judgment of the Court of Appeals that held that preinjury waivers effectuated by parents on behalf of their minor children are not presumptively enforceable, and I would remand the case to the trial court for further proceedings.

MARKMAN, J. I agree that defendant was not entitled to summary disposition on the grounds that the actual language of the waiver at issue did not waive the minor's claims. Accordingly, I would affirm the judgment of the Court of Appeals. However, I would vacate the analysis that concluded that a parent cannot waive a child's negligence claim prospectively in order to participate in voluntary recreational activities. In that regard, the Court of Appeals answered a question that was not properly before it given the actual terms of the release. The lead opinion and those of Justice HATHAWAY and Chief Justice KELLY do the same. Therefore, I disagree with this conclusion of law. If this issue were properly before us—and it is not—I would clarify that Michigan's common law *does* allow the enforcement of such a waiver. That is, if the release in this case had actually contained effective language indicating that the father was waiving his son's negligence claims prospectively, I would conclude that Michigan common law permits the enforcement of that waiver to the same extent as if the father himself had signed a preinjury waiver of his own rights as a condition of participating in a sporting or recreational activity.[1]

[1] Our caselaw is replete with instances in which waivers signed by adults have been enforced. See, e.g., *Kircos v Goodyear Tire & Rubber Co*, 108 Mich App 781; 311 NW2d 139 (1981) (pit crew members could not recover from a sports car club for their injuries because they had signed an applicable waiver); *Paterek v 6600 Ltd*, 186 Mich App 445; 465 NW2d 342 (1990) (softball field owner's agreement to let a player play softball on its field was adequate consideration to support the player's release of

I. THE RELEASE

As recognized in the lead opinion, Jeffrey Woodman signed a form so that his son could participate in a recreational activity. The pertinent part of the release, which only the father signed, provided:

> THE UNDERSIGNED, by his/her signature herein affixed does acknowledge that any physical activities involve some element of personal risk and that, accordingly, in consideration for the undersigned waiving his/her claim against BOUNCE PARTY, and their agents, the undersigned will be allowed to participate in any of the physical activities.

Thus, the release stated plainly that the "undersigned" (who was the father), in consideration for waiving his claim against defendant, would be allowed to participate in any of defendant's physical activities, which involved some element of personal risk. While the child was identified as a "participant" at the bottom of the release, the only waiver that actually occurred was by and for the "undersigned," the father. Thus, the actual language of the release simply did not waive any claims or rights of the minor, whatever was purported to have been done and whatever issues the parties have determined to litigate.

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the owner from liability); *Dombrowski v City of Omer*, 199 Mich App 705; 502 NW2d 707 (1993) (release executed by a contestant in a "rope climb" across a river was not subject to rescission on the ground of mutual mistake as a result of the contestant's signing it without reading it, absent any allegation of misrepresentation); *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 617-618; 513 NW2d 428 (1994) ("It is not contrary to this state's public policy for a party to contract against liability for damages caused by its own ordinary negligence."); and *Lamp v Reynolds*, 249 Mich App 591, 594; 645 NW2d 311 (2002) ("[A]lthough a party may contract against liability for harm caused by his ordinary negligence, a party may not insulate himself against liability for gross negligence or wilful and wanton misconduct.").

Remarkably, the justices comprising the majority do not see this as a barrier to their opinions. Rather, they decide that *if* the document had been drafted to state that the father was waiving his son's potential claims—which again it was not—it would have been unenforceable. This is a noteworthy pronouncement of law, but over the past 175 years or so, this Court has been in the habit of uttering such pronouncements only in response to actual and not hypothetical disputes. We have been in the habit of viewing an actual dispute as a condition for the exercise of our "judicial power." Const 1963, art 6, § 1. To decide a hypothetical dispute is the equivalent of issuing an advisory opinion, which, with narrow constitutional exceptions, is beyond the scope of this judicial power.[2]

In effect, the justices in the majority assert the invalidity of a contract into which the parties never entered. This constitutes nothing less than reaching out to decide a non-controversy—indeed, in this case, a false controversy. The opinions of the justices in the majority, whatever their substantive merits, constitute little more than nonbinding dicta and more properly belong in a law review rather than a volume of the Michigan Reports.

The lead opinion suggests that plaintiff "abandoned" or "waived" the argument that the release did not actually waive the son's claims because, although plaintiff preserved this issue in the trial court, he did not preserve it in the Court of Appeals. While I certainly agree that an appellate court will not ordinarily review an issue that has been abandoned or waived, such

[2] Const 1963, art 3, § 8, authorizes this Court to issue advisory opinions concerning the constitutionality of legislation, but only upon the request of either house of the Legislature or the Governor and only after it has been enacted into law but not yet taken effect.

review is allowed when it is "necessary to a proper determination of the case . . . ." *Dation v Ford Motor Co*, 314 Mich 152, 160-161; 22 NW2d 252 (1946); see also *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 731; 344 NW2d 788 (1984); *Prudential Ins Co of America v Cusick*, 369 Mich 269, 290; 120 NW2d 1 (1963).[3] This could not be more clearly the situation here. The individual decision of a litigant not to pursue an available argument, or to relinquish an available issue, cannot impose on this Court an obligation to operate upon a false premise, in this case that a contract says what it clearly does not say.[4] That is, neither an individual litigant nor even both litigants acting jointly can require this Court to turn a blind eye toward the actual words of a dispositive document. No matter what the parties' determination to have a particular issue decided, they cannot impose on this Court the obligation to pretend that A does not say A; no litigant can obligate this Court to ignore what is true and accept what is false.

Thus, in deciding whether a parent can waive a child's claims before the injury, the justices in the

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[3] See also MCR 7.316(A)(3), providing that this Court may "permit the reasons or grounds of appeal to be amended." If ever there was a circumstance compelling the application of this rule, it is here.

[4] See, e.g., *Mack v Detroit*, 467 Mich 186, 197; 649 NW2d 47 (2002), in which the defendant "city abandoned its assertion of governmental immunity to this Court," yet this Court nevertheless held that the city was entitled to prevail because of governmental immunity. As this Court explained:

> [A]ddressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle. See *Legal Services Corp v Velazquez*, 531 US 533, 549, 558; 121 S Ct 1043; 149 L Ed 2d 63 (2001) (majority and dissent both stating that whether to address an issue not briefed or contested by the parties is left to discretion of the Court); *Seattle v McCready*, 123 Wash 2d 260, 269; 868 P2d 134 (1994) (indicating that the court "is not constrained by the issues as framed by the parties"). [*Id.* at 207-208.]

majority are compelled to rewrite what is a straightforward release. However, the proper rule is that the scope of a release is controlled by its *language*, and we construe such language as written. See *Batshon v Mar-Que Gen Contractors, Inc*, 463 Mich 646, 649-650; 624 NW2d 903 (2001); *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197-198; 747 NW2d 811 (2008). The justices in the majority construe the release not "as written," but as rewritten.

For these reasons, I would affirm the judgment of the Court of Appeals that held that defendant was not entitled to summary disposition, but I would vacate the Court of Appeals' analysis addressing a parent's ability to waive a child's negligence claims prospectively. I thus dissent from the decision to rewrite a contract in order to answer a question not raised by the actual contract.

II. THE COMMON LAW

A. NATURE OF THE COMMON LAW

The common law originated in the decisions of English judges, starting in the early Middle Ages, and developed over the ensuing centuries. Hall, ed, *The Oxford Companion to American Law*, (New York: Oxford University Press, 2002), p 125. Sir Edward Coke explained that the common law was the "custom of the realm." Coke, *The Complete Copyholder*, p 70 (1641). He indicated that if a custom was "current throughout the commonwealth," it was a part of the common law. *Id.* Sir William Blackstone similarly discussed "[g]eneral customs; which are the universal rule of the whole kingdom, and form the common law." 1 Blackstone, Commentaries on the Laws of England, p 67.

The "common law and its institutions were systemically extended to America, at least insofar as appropri-

ate for frontier conditions." *Oxford Companion*, p 127. This was true in particular in Michigan where each of its constitutions (starting in 1835) generally adopted the common law.[5] Given that the common law develops through judicial decisions, it has been described as "judge-made law." *Placek v Sterling Hts*, 405 Mich 638, 657; 275 NW2d 511 (1979). As this Court explained in *Bugbee v Fowle*, the common law " 'is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes.' " *Bugbee v Fowle*, 277 Mich 485, 492; 269 NW 570 (1936), quoting *Kansas v Colorado*, 206 US 46, 97; 27 S Ct 655; 51 L Ed 956 (1907).

The common law, however, is not static. By its nature, it adapts to changing circumstances. See Oliver Wendell Holmes, Jr., *The Common Law* (New York: Dover Publications, Inc., 1991), p 1 (noting that the common law is affected by "the felt necessities of the time, the prevalent moral and political theories, [and] intuitions of public policy" and that it "embodies the story of a nation's development through many centuries"). And as this Court stated in *Beech Grove Investment Co v Civil Rights Comm*:

> It is generally agreed that two of the most significant features of the common law are: (1) its capacity for growth and (2) its capacity to reflect the public policy of a given era.

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[5] See Const 1835, Schedule, § 2; *Stout v Keyes*, 2 Doug 184, 188-189 (Mich, 1845), Const 1850, Schedule, § 1, Const 1908, Schedule, § 1, and Const 1963, art 3, § 7 ("The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed"). As noted in *Bean v McFarland*, 280 Mich 19, 21; 273 NW 332 (1937), "the retention of the common law [in the constitution] is expressly conditioned upon right to abrogate the same or any part thereof." Thus, whenever the Legislature enacts a statute that is inconsistent with the common law, the statute supersedes the common-law rule. Positive law trumps common law.

> "The common law does not consist of definite rules which are absolute, fixed, and immutable like the statute law, but it is a flexible body of principles which are designed to meet, and are susceptible of adaption to, among other things, new institutions, public policies, conditions, usages and practices, and changes in mores, trade, commerce, inventions, and increasing knowledge, as the progress of society may require. So, changing conditions may give rise to new rights under the law . . . ." [*Beech Grove Investment Co v Civil Rights Comm*, 380 Mich 405, 429-430; 157 NW2d 213 (1968), quoting CJS, Common Law, § 2, pp 43-44.]

The common law is always a work in progress and typically develops incrementally, i.e., gradually evolving as individual disputes are decided and existing common-law rules are considered and sometimes adapted to current needs in light of changing times and circumstances. *In re Arbitration Between Allstate Ins Co & Stolarz*, 81 NY2d 219, 226; 597 NYS2d 904; 613 NE2d 936 (1993) (noting that the law evolves through the "incremental process of common-law adjudication as a response to the facts presented");[6] see also *People v Aaron*, 409 Mich 672, 727; 299 NW2d 304 (1980) ("Abrogation of the felony-murder rule is not a drastic move in light of the significant restrictions this Court has already imposed. Further, it is a logical extension of our decisions . . . .").

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[6] See also Kestin, *The bystander's cause of action for emotional injury; Reflections on the relational eligibility standard*, 26 Seton Hall L R 512, 512 (1996) ("Growth in the common law is incremental, often scarcely noticeable in the short run, but inexorable when viewed in the long term."); *Davis v Moore*, 772 A2d 204, 238 (DC, 2001) (Ruiz, J., dissenting) ("It cannot be forgotten that the incremental pace at which common law develops, coupled with the increasing importance of statutory law, ensures that cases where truly 'new' rules of common law are announced . . . will not frequently occur.").

B. COMMON-LAW AUTHORITY

The lead opinion acknowledges that this Court "unquestionably" has the authority to modify the common law.[7] *Ante* at 231. This authority is traceable to Const 1963, art 3, § 7, which provides:

> The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.

As stated in *Myers v Genesee Co Auditor*, 375 Mich 1, 7; 133 NW2d 190 (1965) (opinion by O'HARA, J.): " 'Amendment' and 'repeal' refer to the legislative process. 'Change' must necessarily contemplate judicial change. The common law is not static, fixed and immutable as of some given date." Thus, the ability to alter the common law is constitutionally vested in both the Legislature and the judiciary. There is no violation of separation-of-powers principles under Const 1963, art 3, § 2, when the judiciary alters the common law because that power is given to both branches to exercise through means and procedures that are proper to each.[8]

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[7] This Court's authority to alter the common law has also been described as "axiomatic." *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 403 n 9; 578 NW2d 267 (1998).

[8] While this Court's authority to alter *civil* common law is unquestioned, our authority to alter *criminal* common law has been the subject of debate. See, e.g., *In re Lamphere*, 61 Mich 105, 109; 27 NW 882 (1886) ("Whatever elasticity there may be in civil matters, it is a safe and necessary rule that criminal law should not be tampered with except by legislation."). *Lamphere* was cited with approval in *People v Riddle*, 467 Mich 116, 126; 649 NW2d 30 (2002), yet notwithstanding *Lamphere* this Court has altered criminal common law on several occasions. See, e.g., *People v Stevenson*, 416 Mich 383, 392; 331 NW2d 143 (1982) (rejecting the common-law "year and a day" rule and stating that "no limitation upon this Court's authority to 'enlarge' common-law criminal liability appears in Const 1963, art 3, § 7 or can be fairly implied from its language"). In *Aaron*, 409 Mich at 733, this

The common law is, thus, law subject to continuing judicial and legislative development.[9]

The lead opinion contends that this Court is less well positioned than the Legislature to decide whether the common law should be altered.[10] Although there may well be instances in which this is true, and in which prudence would dictate that we defer to the Legislature,

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Court stated, "Today we exercise our role in the development of the common law by abrogating the common-law felony-murder rule." Further, in *People v Kevorkian*, 447 Mich 436, 445; 527 NW2d 714 (1994), this Court rejected the common-law definition of "murder" to the extent it could be read to encompass the act of intentionally facilitating the commission of suicide. And in *People v Kreiner*, 415 Mich 372; 329 NW2d 716 (1982), we essentially held that the Michigan Rules of Evidence constituted a codification of the rules of evidence that superseded common-law rules.

[9] Although it is undeniably true that this Court's exercise of the "judicial power" generally involves declaring only what the law "is," as opposed to what it "ought" to be, *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 66; 718 NW2d 784 (2006), citing *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803), the quasi-legislative exercise that characterizes our common-law authority is an exception to this general rule. Nonetheless, such common-law authority constitutes a traditional part of the exercise of Michigan's "judicial power," just as it does in most states. Ultimately, the "judicial power" of this Court is the sum of the powers that have been conferred upon us by our laws and constitution.

[10] Notwithstanding this assertion, I note that the author of the lead opinion has also authored and joined opinions in which this Court has altered the common law, as have other members comprising the majority in this case. See, e.g., *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 89; 597 NW2d 517 (1999); *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 606; 614 NW2d 88 (2000); *James v Alberts*, 464 Mich 12, 18; 626 NW2d 158 (2001). Moreover, in at least *Ritchie-Gamester* and *James*, the common law was not merely being clarified, as it is here, but was clearly being altered. Why is the Legislature the proper institution for addressing the common law in the instant case, but not in those prior cases? The lead opinion provides no standards in this regard, and indeed offers nothing more than the conclusion that the instant matter is better left for the Legislature, even though for more than a century it has been a matter left to the judiciary.

I do not know why this should invariably be true.[11] The common law of parental waivers has been a matter of longstanding judicial interest in this state, the legal rights of children is an issue well known to this Court in a wide variety of contexts, the judiciaries of most other states have addressed the common law of parental waivers, and the immediate dispute involves only whether to clarify, or 'fine-tune' at the margins, a common-law rule of considerable vintage. Each of these factors implicates exactly the kind of decision-making that typifies the evolution of the common law. Our constitution gives the judiciary the authority to change the common law because the common law *is* "judge-made law." *Placek*, 405 Mich at 657. And it is well recognized that rules that were "judge-invented" can be "judge-reinvented," "judge-uninvented," or, as I believe is required in this case, "judge-clarified." See *Montgomery v Stephan*, 359 Mich 33, 49; 101 NW2d (1960). As

[11] The lead opinion accurately notes that this Court decides cases and controversies involving individual parties. But it overstates its case when it asserts that we do not give consideration to the views of nonparties. Indeed, justices routinely remind attorneys arguing before this Court that the rule to be formulated by this Court in both common-law and non-common-law cases must be just and reasonable, not only for their individual case, but also for the 100 or 1,000 forthcoming cases that will involve similar legal issues. Moreover, we routinely receive amicus curiae briefs from interested individuals and organizations, just as we have in this case. If the lead opinion's point is that our common-law decisions require justices to think along somewhat different lines than is required by our other areas of responsibility, I concur. If, however, its point is to suggest the wisdom of retreating from a responsibility that has belonged to Anglo-American courts for 500 years or so, I respectfully disagree. In any event, the lead opinion *does* reach its conclusions about this case on the basis of its author's *own* views of the common law. And further, if this Court did nothing at all to maintain the common law, existing common law would remain in place—at least until the Legislature decided, if ever, to alter it—and it would still have to be interpreted by some court, just as occurred here. It just happens in the instant case that the lead opinion is apparently in agreement with the interpretation of the Court of Appeals.

was stated in *Moning v Alfono*, 400 Mich 425, 436; 254 NW2d 759 (1977): "The law of negligence was created by common-law judges and, therefore, it is unavoidably the Court's responsibility to continue to develop or limit the development of that body of law *absent* legislative directive."

I would further observe that in *Henry v Dow Chem Co*, 473 Mich 63, 83; 701 NW2d 684 (2004), which the lead opinion cites, this Court explained that it is "the *principal* steward of Michigan's common law."[12] (Emphasis added.) And in *Burns v Van Laan*, 367 Mich 485, 494; 116 NW2d 873 (1962), we stated, "In that great field where the common law grows or withers the judiciary is the *primary* actor." (Emphasis added.)[13]

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[12] See also *Gruskin v Fisher*, 405 Mich 51, 58; 273 NW2d 893 (1979) (noting that "it is for this Court to decide whether a common-law rule shall be retained unless the Legislature states a rule that is inconsistent with or precludes a change in the common-law rule").

[13] This Court, in lieu of the Legislature, has altered the common law over the last 40 years on numerous occasions. See, e.g., *Daley v LaCroix*, 384 Mich 4, 12-13; 179 NW2d 390 (1970) (rejecting the "impact" requirement for common-law claims for emotional distress proximately caused by a defendant's negligent conduct); *Womack v Buchhorn*, 384 Mich 718, 724-725; 187 NW2d 218 (1971) (rejecting the common-law disallowance of recovery for negligently inflicted prenatal injury); *Plumley v Klein*, 388 Mich 1; 199 NW2d 169 (1972) (abolishing the common-law rule that children cannot bring a tort cause of action against their parents); *Pittman v Taylor*, 398 Mich 41; 247 NW2d 512 (1976) (abrogating the common-law doctrine of state governmental immunity); *Serafin v Serafin*, 401 Mich 629; 258 NW2d 461 (1977) (abolishing Lord Mansfield's rule, which prevented spouses from testifying that they had no access to each other at the time a child was conceived to prove the husband's lack of paternity); *Gruskin*, 405 Mich at 58, 70-71 (rejecting the common-law rule that forfeiture of a land contract is considered an election of remedy); *Placek*, 405 Mich at 656-657 (abolishing common-law contributory negligence as a total bar to recovery and adopting pure comparative negligence); *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579, 615; 292 NW2d 880 (1980) (making employer policies and procedures a legally enforceable part of an employment relationship if such policies and procedures instill "legitimate expectations" of job

Then, in *Placek*, 405 Mich at 657, 659, we reiterated that this Court may alter the common law through its decisions: "[W]hen dealing with judge-made law, this Court in the past has not disregarded its corrective

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security); *Aaron*, 409 Mich at 723 (abolishing the common-law felony-murder rule); *Berger v Weber*, 411 Mich 1; 303 NW2d 424 (1981) (expanding the common law to permit a child to recover money damages for the lost society and companionship of a negligently injured parent, notwithstanding the argument that the Legislature was in the best position to determine whether this new cause of action should be instituted and what limits should be placed on it); *Kreiner*, 415 Mich at 377 (holding that Michigan's common-law tender-years rule, which permitted excusable delay in reporting certain crimes against minors, did not survive the adoption of MRE 803[2]); *Stevenson*, 416 Mich at 392 (abolishing the common-law year-and-a-day rule in homicide cases); *Kevorkian*, 447 Mich at 494 (rejecting the common-law definition of "murder" to the extent it could be read to encompass intentionally providing the means by which a person commits suicide); *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995) (applying the common-law open-and-obvious-danger doctrine to claims of premises liability); *Ritchie-Gamester*, 461 Mich at 89 (specifically modifying the common law of torts regarding recreational activities by adopting reckless misconduct as the minimum standard of care for co-participants in recreational activities); *Stitt*, 462 Mich at 606 (holding, as a matter of premises liability law, that church visitors are not invitees); and *James*, 464 Mich at 18 (abolishing the common-law "volunteer" doctrine); see also *Ghaffari v Turner Constr Co*, 473 Mich 16, 25-26; 699 NW2d 687 (2005) (clarifying that the open-and-obvious-danger doctrine has no applicability to a claim under the common-work-area doctrine). And, concomitantly, there have been occasions on which this Court has rejected requests to alter the common law. See, e.g., *In re Certified Question*, 479 Mich 498, 521-522; 740 NW2d 206 (2007) (declining to expand the common law to impose a duty on a landowner to anybody who comes into contact with somebody who has been on the landowner's property because it would expand traditional tort concepts beyond manageable bounds); *Wold Architects & Engineers v Strat*, 474 Mich 223, 236; 713 NW2d 750 (2006) (declining to reject Michigan's common-law arbitration-unilateral-revocation rule, being "unpersuaded that the time is ripe to change" the rule); *Henry*, 473 Mich at 68, 89 ("[a]lthough . . . recogniz[ing] that the common law is an instrument that may change as times and circumstances require," declining to expand the common law to recognize a medical monitoring cause of action, noting that it might "lead to dramatic reallocation of societal benefits and burdens").

responsibility in the proper case. . . . [The courts] are certainly in as good, if not better, a position to evaluate the need for change, and to fashion that change." In *People v Stevenson*, 416 Mich 383, 390; 331 NW2d 143 (1982), we stated, "This Court has often recognized its authority, indeed its duty, to change the common law when change is required." And in *Adkins v Thomas Solvent Co*, 440 Mich 293, 317; 487 NW2d 715 (1992), we asserted: "When appropriate, we have not hesitated to examine common-law doctrines in view of changes in society's mores, institutions, and problems, and to alter those doctrines where necessary."

For these reasons, I reject the Court of Appeals' statement that "we can neither judicially assume nor construct exceptions to the common law extending or granting the authority to parents to bind their children to exculpatory agreements. Thus, the designation or imposition of any waiver exceptions is solely within the purview of the Legislature." *Woodman v Kera, LLC*, 280 Mich App 125, 149; 760 NW2d 641 (2008) (opinion by TALBOT, J.). Far more accurately, as Judge BANDSTRA stated, the issue is for "*either* the Michigan Legislature or our Supreme Court . . . ." *Id.* at 157 (BANDSTRA, J., concurring) (emphasis added).

C. COMMON-LAW PRINCIPLES

The lead opinion correctly states that when deciding whether to clarify or change the common law, this Court should consider existing sources of public policy, such as statutes and other court decisions setting forth common-law doctrines.[14] As a starting point, we inquire

[14] As this Court emphasized in *Terrien v Zwit*, 467 Mich 56, 67; 648 NW2d 602 (2002): "The public policy of Michigan is *not* merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law." The focus of

whether the Legislature has already spoken regarding the specific issue.[15] If not, we then inquire whether the Legislature has preempted a particular area of the law.[16] When we determine that the Legislature has not specifically spoken, and has not preempted the adoption or

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the judiciary must ultimately be on the policies that, in fact, have been adopted by the public through our various legal processes and that are reflected in our state and federal constitutions, our statutes, the common law, and administrative rules and regulations. *Id.* at 71 n 11.

[15] "[L]egislative amendment of the common law is not lightly presumed." *Wold Architects*, 474 Mich at 233. Rather, the Legislature "should speak in no uncertain terms" when it exercises its authority to modify the common law. *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). See also *Burns*, 367 Mich at 492 n 5, in which we approvingly quoted Judge Benjamin N. Cardozo:

> "When the legislature has spoken, and declared one interest superior to another, the judge must subordinate his personal or subjective estimate of value to the estimate thus declared. He may not nullify or pervert a statute because convinced that an erroneous axiology [set of values] is reflected in its terms." [Citation omitted.]

I note further that the Legislature has forbidden prospective waivers of certain rights. For example, the Worker's Disability Compensation Act states: "No [preinjury] agreement by an employee to waive his rights to compensation under this act shall be valid . . . ." MCL 418.815. The Michigan Employment Security Act states: "No agreement by an individual to wave [sic], release, or commute his rights to benefits or any other rights under this act from an employer shall be valid." MCL 421.31. And the teacher tenure act provides: "No teacher may waive any rights and privileges under this act in any contract or agreement made with a controlling board." MCL 38.172. Here, however, the Legislature has in no way forbidden releases in which a parent prospectively waives a child's negligence claims.

[16] See, e.g., *Jackson v PKM Corp*, 430 Mich 262, 278; 422 NW2d 657 (1988) ("'The Legislature intended the dramshop act to afford the exclusive remedy for injuries arising out of an unlawful sale, giving away, or furnishing of intoxicants thereby preëmpting all common-law actions arising out of these circumstances."); *Hoerstman Gen Contracting*, 474 Mich at 74 (". . . Article 3 of the [Uniform Commercial Code] is comprehensive. It is intended to apply to nearly every situation involving negotiable instruments.").

revision of a new common-law rule, we consider whether a clarification or change of the common law is warranted in light of a variety of factors discussed herein.

As noted, "we have not hesitated to examine common-law doctrines in view of changes in society's mores, institutions, and problems, and to alter those doctrines where necessary." *Adkins*, 440 Mich at 317. But as counseled in *People v Kevorkian*, 447 Mich 436, 482 n 60; 527 NW2d 714 (1994) (opinion by CAVANAGH, C.J., and BRICKLEY and GRIFFIN, JJ.), citing Judge Cardozo's *The Nature of the Judicial Process*:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains. [Quotation marks and citations omitted.][17]

It is also the case that "endeavoring to uncover the doctrinal underpinnings of common-law rules can be an effective—if not essential—way of determining whether a suggested [clarification or] change [to a common-law rule] is warranted." Young, *A judicial traditionalist confronts the common law*, 8 Texas Rev L & Pol 299, 309 (2004); see also *Montgomery*, 359 Mich at 49 ("The reasons for the old rule no longer obtaining, the rule

[17] Concerning the common law, Oliver Wendell Holmes, Jr., stated that it is predicated, not upon logic, but upon experience. Holmes, *The Common Law*, p 1.

falls with it.");[18] *James v Alberts*, 464 Mich 12, 17; 626 NW2d 158 (2001) (abolishing the volunteer doctrine because "the fellow-servant rule, which created the need for the volunteer doctrine, was no longer part of our law"). Thus, when the common-law rationale for a particular rule has dissipated, the rule itself may be subject to revision or change.

Courts also consider other relevant, though not directly applicable, statutes in determining whether to clarify or change the common law because

> "legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction *but also in those of decisional law*." [*Moning*, 400 Mich at 453-454, quoting *Moragne v States Marine Lines, Inc*, 398 US 375, 390-391; 90 S Ct 1772; 26 L Ed 2d 339 (1970).]

Thus, we also look to (1) actual social customs and practices, and changes in such customs and practices, (2) the doctrinal underpinnings of a common-law rule and their continuing relevance, (3) related statutes and

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[18] Judge Cardozo, in his William L. Storrs Lectures before the Yale University Law School in 1921, had this to say:

> There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years. [Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), p 151.]

In the case at bar, there is no hint that either party operated as if the common-law rule adopted here by a majority of justices (that a parent may not waive his or her child's negligence claim prospectively in order to participate in a sporting or recreational activity) determined their conduct. Indeed, the precise opposite is true: a waiver purporting to have exactly the opposite effect was signed.

case-law, and (4) the extent to which existing rules may reasonably be supposed to have influenced or determined the conduct of the litigants. But in the final analysis, we ask ourselves, what common-law rule would best serve the interests of Michigan citizens while taking into consideration the prevailing customs and practices of the people?[19]

III. PARENTAL PREINJURY WAIVERS

The justices in the majority assert that under existing Michigan common law, a preinjury release signed by a parent waiving a child's negligence claim in order to enable that child to participate in a sporting or recreational activity is unenforceable. However, they do not cite a single Michigan case holding that a preinjury parental waiver is unenforceable.[20] Instead, they only

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[19] As stated in *Stitt*, 462 Mich at 607 "[I]n exercising our common-law authority, our role is not simply to 'count heads' but to determine which common-law rules best serve the interests of Michigan citizens." The lead opinion asks whether a parental preinjury waiver is "ever" in the best interests of a child who becomes injured. *Ante* at 251-252. However, the proper question would take into consideration the interests of *all* children whose parents sign a preinjury waiver, as well as the interests of *all* children whose access to sporting or recreational activities might be adversely affected by rule the majority favors, not merely those very few children whose parents have signed a preinjury waiver and who later suffer an injury. If we could look into the future and know which children will, in fact, be injured after a preinjury waiver has been signed, we would, of course, have to conclude that it would have been better if it had not been signed. The lead opinion's is a misleading and skewed question. As we stated in *Stitt*, our inquiry should be what rule best serves Michigan's citizens in general.

[20] Justice HATHAWAY's opinion states, "[T]he fact is that preinjury waivers have never been enforced or considered enforceable by the courts of this state." *Ante* at 258. But also like the lead opinion, she does not cite a single Michigan case in which a preinjury waiver of a child's negligence claim has been deemed unenforceable. Obviously, neither of the parties in the *instant* case was similarly apprised that preinjury waivers have never

cite cases involving parental waivers of existing claims. Until today, Michigan's common-law rule against parental waivers has only been applied to the latter claims. I would not, as do the justices comprising the majority, extend our common-law rule against postinjury parental waivers to preinjury parental waivers. These waivers are very different.

The trial court held that the preinjury waiver here was enforceable, specifically noting the absence of "any Michigan case which says that a parent who signs a waiver like this one prior to a child engaging in an activity is engaging in an act which is a legal nullity." Similarly, Judge BANDSTRA correctly stated, "There is no Michigan precedent explicitly discussing whether the postinjury rule against parental waivers should apply in a preinjury case." *Woodman*, 280 Mich App at 157 (BANDSTRA, P.J., concurring). And Judge SCHUETTE also correctly remarked upon "the dearth of preinjury, parental-waiver-of-liability cases in Michigan . . . ." *Id.* at 163 (SCHUETTE, J., concurring).

If the justices who make up the majority are correct that current Michigan common law precludes the enforcement of preinjury parental waivers, then the lack of any earlier decision actually stating this proposition is, to say the least, noteworthy, especially given that such waivers have been commonplace in this state and our country for decades. The lead opinion rightly states, "The underlying facts are simple *and likely familiar* to many parents with young children." *Ante* at 233 (emphasis added). Doubtless, the facts are "likely familiar" precisely because generations of parents have routinely

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been enforced or considered enforceable. Nor were the countless numbers of sporting and recreational providers and the parents of children participating in sporting and recreational activities who have signed preinjury waivers over the decades. Nor, for that matter, was the trial court judge or two judges of the Court of Appeals.

been confronted with such waivers as a condition to their children's participation in sporting and recreational activities. As Judge SCHUETTE observed: "[A]n immense amount of youth activities—church groups, Boy Scouts, sports camps of all kinds, orchestra and theatrical events, and countless school functions—run and operate on release and waiver-of-liability forms for minor children." *Id*. at 163-164 (SCHUETTE, J., concurring). In view, therefore, of the facts that (1) preinjury parental waivers have been ubiquitous in this state for decades, enabling children to participate in a wide array of sporting and recreational activities that might otherwise not be available, and (2) there is no Michigan case that has ever held that a parental preinjury waiver is unenforceable, or otherwise prohibited or contrary to public policy, what exactly is the basis for the confident assertion by a majority of justices that such waivers are unenforceable in this state?

The lead opinion correctly observes that in *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 192-193; 405 NW2d 88 (1987), this Court set forth "the common-law rule that a parent has no authority to waive, release, or compromise claims by or against a child." This statement, however, was made in the course of an opinion that held that a particular statute created an *exception* to this common-law rule, and the cases cited in *McKinstry* in support of this rule all involved *existing* claims. *McKinstry* did not assert that the common-law rule applies to preinjury parental waivers, and it did not hold that such waivers are unenforceable. To make the point as clearly as possible, until the instant Court of Appeals decision, *no* existing Michigan case had held that the rule barring parental waivers applied in the preinjury context, and none had applied the rule in such a context, notwithstanding the familiarity of such waivers in this state. Thus, the

precise question before this Court is genuinely an issue of first impression in this state.

IV. APPLICATION OF THE COMMON-LAW

On the basis of the following considerations, I believe that the common law in our state should be clarified to hold that parental preinjury waivers are enforceable: (1) statutes and caselaw that have enhanced the legal autonomy of minors, (2) statutes and caselaw that have recognized parents' authority to undertake important decisions regarding their children, (3) decisions of the United States Supreme Court that have 'constitutionalized' the rights of fit parents to undertake important decisions regarding their children, (4) statutes and caselaw that have granted protections to recreational providers, (5) freedom of contract principles, (6) evolution of the litigative environment in recent decades, and (7) persuasive decisions from other jurisdictions.

A. AUTHORITY OF MINORS

The lead opinion acknowledges six statutory exceptions to the rule that a minor lacks the capacity to contract. *Ante* at 237 n 14. Despite this list, however, the justices in the majority give no apparent weight to these exceptions. In reality, there are a far greater number of statutory exceptions to the two common-law rules that form the basis of the decision here, namely that (1) a child cannot bind himself or herself by contract and (2) a parent cannot bind a child by contract.

Concerning the common-law rule that a child cannot bind himself or herself by contract, the lead opinion acknowledges the common-law exception that a child

can do so by a contract for necessaries.[21] It also notes a statutory exception, MCL 600.1403, that provides that an infancy defense will not be recognized for breach of contract if a minor willfully misrepresented his or her age when entering into a contract. Under the common law, a child was not considered an adult until age 21, but our Legislature reduced this age to 18 in 1971,[22] and for criminal matters, the effective age of majority is now 17.[23]

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[21] *Publishers Agency, Inc v Brooks*, 14 Mich App 634; 166 NW2d 26 (1968) (recognizing that minors are liable for contracts to purchase necessaries).

[22] The Age of Majority Act, MCL 722.51 *et seq*., effective January 1, 1972. Under MCL 722.52(1), a person who attains the age of 18 "is an adult of legal age for all purposes whatsoever, and shall have the same duties, liabilities, responsibilities, rights, and legal capacity as persons heretofore acquired at 21 years of age." But one still must be 21 in order to lawfully purchase or consume alcoholic beverages under an amendment of our constitution that was adopted in 1978. Const 1963, art 4, § 40; see MCL 722.52(1).

[23] MCL 712A.2(a)(1) provides that the family division of circuit court has "[e]xclusive original jurisdiction superior to and regardless of the jurisdiction of another court" in proceedings concerning minors under the age of 17 who violated a municipal ordinance or a state or federal law. Indeed, the common law's solicitude toward minors has been diminished dramatically with respect to criminal law. Pursuant to MCL 769.1(1), a court must sentence a juvenile convicted of any one of 12 specified serious felonies in the same manner as an adult. See also MCR 6.931(A). In 1996, the Michigan Legislature amended the state's juvenile code, allowing a child of any age to be tried and sentenced in the family division of circuit court in the same manner as an adult. This procedure may take place either at the discretion of the prosecutor for certain "specified juvenile violations," MCL 712A.2d(1), or by order of the court following a request by the prosecutor and a hearing for any other offense, MCL 712A.2d(2). In 1997, an 11 year old was charged by the prosecutor as an adult, pursuant to this statute, with first-degree premeditated murder, assault with intent to murder, and two counts of felony-firearm. See *People v Abraham*, 234 Mich App 640; 599 NW2d 736 (1999); *People v Abraham*, 256 Mich App 265; 662 NW2d 836 (2003). Indeed, we are told that the Michigan Department of Corrections currently holds 146 defendants sentenced to life without the possibility of parole who were 16 or younger when they committed their offenses. Note: *A second chance: Michigan's progressive shift in social policy to rehabilitate its mentally ill and juvenile defendants*, 86 U Det Mercy L R 559, 565 (2009).

The common-law rule that a child is incompetent to enter into a contract has other exceptions. As a result of legislation,[24] minors can now enter into enforceable contracts in these additional situations: (1) upon being emancipated by the family division of circuit court,[25] (2) upon getting married,[26] (3) upon entering into active duty with the United States military,[27] (4) in order to open a savings account,[28] (5) in order to receive substance abuse treatment,[29] (6) in order to receive treatment for a venereal disease or HIV,[30] (7) in order to

[24] The lead opinion cites MCL 600.1404(2) (educational loans) as an exception, but this 1970 statute is no longer properly considered an exception because it refers to the enforceability of educational loans entered into by "a minor 18 or more years of age . . . ." When the statute was enacted, the age of majority was 21. Because the age of majority is now 18, the statute is little more than an anachronism.

[25] MCL 722.4e(1)(a) states:

> A minor shall be considered emancipated for the purposes of, but not limited to, all of the following:
>
> (a) The right to enter into enforceable contracts, including apartment leases.

[26] MCL 722.4(2)(a). A minor who is 16 or 17 can marry with the consent of a parent. MCL 551.103(1).

[27] MCL 722.4(2)(c). Under federal law, a 17 year old can join the military with the consent of a parent. See 10 USC 505(a).

[28] MCL 491.614 authorizes the issuance of a savings account to a minor as the sole and absolute owner of the account and authorizes the paying of withdrawals and the performance of acts with respect to the account on the order of the minor with the same effect as if the minor had full legal capacity.

[29] MCL 333.6121(1) provides that a minor who is or professes to be a substance abuser may sign a consent to the provision of substance-abuse-related medical or surgical care, treatment, or services by a hospital, clinic, or health professional and that the consent is valid and binding in the same manner as if the minor had achieved the age of majority.

[30] MCL 333.5127(1) provides that a minor who is or professes to be infected with a venereal disease or HIV may sign a consent to the provision of medical or surgical care, treatment, or services by a hospital, clinic, or physician and that the consent is valid and binding in the same manner as if the minor had achieved the age of majority.

receive pregnancy-related services,[31] (8) in order to receive mental health services,[32] and (9) in order to purchase certain insurance policies.[33] All but one of these statutory exceptions were adopted between 1956 and 1980.

Thus, there is a clear trend in Michigan public policy toward giving increased weight to the significant life decisions of minors by allowing them a limited measure of legal autonomy and responsibility. Indeed, minors are also considered competent to waive a variety of rights when charged with a crime. See, e.g., *People v Simpson*, 35 Mich App 1; 192 NW2d 118 (1971), which indicates that minors are competent to waive even constitutional rights when charged with a crime.[34]

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[31] MCL 333.9132 provides that a minor may sign a consent to the provision of prenatal and pregnancy-related health care or to the provision of health care for a child of the minor by a licensed health facility or agency or a licensed health professional and that the consent is valid and binding in the same manner as if the minor had achieved the age of majority.

[32] MCL 330.1707 provides:

> A minor 14 years of age or older may request and receive mental health services and a mental health professional may provide mental health services, on an outpatient basis, excluding pregnancy termination referral services and the use of psychotropic drugs, without the consent or knowledge of the minor's parent, guardian, or person in loco parentis.

[33] MCL 500.2205 provides that a life insurance or disability insurance contract made by a person between the ages of 16 and 18 years for the person's benefit or that of a close relative is good and of the same force and effect as though the minor had attained majority at the time of making the contract.

[34] See also *Llapa-Sinchi v Mukasey*, 520 F3d 897, 900 (CA 8, 2008), which explains:

> Minors can be responsible for their own legal status and can waive their constitutional rights. Courts have repeatedly held this, and statutes have long allowed it. The Supreme Court has held

The common-law rule that minors are incompetent to enter into contracts was predicated on the idea that minors must be protected from their own contractual follies and exploitation by adults. *Holmes v Rice*, 45 Mich 142; 7 NW 772 (1881); *Frye v Yasi*, 327 Mass 724, 728; 101 NE2d 128 (1951). These purposes comport with common sense and experience, but neither would be undermined by permitting a child's *parents* to exercise their own prudence and judgment on behalf of their minor children in prospectively waiving negligence claims in order to allow their children to participate in recreational activities. As explained in *Parham v J R*, 442 US 584, 602; 99 S Ct 2493; 61 L Ed 2d 101 (1979), there is a presumption that parents possess what a child lacks in maturity, experience, and the capacity for judgment required for making life's difficult decisions. Thus, it is not incompatible with the common-law rule concerning the limited ability of a minor to enter into legal contracts to allow the parent the right to permit or deny a child's participation in sporting or recreational activities and to weigh the risks and benefits of that participation.

B. PARENTAL AUTHORITY

Concerning the common-law rule that a parent cannot bind a child by contract, the courts and the Legislature have found it increasingly appropriate to allow parents to provide consent to their children's participation in numerous significant activities. As explained in *Parham*, 442 US at 602:

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minors can be responsible for waiving their right to appeal deportation and custody determinations.

Llapa-Sinchi went on to cite cases holding that minors can waive the right to appeal, the right to a jury trial, and the rights guaranteed by *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

More recently, the United States Supreme Court has determined that the right of a parent to decide how a child will be raised is one of the oldest and most fundamental rights emanating from the "liberty" interest of the Due Process Clause of the Fourteenth Amendment. *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (opinion by O'Connor, J.). In *Troxel*, a plurality cited the Court's long history of recognizing that the family is a unit within which parents possess " 'broad . . . authority over minor children.' "[35] *Troxel*, 530 US at 66, quoting *Parham*, 442 US at 602. *Troxel* also indicated that courts may not overturn decisions by a fit custodial parent "solely on [the basis of] the judge's determination of the child's best interests." *Troxel*, 530 US at 67. Rather, courts must give some "special weight" to the parents' determination of their children's best interests. *Id*. Indeed, in *Hunter v Hunter*, 484 Mich 247, 258 n 16, 262; 771 NW2d 694 (2009), this Court recognized that *Troxel* "included forceful language describing the significance of parents' fundamental liberty interest in the care, custody, and control of their children" before proceeding to hold that "*Troxel* established a floor or minimum protection against state intrusion into the parenting

[35] "It is the natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children." MCL 380.10 (part of the Revised School Code).

decisions of fit parents." Considering the breadth and significance of the constitutional right of a fit parent to raise a child as that parent deems appropriate, I would clarify that parental preinjury waivers are enforceable, in part on the basis of this constitutional development.

There is also Michigan caselaw indicating that parents can consent to a variety of actions having serious consequences for their children. *In re Rosebush*, 195 Mich App 675, 682-683; 491 NW2d 633 (1992), for example, held that parents are empowered to make decisions regarding withdrawal or withholding of lifesaving or life-prolonging measures on behalf of their children because the right of the parent to speak for the minor child is embedded within our common law. To put it starkly, then, although the common law allows a parent to unilaterally deny or withdraw even life-prolonging medical care for his or her child if the child is seriously injured while participating in a recreational or sporting activity, a majority of justices would deny the same parent the right to prospectively waive a negligence claim that would allow the same child to participate in a 'Bounce Party,' or some other sporting or recreational activity, in the first place. And in *People v Goforth*, 222 Mich App 306; 564 NW2d 526 (1997), the Court of Appeals held that parents may consent to a police search of their child's bedroom even though such consent could have serious consequences if contraband or other evidence of criminal activity were found in the minor's room. Moreover, in *People v Givans*, 227 Mich App 113, 116, 123-124; 575 NW2d 84 (1997), the Court of Appeals affirmed the defendant's conviction in a case in which the parent consented to have her child interrogated by the police out of her presence—even though the questioning produced a confession to the crime.

In the face of the broad authority parents have regarding the raising of their children, our Legislature has enacted a long list of statutes related to that authority. For example, as a result of legislation, parents can (1) consent to allow their minor daughter obtain an abortion,[36] (2) consent to their minor child's release of his or her child for adoption,[37] (3) consent to their minor child's receiving a tattoo, brand, or body piercing,[38] (4) consent to their minor child's petition for a name change,[39] (5) consent to their minor child's participation in an undercover operation by purchasing or receiving alcoholic liquor under the supervision of a law enforcement agency,[40] (6) consent to their 16- or 17-year-old child's marriage,[41] (7) file a petition for court approval of a kidney donation by their minor child to a close relative if the child is at least 14 years old,[42] (8) consent to electroconvulsive therapy or a procedure intended to produce convulsions or a coma for their minor child,[43] (9) consent to the issuance of a level 1 graduated driver's license to their minor child if the child is 14 years and 9 months old or older,[44] (10) consent to their minor child's employment as a golf caddy or as a youth athletic program referee or umpire if the child is at least 11 years old,[45] (11) delegate to another person for up to six months most of the

[36] MCL 722.903(1).

[37] MCL 710.43(4).

[38] MCL 333.13102(1).

[39] MCL 711.1(5).

[40] MCL 436.1701(7).

[41] MCL 551.103(1).

[42] MCL 700.5105.

[43] MCL 330.1717(1)(b).

[44] MCL 257.310e(3)(c).

[45] MCL 409.103(2)(a) and (b).

parent's powers regarding care, custody, or property of the minor child by signing a power of attorney,[46] (12) consent to a pawnbroker's purchase of an item from their minor child,[47] (13) consent to allow a merchant to furnish or sell their minor child bulk gunpowder, dynamite, blasting caps, or nitroglycerine,[48] and (14) consent to the sale of a motor vehicle to their minor child.[49] Similarly, as a result of federal legislation, parents can (15) consent to their 17-year-old child's enlisting in the United States military[50] and (16) consent to their minor child's participation as a subject in certain kinds of medical research.[51] Third parties cannot consent to have someone else's child do or receive these things; only the child's *parents* can provide such consent. This is because, contrary to the assertion of the lead opinion, a parent is not merely tantamount to a "third party" with regard to his or her child. There is a clear trend in Michigan public policy toward according parents authority to consent to let their children engage in, or experience, a variety of significant activities. These consent statutes recognize the liberty interest of parents to make important decisions that affect the well-being of their children and acknowledge the constitutional principle that fit parents are presumed to act in the best interests of their children in making those decisions.

As these examples illustrate, current Michigan public policy—genuine public policy rooted in the statutory and decisional law of this state—fully recognizes that

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[46] MCL 700.5103(1).

[47] MCL 750.137.

[48] MCL 750.327a.

[49] MCL 750.421c.

[50] 10 USC 505(a).

[51] 45 CFR 46.404 through 46.408.

parents may make important, even life-altering, decisions on behalf of their children. While the lead opinion cites statutes and common-law doctrines showing the law's general solicitude toward minors[52]—and who could disagree with such a proposition?—the statutes and cases cited here are in no way inconsistent with those cited by the lead opinion and are fully compatible with a clarification of our common law allowing parents to sign preinjury waivers of negligence claims so their children can participate in recreational and sporting opportunities.[53] Such clarification would be consistent with, and no more than a logical extension of, existing Michigan public policy based on the trends identified in this section.

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[52] The lead opinion correctly notes, *ante* at 256-257, that the common law generally holds minors to a lower standard than an adult. But it fails to mention that even infants were liable for their torts at common law. Indeed, in *Jennings v Rundall*, 101 Eng Rep 1419, 1421-1422 (KB, 1799), Lord Kenyon said, "[I]f an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a Court of Justice." See also Prosser, Torts (3d ed), § 128, p 1024. Moreover, our common law provides that " 'whenever a child, whether as plaintiff or as defendant, engages in an activity which is normally one for adults only * * * he must be held to the adult standard, without any allowance for his age.' " *Farm Bureau Ins Group v Phillips*, 116 Mich App 544, 547; 323 NW2d 477 (1982), quoting Prosser, Torts (4th ed), § 32, pp 156-157; accord *Constantino v Wolverine Ins Co*, 407 Mich 896 (1979); *Osner v Boughner*, 180 Mich App 248, 254-257; 446 NW2d 873 (1989) (driving is an adult activity, and when minors drive, they are held to the adult standard of care).

[53] Under the clarifying rule I would adopt, parents would still need judicial approval to settle existing claims involving their children, and even prospective waivers would be ineffective with respect to claims of gross negligence or willful or wanton behavior. *Lamp*, 249 Mich App at 594 ("[A] party may not insulate himself against liability for gross negligence or wilful and wanton misconduct."). I also would not allow prospective waivers regarding *compulsory* activities, such as required school classes or events. See, e.g., *Sharon v City of Newton*, 437 Mass 99, 106; 769 NE2d 738 (2002) (enforcing a release "in the context of a compelled activity . . . might well offend public policy").

C. RECREATIONAL ACTIVITIES

The Legislature has also determined that there is a place in society for recreational activities that occasionally produce injuries by enacting standards of care that preclude claims for injuries to participants, regardless of the injured person's age, resulting from the inherent risks of such activities. As this Court indicated in *Neal v Wilkes*, 470 Mich 661; 685 NW2d 648 (2004), the Legislature enacted Michigan's recreational land use statute, MCL 324.73301, to provide immunity for landowners from personal-injury lawsuits by persons using their property recreationally, regardless of age, i.e., even when minors are injured.[54] As we discussed in *Anderson v Pine Knob Ski Resort, Inc*, 469 Mich 20; 664 NW2d 756 (2003), the Legislature enacted Michigan's Ski Area Safety Act, MCL 408.321 *et seq*., to provide immunity for ski-area operators from personal-injury suits by injured skiers, regardless of the age of the skier.[55] And

[54] MCL 324.73301(1) provides:

> Except as otherwise provided in this section, a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.

[55] 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. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment.

as was further mentioned in *Dale v Beta-C, Inc*, 227 Mich App 57; 574 NW2d 697 (1997), the Legislature enacted Michigan's Roller Skating Safety Act, MCL 445.1721 *et seq*., to provide some immunity for roller-skating rink operators from personal-injury suits by injured skaters, again regardless of the skater's age.[56] See also the Equine Activity Liability Act (EALA), MCL 691.1661 *et seq*., which proscribes general claims for ordinary negligence, regardless of the injured person's age. In particular, the EALA proscribes liability for injuries resulting from the inherent risks of equine activity.[57] We should give significant weight to the Legislature's expression of the public policy that such activities are worthy of protection, even in light of their risks, and that providers of such activities are entitled to receive some measure of protection from lawsuits in the absence of gross negligence, *even when the participants are minors*.

Similarly, our state's caselaw evidences that Michigan public policy recognizes that there are benefits to recreational activity. In *Benejam v Detroit Tigers, Inc*, 246 Mich App 645, 657-658; 635 NW2d 219 (2001), in which a minor was injured by a flying bat fragment, the

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[56] MCL 445.1725 provides "Each person who participates in roller skating accepts the danger that inheres in that activity insofar as the dangers are obvious and necessary."

[57] MCL 691.1663 provides:

> Except as otherwise provided in [MCL 691.1665], an equine activity sponsor, an equine professional, or another person is not liable for an injury to or the death of a participant or property damage resulting from an inherent risk of an equine activity. Except as otherwise provided in [MCL 691.1665], a participant or participant's representative shall not make a claim for, or recover, civil damages from an equine activity sponsor, an equine professional, or another person for injury to or the death of the participant or property damage resulting from an inherent risk of an equine activity.

Court of Appeals reversed a jury verdict and dismissed the injured minor's claim after adopting the "limited duty doctrine" as a matter of Michigan law.[58] See also *Moning*, 400 Mich at 458, in which this Court said:

> [B]aseball equipment and bicycles . . . are viewed by society essentially as are automobiles in that although children are injured and killed riding bicycles and playing baseball, the utility of such activity is regarded by society and all reasonable persons as outweighing the risk of harm created by their manufacture for and marketing to children.

Indeed, in *Ritchie-Gamester v City of Berkley*, 461 Mich at 73, 92 n 13; 597 NW2d 517 (1999), this Court described recreational activities as "valuable" and "important" "social activities." We should take cognizance of and give weight to these judicial decisions when assessing whether there is a public policy favoring parental preinjury waivers as a condition to allowing minors to participate in sporting and recreational activities and how this ought to be reflected in our state's common law.

D. FREEDOM OF CONTRACT

The common-law default position is that contracts are enforced. *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002).[59] This freedom of contract is "deeply

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[58] The Court of Appeals stated:

> [W]e hold that a baseball stadium owner that provides screening behind home plate sufficient to meet ordinary demand for protected seating has fulfilled its duty with respect to screening and cannot be subjected to liability for injuries resulting to a spectator by an object leaving the playing field. [*Benejam*, 246 Mich App at 657-658.]

[59] I do recognize that some contracts are not enforceable in Michigan as a matter of public policy. See, e.g., *Cudnik v William Beaumont Hosp*, 207 Mich App 378, 389-390; 525 NW2d 891 (1994), which held that on the

entrenched in the common law of Michigan." *Id*. at 71 n 19. The lead opinion, however, states that the issue is "whether a minor can be bound by a contract signed on his behalf by a third party." *Ante* at 238. I respectfully disagree with how the lead opinion frames this issue.[60] It errs in characterizing a parent as a "third party" with respect to his or her own child. The better, and more precisely, crafted question is whether a *parent*—a person who in the course of caring for his or her child might take actions pertaining to such matters as the location and establishment of a home, schooling, health care, diet and nutrition, discipline, social and family relationships, lifestyle, hobbies, clothing, religion, instruction in values, vacations, and, yes, even recreational activities, to name a few—may prospectively waive the child's future negligence claim so that the child can participate in a sporting or recreational activity. That is, the relevant question in this case pertains to the rights of a "parent," not those of a "third-party."

The common-law rule that parents are empowered to make important decisions regarding their children was recognized in *In re Rosebush*, 195 Mich App at 682-683. See also *In re LHR*, 253 Ga 439, 445; 321 SE2d 716 (1984) ("The right of the parent to speak for the minor child is . . . imbedded in our tradition and common law . . . ."). Moreover, as previously indicated, caselaw holds that parents are presumed to act in the best interests of their children and are entitled to make

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basis of public policy, "an exculpatory agreement executed by a patient before treatment is not enforceable to absolve a medical care provider from liability for medical malpractice and other acts of negligence related to a patient's medical care."

[60] I certainly agree that a third party cannot bind someone else to a contract. That is, if a parent signs a contract purporting to bind his next door neighbor or the neighbor's child, that contract would obviously be of no effect.

judgments and decisions concerning risks to their children. *Parham*, 442 US at 602. The lead opinion discounts this presumption as overbroad, noting that it is not limited to preinjury waivers and could be cited to justify a parent being able to bind a child to any contract. *Ante* at 250. I agree this presumption does not justify allowing a parent to enter into *any* contract that would be binding on a child. But this presumption, now of constitutional dimension, *does* support making parental preinjury waivers of negligence claims enforceable.

Assuming that the release actually waived the child's claim in this case, a *parent* made the decision that the benefits to his child flowing from the waiver outweighed the risks of a broken leg, as was suffered here, or an even more serious injury. Although plaintiff now seeks to avoid his obligations under the waiver on the grounds that it is "unenforceable," the father's waiver was nonetheless entered into voluntarily and knowingly. This Court should not disturb that decision, out of regard for the parent's rights to undertake such decisions for the child, as well as out of regard for traditional 'freedom of contract' principles. A majority of the justices forbid parents under all circumstances to undertake even a perfectly rational decision to assess the risks and benefits when determining what is in the best interests of their children. Instead, such decision-making will now be monopolized by judges, and the answer will always be the same: "No. The parent cannot be permitted to make such a determination." That is, no matter how compelling the child's interest in participating in a sporting or recreational activity, and no matter how slight the risk of a serious injury, the answer will always remain the same. There can be *no* parental preinjury waiver; there can be *no* assessment of the risks and benefits by the person who is constitu-

tionally presumed to be, and who in reality is, more concerned than anyone else in the world about the well-being of that child; and there can be *no* contract freely entered into by adults, both of whom may be exercising entirely reasonable and sound judgments.

The justices in the majority refuse to enforce the preinjury waiver contract, noting that postinjury waivers are not enforced. But I would not extend our common-law rule against postinjury parental waivers to preinjury parental waivers. These situations are quite different. As Judge BANDSTRA stated in his concurrence in the Court of Appeals:

> " 'The concerns underlying the judiciary's reluctance to allow parents to dispose of a child's existing claim do not arise in the situation where a parent waives a child's future claim. A parent dealing with an existing claim is simultaneously coping with an injured child; such a situation creates a potential for parental action contrary to that child's ultimate best interests.
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> " 'A parent who signs a release before her child participates in a recreational activity, however, faces an entirely different situation. First, such a parent has no financial motivation to sign the release. To the contrary, because a parent must pay for medical care, she risks her financial interests by signing away the right to recover damages. Thus, the parent would better serve her financial interests by refusing to sign the release.
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> " 'A parent who dishonestly or maliciously signs a preinjury release in deliberate derogation of his child's best interests also seems unlikely. Presumably parents sign future releases to enable their children to participate in activities that the parents and children believe will be fun or educational. Common sense suggests that while a parent might misjudge or act carelessly in signing a release, he would have no reason to sign with malice aforethought.
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> " 'Moreover, parents are less vulnerable to coercion and fraud in a preinjury setting. A parent who contemplates

> signing a release as a prerequisite to her child's participation in some activity faces none of the emotional trauma and financial pressures that may arise with an existing claim. That parent has time to examine the release, consider its terms, and explore possible alternatives. A parent signing a future release is thus more able to reasonably assess the possible consequences of waiving the right to sue.' " [*Woodman*, 280 Mich App at 158-159 (BANDSTRA, P.J., concurring) (citations omitted).]

I agree with Judge BANDSTRA's observations and have no difficulty concluding that the policy considerations underlying the rule limiting *postinjury* waivers absent judicial approval are sharply distinct from those at issue with respect to the preinjury rule. In particular, the traditional freedom of contract enjoyed by parents with regard to their children argues in favor of allowing enforcement of parental preinjury waivers.

E. GROWTH OF LITIGATION

There can also be little denying Judge BANDSTRA's observation that "[a]s this case amply demonstrates, ours is an extremely and increasingly litigious society."[61] *Id*. at 160. "Children have routinely jumped off

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[61] In 1982 Chief Justice Warren Burger observed:

> One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibilities of institutions other than the courts are now boldly asserted as "legal entitlements." The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity. [Burger, *Isn't there a better way?*, 68 ABA J 274 (1982).]

See also Posner, *The Federal Courts: Crisis And Reform* 55-79 (1985) (explicitly finding a litigation explosion since the 1960's and employing numerous categories of statistics to analyze this dramatic increase), and Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (1991).

playground slides for generations; lawsuits seeking to impose damages on someone else for resulting injuries are only a recent phenomenon." *Id.* at 160 n 2. As a result of trends toward increasing litigation in modern society, 48 jurisdictions adopted tort reform legislation between 1985 and 1988. Sanders & Joyce, *Off to the races: The 1980s tort crisis and the law reform process*, 27 Hous L R 207, 220-222 (1990). Even in 1992 it was stated:

> Few would dispute the proposition that America has become a litigious society and that the preferred method for resolving disputes and achieving social reform is to file lawsuits. In 1989, close to eighteen million new civil cases were filed in state and federal courts, amounting to one lawsuit for every ten adults. In the federal courts alone, the number of lawsuits filed each year has more than quadrupled in the last thirty years—from approximately 51,000 in 1960 to almost 218,000 in 1990. [Quayle, *Civil justice reform*, 41 Am U L R 559, 560 (1992).][62]

Indeed, this Court has previously expressed "concern over the effect of increased litigation on recreational activities" and identified "clear evidence that litigation can exact a toll on what most would consider valuable social activities." *Ritchie-Gamester*, 461 Mich at 92 n

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[62] See also Bator, *What is wrong with the supreme court?*, 51 U Pitt L R 673, 676-677 (1990):

> In the 1985 fiscal year there were filed in the federal district courts about 315,000 civil and criminal cases; this is, of course, exclusive of the some 365,000 bankruptcy petitions filed in 1985. (Compare this figure of 315,000 to the total of under 200,000 cases commenced as recently as 1980 and the total of some 120,000 commenced in 1970.) In 1985, these district court cases, together with the work of those administrative agencies reviewed directly in the courts of appeals, generated, in 1985, a total of about 34,000 new cases in the federal courts of appeals (including the Court of Appeals for the Federal Circuit). (This figure of 34,000 should be contrasted with the figure of just over 23,000 such cases in 1980, 11,500 in 1970, and under 4,000 in 1960.).

13. I agree with *Ritchie-Gamester* that "our duty" is to adopt common-law rules that do not create "destructive levels of litigation that will inhibit important social activity." *Id.* at 93 n 13.[63] Unfortunately, the concern expressed in *Ritchie-Gamester* is not shared by a majority of justices here. Indeed, their decision to expressly preclude the enforceability of parental preinjury waivers should be seen for what it is: an *anti-tort-reform* measure that will exact a heavy toll upon valuable social activities. Their decision will encourage the kind of modern litigation that has led to the closing of playgrounds for fear of a child being injured and a lawsuit being filed. See, e.g., *Messina v Dist of Columbia*, 663 A2d 535, 538 (DC, 1995) (holding that expert testimony was necessary to establish the standard of care for installation of cushioning under the monkey bars on a playground).[64]

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[63] As stated by the Ohio Supreme Court in *Zivich v Mentor Soccer Club, Inc*, 82 Ohio St 3d 367, 372; 696 NE2d 201 (1998): "[F]aced with the very real threat of a lawsuit, and the potential for substantial damage awards, nonprofit organizations and their volunteers could very well decide that the risks are not worth the effort."

[64] In 1996 New York City Parks Commissioner Henry Stern stated, "In today's litigious world, the children come to the playground with parents and the parents come with lawyers." Douglas, *That Upside-Down High Will Be Only a Memory, Monkey Bars Fall to Safety Pressure*, NY Times, April 11, 1996, available at (accessed June 10, 2010). Indeed, it was widely reported last year that a child in the New York area sued two coaches along with Little League Baseball Incorporated and the New Springville Little League when he was injured sliding into second base. Nyback, *Staten Island mom settles suit with Little League and coaches over knew injury*, available at <http://www.silive.com/northshore/index.ssf/2009/08/staten_island_mom_settles_suit.html> (accessed June 10, 2010); see also Benard, *Little league fun, big league liability*, 8 Marq Sports L J 93, 98 (1993) ("[O]ur lawsuit happy society has come to view a child's misjudging a fly ball as a cause of action against an individual who may, incidentally, have the most economic wealth."); Doughtery, *This Museum Exposes Kids To Thrills, Chills and Trial Lawyers*, Wall St J, May 1, 2010 (reporting that annual insurance costs for the City

The more litigious our society becomes, the more each injured child becomes a potential plaintiff in a lawsuit and the more sports and recreational providers see the need to obtain waivers in order to avoid lawsuits and remain in business. Thus, I believe that our society's overall increase in litigiousness over recent generations constitutes a substantial change in society's customary practice that supplies an additional reason for this Court to clarify that our common law allows for the enforceability of parental preinjury waivers. A society in which monkey bars and other traditional playground equipment disappear, and in which sports such as dodge ball attract the scrutiny of the bench and bar, may be a society in which there is less risk of injury, but it is also a society in which the nature of childhood, and the responsibilities of parenthood, are defined very differently than they have by past generations of Americans. Because I see no evidence that community views have altered in this regard, I would maintain the *genuine* common law in this state—one in which parental preinjury waivers are an ordinary part of the family experience—not the distorted common law articulated by a majority here.

F. OTHER JURISDICTIONS

The question whether to enforce parental preinjury waivers of negligence claims so that minors may participate in elective recreational activities has arisen in other states.[65] Numerous out-of-state cases have de-

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Museum in St. Louis Missouri, have risen from about $36,000 since its founding in 1997 to about $600,000 a year, representing about $1 of the museum's $12 admission price), available at (accessed June 10, 2010).

[65] However, I well recognize that "in exercising our common-law authority, [this Court's] role is not simply to 'count heads' but to determine which common-law rules best serve the interests of Michigan citizens." *Stitt*, 462 Mich at 607.

cided that parental preinjury waivers should be enforced in a wide variety of situations, notwithstanding the common law's obvious solicitude toward children. It is generally seen as being entirely compatible with that solicitude that parents be allowed to undertake certain decisions on behalf of their children, the consequences of which may not be entirely foreseeable. Who normally would be more concerned about, caring toward, and solicitous of the interests of a child than that child's parents? In *Hohe v San Diego Unified School Dist*, 224 Cal App 3d 1559; 274 Cal Rptr 647 (1990), a 15-year-old girl was injured when she volunteered to participate in a hypnotism show sponsored by her school's parent-teacher-student association. Although the minor and her father had signed a waiver form as a condition to her participation in the show, the plaintiff still attempted to hold the school, the association, and the school district liable for her injuries. The appellate court ruled that the release was not void as against public policy.[66]

In *Zivich v Mentor Soccer Club, Inc*, 82 Ohio St 3d 367; 696 NE2d 201 (1998), Pamela Zivich registered her seven-year-old son for soccer. The soccer club required Mrs. Zivich to sign a release form for her son as a part

[66] *Hohe* stated:

> Hohe, like thousands of children participating in recreational activities sponsored by groups of volunteers and parents, was asked to give up her right to sue. The public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of litigation. Thousands of children benefit from the availability of recreational and sports activities. Those options are steadily decreasing—victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risk. In this instance Hohe agreed to shoulder the risk. No public policy forbids the shifting of that burden. [*Hohe*, 224 Cal App 3d at 1564.]

of the registration process. The child was injured at practice, and his parents filed a lawsuit. The court held that a parent can bind a minor child to an exculpatory agreement in favor of volunteers and sponsors of nonprofit sport activities when the cause of action sounds in negligence. The court concluded that no public policy was violated by enforcing the release, stating:

> It cannot be disputed that volunteers in community recreational activities serve an important function. Organized recreational activities offer children the opportunity to learn valuable life skills. It is here that many children learn how to work as a team and how to operate within an organizational structure. Children also are given the chance to exercise and develop coordination skills. Due in great part to the assistance of volunteers, nonprofit organizations are able to offer these activities at minimal cost. . . .
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> [A]lthough Bryan, like many children before him, gave up his right to sue for the negligent acts of others, the public as a whole received the benefit of these exculpatory agreements. Because of this agreement, the Club was able to offer affordable recreation and to continue to do so without the risks and overwhelming costs of litigation. Bryan's parents agreed to shoulder the risk. Public policy does not forbid such an agreement. In fact, public policy supports it. See *Hohe v. San Diego Unified School Dist.* (1990), 224 Cal.App.3d 1559, 1564, 274 Cal.Rptr.647, 649. Accordingly, we believe that public policy justifies giving parents authority to enter into these types of binding agreements on behalf of their minor children. We also believe that the enforcement of these agreements may well promote more active involvement by participants and their families, which, in turn, promotes the overall quality and safety of these activities. . . .
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> * * *

> [W]e hold that parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sport activities where the cause of action sounds in negligence. These agreements may not be disaffirmed by the child on whose behalf they were executed. [*Id*. at 371-374.]

In *Sharon v City of Newton*, 437 Mass 99; 769 NE2d 738 (2002), the Court upheld a release relating to a voluntary high school cheerleading program on the basis of public policy. The Court stated:

> In the instant case, Merav's father signed the release in his capacity as parent because he wanted his child to benefit from participating in cheerleading, as she had done for four previous seasons. He made an important family decision cognizant of the risk of physical injury to his child and the financial risk to the family as a whole. In the circumstance of a voluntary, nonessential activity, we will not disturb this parental judgment. This comports with the fundamental liberty interest of parents in the rearing of their children, and is not inconsistent with the purpose behind our public policy permitting minors to void their contracts.
>
> . . . Our views with respect to the permissibility of requiring releases as a condition of voluntary participation in extracurricular sports activities, and the enforceability of releases signed by parents on behalf of their children for those purposes, are also consistent with and further the public policy of encouraging athletic programs for the Commonwealth's youth. [*Id.* at 108-109.][67]

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[67] See also *Brooks v Timberline Tours Inc*, 941 F Supp 959 (D Colo, 1996) (upholding the enforceability of waivers signed by parents on behalf of their minor child); *Kondrad v Bismarck Park Dist*, 655 NW2d 411 (ND, 2003) (child's negligence claim was barred by a waiver and release signed by his mother regarding an after-school care program when the minor fell on the school grounds while riding a bicycle owned by a child who was not part of the after-school care); *Gonzalez v City of Coral Gables*, 871 So 2d 1067 (Fla App, 2004) (upholding a parental preinjury release executed for a minor's participation in a high school fire-rescue

I acknowledge that some out-of-state cases have refused to enforce parental preinjury waivers. See, e.g., *Cooper v Aspen Skiing Co*, 48 P3d 1229, 1237 (Colo, 2002);[68] *Scott v Pacific West Mt Resort*, 119 Wash 2d 484; 834 P2d 6 (1992); *Hawkins v Peart*, 37 P3d 1062 (Utah, 2001); *Hojnowski v Vans Skate Park*, 375 NJ Super 568; 868 A2d 1087 (2005). However, in my judgment, these decisions rely on the same kind of arguments set forth in the lead opinion and those of Justice HATHAWAY and Chief Justice KELLY and fail to recognize the superior authority of parents, now recognized by the United States Constitution's Due Process Clause, to make decisions of the present sort on behalf of their children. I find the out-of-state cases allowing parental preinjury waivers of negligence claims far more persuasively reasoned and considerably more in line with the constitutional presumption that parents act in their children's best interests, as well as with Michigan's public policy favoring recreational activities and affording some measure of legal protection to providers of such recreational activities.

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training program); *Rackley v Advanced Cycling Concepts Inc*, 2009 Tex App LEXIS 1888 (2009) (barring the claim of a child injured at a "Pump it Up" party—a chain of children's party venues featuring inflatable houses, slides, and obstacle courses—because of a release signed by his parent); *Mohney v USA Hockey, Inc*, 77 F Supp 2d 859 (ED Ohio, 1999) (applying the *Zivich* holding and ruling that "[n]othing in the *Zivich* opinion indicates that its holding should be limited to nonprofit sports organizations that are local in scope"), aff'd in part and rev'd in part on other grounds, 248 F3d 1150 (CA 6, 2001) (stating that parents have the authority to bind their minor children to exculpatory agreements).

[68] The *Cooper* case, however, was legislatively superseded by statute in 2003. As noted in *Pollock v Highlands Ranch Community Ass'n, Inc*, 140 P3d 351 (Colo App, 2006), the statute recognizes a substantive defense to negligence claims that will often operate as a complete bar to relief. The statute provides: "A parent of a child may, on behalf of the child, release or waive the child's prospective claim for negligence." Colo Rev Stat 13-22-107(3). An Alaska statute similarly allows a parent to prospectively waive a child's negligence claim. Alas Stat 09.65.292.

Finally, it is at least noteworthy that many legal commentators have come down on the side of the enforceability of parental preinjury waivers. Professor Joseph King, Jr., for example, states, "[Negative] judicial attitudes toward exculpatory agreements signed by parents on behalf of their minor children seem inconsistent with the powers conferred on parents respecting other important life choices." King, *Exculpatory agreements for volunteers in youth activities—The alternative to "Nerf®" tiddlywinks*, 53 Ohio St L J 683, 716 (1992).[69]

V. CONSEQUENCES

As a result of today's decision holding that parental preinjury waivers are not enforceable, there will be at least the following predictable consequences: (1) this being the first decision in Michigan specifically holding that such waivers are unenforceable, there will be an increase in recreational and sports-related litigation, arising as a consequence both of now invalid past waivers and the disappearance of future waivers, (2) sporting and recreational opportunities, particularly for minors, will dwindle out of a reasonable fear of tort liability,[70] (3) parents' fundamental interests in making important decisions regarding their children will be

[69] See also Comment, *Interscholastic sports: Why exculpatory agreements signed by parents should be upheld*, 76 Temp L R 619 (2003); Comment, *The theory of the waiver scale: An argument why parents should be able to waive their children's tort liability claims*, 36 USF L R 535 (2002); Note, *Scott v Pacific West Mountain Resort: Erroneously invalidating parental releases of a minor's future claim*, 68 Wash L R 457 (1993).

[70] As was recognized in *Nat'l Int'l Brotherhood of Street Racers, Inc v Superior Court*, 215 Cal App 3d 934, 937; 264 Cal Rptr 44 (1989), "many popular and lawful recreational activities are destined for extinction" unless preinjury waivers are enforceable.

curtailed in favor of a rigid judicial policy that prohibits parents from making important decisions concerning their children's participation in recreational and sporting activities,[71] (4) Michigan's erstwhile public policy favoring and encouraging recreational and sporting opportunities for minors will run afoul of its new common law diminishing such opportunities, (5) recreational providers, such as schools and municipalities; organizations, such as the YMCA, Boy Scouts, Girl Scouts, and the 4-H Club; civic and service organizations, such as the Optimists, the Kiwanis Club, the Jaycees, the Lions Club, and the Elks; and local small businesses will all be subject to increased exposure to lawsuits and higher insurance costs, which will lead to either a reduction in interest in sponsoring youth activities or an increase in participation costs for minors and their parents, and (6) nonprofit recreational providers will have a more difficult time recruiting volunteers because of their fear of being personally sued if a child is injured.[72]

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[71] I concur with the following dissenting statement in *Hojnowski*, 375 NJ Super 568 at 598 (Fisher, J. concurring in part and dissenting in part):

> I believe a parent also has the right—with which the state must not interfere—to decide whether a child may play football or collect sea shells, learn to ride a horse or engage in bird-watching, go skateboarding or only play video games involving animated skateboarders, or engage in any other type of sport or recreational activity that encompasses inherent risks, or those that are sedate, or all such activities, or none. The majority may not view these matters as important, but, important or not, they and countless others ought to be resolved solely within the sphere of the family and, absent the parents' unfitness, it should be beyond our courts' power to say otherwise.

[72] The lead opinion asserts, remarkably, that if the rule the majority here favors were not adopted, business owners might have a diminished incentive to maintain their property appropriately, resulting in an increased number of injuries to children. *Ante* at 249. I see just the opposite incentive. This concern is considerably overblown, in my judg-

The rule established here by a majority of justices summarily strikes down tens of thousands of waivers now believed to be valid and enforceable by thousands of providers of recreational and sporting opportunities and the parents of children who partake in such opportunities.[73] One can then be assured, as certainly as day follows night, that every hard slide at third base, every hockey penalty, every overly aggressive tackle, every slip at an ice arena, every broken leg at a summer camp, every display of carelessness by a six year old, and every collision between two young athletes will be followed by the attentions of a lawyer newly specializing in "recreational and sporting law." That is, if some intrepid providers can still be found who are prepared to continue to make available youth recreational and sporting opportunities.

By contrast, enforcing parental preinjury waivers of negligence claims accords respect to the judgments of parents concerning their minor children's welfare, upholds the freedom of contract, encourages safe and available recreational and athletic opportunities, and intelligently and responsibly reconciles competing soci-

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ment. First, providers would continue to be liable when they acted in a grossly negligent manner. Second, recreational providers of sports and recreational activities to adults already have waivers enforced absent gross negligence, and there is utterly no evidence that those facilities are generally maintained in an unsafe manner. Third, as noted by the Ohio Supreme Court, "enforcement of [parental waivers] may well promote more active involvement by participants and their families, which, in turn, promotes the overall quality and safety of these activities. [*Zivich*, 82 Ohio St 3d at 372.]

[73] Regrettably, many of the providers who continue to abide by established customs and practices, and who may only belatedly become aware of today's decision, will learn the hard way that contracts they believed were protecting them and their businesses have become unenforceable. This is all the more reason why the common law ought to closely reflect the actual customs and practices of the people, so that citizens need not enroll in continuing legal education courses.

etal interests in a fashion similar to that of the Legislature in a widening range of areas pertaining to recreational and sporting opportunities. In refusing to permit parental preinjury waivers, the justices in the majority fail to appreciate the destructive impact of their decision on children, parents, and those who finance and provide recreational opportunities.

The clarifying rule I would adopt is consistent with the common law's concern that children generally be protected from their own contractual follies, and it is equally faithful to the common law's concern that parents not act precipitously when releasing an existing negligence claim of their child. This rule is also consistent with the actual practices of the *parties* themselves in this case, as well as with those of Michigan citizens generally. Indeed, it is contrary to our common-law experience not to bring the common law into accord with the *actual* customs and practices of its citizens; rather, those customs and practices lie at the foundation of our common law. In my judgment, the rule that would best serve the interests of Michigan citizens, and that most closely comports with our people's values and traditions, is the rule set forth in this opinion.

VI. RESPONSE TO JUSTICE HATHAWAY'S OPINION

Justice HATHAWAY's opinion shows particular confusion in its confident and sweeping assertion that "[parental] pre-injury waivers have never been *enforced* or *considered enforceable* by the courts of this state." (Emphasis added.) There is, of course, not the slightest evidence in support of either prong of this assertion. Concerning the first prong, past enforcement, Justice HATHAWAY fails to cite a single judicial decision in this state's history involving a parental preinjury waiver, and given her agreement with the lead opinion that

such waivers are "likely familiar" to parents with young children, one might reasonably wonder why the *absence* of such judicial decisions supports her conclusion rather than exactly the opposite conclusion. Concerning the second prong, parental preinjury waivers not being "considered enforceable," there is also not a bit of evidence in support of her position. To the extent that a straightforward and unambiguous waiver is viewed as meaning what it says, there is no reason to suppose that a parent who had signed such a waiver and whose child had been injured in the course of a sporting or recreational activity would even assume that a lawsuit could be brought. While Justice HATHAWAY would apparently tally that parent within the ranks of those who did not "consider enforceable" the waiver, exactly the opposite conclusion is better founded. That is, precisely to the extent that parents shared Justice HATHAWAY's view and did *not* view waivers as enforceable, one would logically surmise that lawsuits would be *brought* and that the *absence* of such lawsuits should be seen not as Justice HATHAWAY does, as evidence of their unenforceability, but as evidence of the opposite. Justice HATHAWAY's premise is necessarily that injured persons reflexively bring lawsuits even when they recognize that they have signed contracts precluding such lawsuits and that their *not* bringing such lawsuits is the equivalent of their viewing the contract as "unenforceable." Hers is a seriously faulty premise and, thankfully, does not yet reflect the norms and values of the people of this state, the instant decision by a majority of justices notwithstanding.

VII. CONCLUSION

For all the foregoing reasons, I would affirm in part the judgment of the Court of Appeals to the extent that

it held that defendant was not entitled to summary disposition, on the alternative ground that the *actual language* of the release at issue did not waive the minor's claims. I would vacate that portion of the Court of Appeals' judgment concluding that a parent cannot waive a minor child's negligence claims prospectively, because the release at issue did not actually do so. I dissent, however, from the decision to extend the common-law rule forbidding a parent to release a child's *existing* negligence claim to further forbid a parent to *prospectively* waive such a claim so that his or her child may participate in recreational or sporting activities. The decision by a majority of justices will have significant consequences that will be felt widely throughout this state, including both an increase in litigation and a reduction in sporting and recreational opportunities for children. Thus, if the enforceability of parental preinjury waivers were properly before us, and it is not, I would clarify that Michigan's common law permits the enforcement of a parental preinjury waiver.

CORRIGAN, J., concurred with MARKMAN, J.

SHEPHERD MONTESSORI CENTER MILAN v
ANN ARBOR CHARTER TOWNSHIP

Docket No. 137443. Argued December 8, 2009 (Calendar No. 3). Decided June 18, 2010.

Shepherd Montessori Center Milan brought an action in the Washtenaw Circuit Court against Ann Arbor Charter Township, a township zoning official, and the township's zoning board of appeals after it was denied a variance to operate a Catholic primary school on leased property. The court, Melinda Morris, J., granted defendants' motion for summary disposition. The Court of Appeals, OWENS and SCHUETTE, JJ. (MURPHY, P.J., concurring in the result only), affirmed in part, reversed with regard to plaintiff's claim that denying the variance request violated its equal-protection rights, and remanded the case for a determination of whether defendants' denial of a variance placed a substantial burden on plaintiff's religious exercise. 259 Mich App 315 (2003). On remand, the trial court again granted defendants summary disposition, and plaintiff again appealed. The Court of Appeals, SAAD, P.J., and HOEKSTRA and SMOLENSKI, JJ., reversed and remanded for the entry of a judgment in favor of plaintiff. 275 Mich App 597 (2007) (*Shepherd II*). The Supreme Court, in lieu of granting leave to appeal, vacated the *Shepherd II* opinion and remanded the case to the Court of Appeals for reconsideration in light of *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373 (2007), with regard to whether the denial of the variance imposed a substantial burden on plaintiff's religious exercise in violation of federal statutory law. 480 Mich 1143 (2008). On remand, the Court of Appeals, SAAD, P.J., and HOEKSTRA and SMOLENSKI, JJ., held that summary disposition of plaintiff's statutory claim was properly granted in defendants' favor because plaintiff had failed to show that the denial of the variance request coerced anyone into acting contrary to their religious beliefs, that the property at issue had religious significance, or that plaintiff's faith required a school at that particular site. However, the Court of Appeals held that plaintiff was entitled to summary disposition of its equal-protection claim. Accordingly, the Court of Appeals affirmed in part, reversed in part, and remanded to the trial court for entry of a judgment in favor of plaintiff on its equal-protection

claim and to reverse the denial of the variance request. 280 Mich App 449 (2008). The Supreme Court granted defendants' application for leave to appeal the previous judgments of the Court of Appeals, limited to whether the Court of Appeals had applied the correct standard of review when addressing plaintiff's equal-protection claim and whether defendants had violated plaintiff's right to equal protection by denying the variance. 483 Mich 1131 (2009).

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

Defendants' denial of plaintiff's variance request did not violate plaintiff's constitutional right to equal protection because plaintiff did not establish that defendants had treated similarly situated entities disparately or that the variance denial was based on religious animus.

1. For plaintiff to establish that the denial of its zoning variance request violated its equal-protection rights, it must show that defendants treated it differently from a similarly situated entity. Plaintiff has not established that Rainbow Rascals, a daycare facility, was a similarly situated entity. In this case, plaintiff's variance request was to operate a primary school in an office park district, which is not zoned for such a use. While Rainbow Rascals had been granted variance requests in the past, because defendants had never granted it a variance of this nature, the entities were not similarly situated for purposes of plaintiff's equal-protection claim. Because plaintiff was not similarly situated to Rainbow Rascals, the question whether the zoning ordinance is rationally related to a legitimate state interest need not be reached.

2. Plaintiff did not establish that defendants applied the zoning ordinance in a discriminatory manner because of plaintiff's religious affiliation. Although the subject of plaintiff's religious affiliation was addressed at a hearing before the zoning board of appeals, it was plaintiff's own attorney who introduced it in the course of arguing that plaintiff's religious affiliation entitled it to special consideration. Plaintiff presented no evidence of religious animus.

Reversed; order granting defendants' motion for summary disposition reinstated.

ZONING — CONSTITUTIONAL LAW — EQUAL PROTECTION — SIMILARLY SITUATED ENTITIES.

In determining whether entities are similarly situated for purposes of deciding equal-protection claims regarding denials of requests

for zoning variances, courts must compare the nature of the entities' respective variance requests.

Robert L. Bunting and *Robert Charles Davis* for plaintiff.

Bodman LLP (by *James J. Walsh* and *G. Christopher Bernard*) for defendants.

Amicus Curiae:

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *John K. Lohrstorfer*), for the Michigan Townships Association.

HATHAWAY, J. At issue is whether defendants violated plaintiff's right to equal protection by denying a request for a zoning variance. We hold that defendants' denial of plaintiff's variance request does not violate equal protection principles because plaintiff has not met the threshold burden of proof for its equal protection challenge by showing disparate treatment of similarly situated entities based on religion. Accordingly, we reverse the Court of Appeals judgment and reinstate the trial court's order granting defendants' motion for summary disposition.

I. FACTS AND PROCEEDINGS

This case originates from a zoning dispute in Ann Arbor Township. The property at issue is zoned as an office park (OP) district pursuant to the township zoning ordinance, and is located within Domino's Farms office complex. Among the uses permitted in the township's OP zoning district are daycare facilities for use by children of office park employees. Rainbow Rascals, a former tenant of Domino's Farms, had operated a 100-child-capacity secular preschool daycare fa-

cility in the office park limited to children of office park employees. In 1991, Domino's Farms, on behalf of Rainbow Rascals, applied to Ann Arbor Township for a variance to allow children whose parents did not work at the Domino's Farms office complex to attend the Rainbow Rascals daycare. The township's Zoning Board of Appeals (ZBA) granted the requested variance.

In 1998, plaintiff Shepherd Montessori opened a Catholic preschool daycare facility in this same office park complex. The facility was originally limited to children of office park employees. Thereafter, Domino's Farms applied to Ann Arbor Township for a variance to allow children whose parents did not work at the office park to attend Shepherd Montessori's facility, a variance virtually identical to the one granted to Rainbow Rascals. The ZBA again granted the requested variance.

In 2000, Rainbow Rascals moved out of the office park, and Shepherd Montessori proposed to move into the vacated space and operate a K-3 primary school program. Shepherd Montessori sent a letter to the township's zoning administrator describing the proposal. The zoning administrator denied plaintiff's proposed use of the property, explaining that the operation of a primary school is not a permitted use within an OP district as designated in the township's zoning ordinance. Plaintiff filed a petition with the ZBA seeking in the alternative either (1) reversal of the zoning administrator's decision, (2) a use variance, or (3) a determination that plaintiff's proposed use of the property can be considered a "substituted use" of the prior "nonconforming" Rainbow Rascals daycare program.

The ZBA held a hearing on plaintiff's petition. During the hearing, plaintiff's attorney asserted that plaintiff should receive special consideration because its primary school would have a religious component that

would be a use favored by the Constitution. One ZBA member questioned plaintiff's attorney regarding this assertion and inquired whether counsel believed that plaintiff "has some additional right to relief that she [sic] would not have as a nonsectarian private school without a religious affiliation based on the Constitution." Plaintiff's attorney responded that he believed plaintiff is afforded additional rights under the Constitution, which favors education and religion.

At the conclusion of the hearing, the ZBA indicated that it agreed with the zoning administrator's decision and denied plaintiff's request because a primary school is not a permitted use within an OP district as designated in the township's ordinance. The ZBA also ruled that plaintiff's proposed nonconforming primary school use could not be substituted for Rainbow Rascals' use of the property because the daycare was a permitted use whereas a school is not. Finally, the ZBA voted to deny plaintiff's request for a use variance to operate a primary school in the OP district because plaintiff did not prove that without the variance, there could be no other viable economic use of the property. The vote on all three issues was unanimous.

Plaintiff sued the township, alleging, among other things, that its equal protection rights were violated by defendants' denial of the variance request.[1] The matter

[1] This matter has been pending in the courts since 2000. The procedural history is complex. Plaintiff initially filed a lawsuit alleging violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USC 2000cc *et seq.*, substantive due process, procedural due process, and equal protection. The parties filed cross-motions for summary disposition.

The trial court ruled that plaintiff had no claim under RLUIPA and also dismissed plaintiff's constitutional claims. Plaintiff appealed in the Court of Appeals, and the Court of Appeals reversed the trial court's grant of summary disposition on plaintiff's RLUIPA and equal protection

currently before us addresses plaintiff's equal protection challenge. On the most recent remand from this

claims and remanded to the trial court for further proceedings. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp (Shepherd I)*, 259 Mich App 315; 675 NW2d 271 (2003). The township filed an interlocutory application for leave to appeal to this Court, which was denied. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 471 Mich 877 (2004).

In 2006, on remand the parties again filed cross-motions for summary disposition on the RLUIPA and equal protection claims. The trial court granted defendants' motion and denied plaintiff's. Plaintiff once again appealed the decision in the Court of Appeals, which reversed the trial court's opinion and order granting defendants' motion for summary disposition and remanded for entry of judgment in favor of plaintiff and for reversal of the ZBA's denial of plaintiff's variance request. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp (Shepherd II)*, 275 Mich App 597; 739 NW2d 664 (2007). The Court of Appeals concluded that plaintiffs had established a substantial burden on religious exercise to support the RLUIPA claim and also held in favor of plaintiff's equal protection claim. Defendants filed a motion for reconsideration in the Court of Appeals, which the Court denied. Plaintiff filed a motion for sanctions against defendant, arguing that defendant's motion for reconsideration was vexatious under MCR 7.216(C). The Court of Appeals agreed, awarding plaintiff costs and attorney fees in an amount to be determined by the trial court.

Defendants filed applications for leave to appeal in this Court, challenging *Shepherd I* and *Shepherd II* and the Court of Appeals order imposing sanctions against defendants. On March 28, 2008, this Court vacated the judgment of the Court of Appeals in *Shepherd II*, reversed the order awarding plaintiff sanctions for a vexatious motion for reconsideration, and remanded the case to the Court of Appeals for reconsideration in light of *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373; 733 NW2d 734 (2008). *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 480 Mich 1143 (2008).

On remand, the Court of Appeals applied this Court's decision in *Greater Bible Way* and held that the trial court had correctly granted summary disposition in favor of defendants on the RLUIPA claim. However, the Court of Appeals also held that the remand order did not alter its prior ruling that defendants' application of the zoning ordinance violated the Equal Protection Clause, and the Court remanded the case to the trial court for entry of a judgment in favor of plaintiff. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp (On Remand) (Shepherd III)*, 280 Mich App 449; 761 NW2d 230 (2008).

Court, the Court of Appeals affirmed its prior decision that the defendants' application of the zoning ordinance violated the Equal Protection Clause. Applying the strict scrutiny standard of review, the panel held that defendant "treated a secular entity more favorably than plaintiff, a religious entity," and that defendant offered no evidence to show that the denial of plaintiff's variance was "precisely tailored to achieve a compelling governmental interest." The Court of Appeals remanded the case to the trial court for entry of a judgment in favor of plaintiff.[2] Defendants filed an application for leave in appeal to this Court, and we granted defendants' application limited to consideration of "(1) whether the Court of Appeals applied the correct standard of review in determining that the defendants violated the plaintiff's right to equal protection; and (2) whether the defendants violated the plaintiff's right to equal protection in denying the plaintiff's request for a variance."[3]

II. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition is a question of law, which this Court reviews de novo.[4] Underlying constitutional issues are also reviewed de novo by this Court.[5]

III. ANALYSIS

At issue in this case is whether defendants' denial of plaintiff's zoning variance request was constitutionally

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[2] *Shepherd III*, 280 Mich App 449.

[3] *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 483 Mich 1131 (2009).

[4] *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007).

[5] *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008).

permissible. In order to resolve this issue, we apply the following principles of equal protection law.

The equal protection clauses of the Michigan and United States constitutions provide that no person shall be denied the equal protection of the law.[6] This Court has held that Michigan's equal protection provision is coextensive with the Equal Protection Clause of the United States Constitution.[7] The Equal Protection Clause requires that all persons similarly situated be treated alike under the law.[8] When reviewing the validity of state legislation or other official action that is challenged as denying equal protection, the threshold inquiry is whether plaintiff was treated differently from a similarly situated entity.[9] The general rule is that legislation that treats similarly situated groups disparately is presumed valid and will be sustained if it passes the rational basis standard of review: that is, the classification drawn by the legislation is rationally

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[6] Const 1963, art 1, § 2; US Const, Am XIV.

[7] *Harvey v State of Mich*, 469 Mich 1, 6; 664 NW2d 767 (2003). The Court explained:

> By this, we do not mean that we are bound in our understanding of the Michigan Constitution by any particular interpretation of the United States Constitution. We mean only that we have been persuaded in the past that interpretations of the Equal Protection Clause of the Fourteenth Amendment have accurately conveyed the meaning of Const 1963, art 1, § 2 as well. [*Id.* at 6 n 3.]

[8] *City of Cleburne v Cleburne Living Ctr, Inc*, 473 US 432, 439; 105 S Ct 3249; 87 L Ed 2d 313 (1985).

[9] *Watson v Williams*, 329 Fed Appx 193, 196 (CA 10, 2009) (citing *City of Cleburne*, 473 US at 439, for the proposition that an equal protection claim "requires a threshold allegation that the plaintiff was treated differently from similarly situated individuals"); *Gilmore v Douglas Co*, 406 F3d 935, 937 (CA 8, 2005) ("As a threshold matter, to establish the particular equal protection claim alleged by [the plaintiff], she must establish that some government action caused her to be treated differently from others similarly situated.").

related to a legitimate state interest.[10] Under this deferential standard, "the burden of showing a statute to be unconstitutional is on the challenging party, *not* on the party defending the statute[.]"[11]

However, when legislation treats similarly situated groups disparately on the basis of a suspect classification, such as race, alienage, or national origin, or infringes on a fundamental right protected by the Constitution, such as the free exercise of religion, the legislation will only be sustained if it passes the rigorous strict scrutiny standard of review: that is, the government bears the burden of establishing that the classification drawn is narrowly tailored to serve a compelling governmental interest.[12]

If entities are treated differently on the basis of the quasi-suspect classes of gender and illegitimacy, intermediate scrutiny applies, and the burden is on the government to show that the classification serves important governmental objectives and that the means employed are substantially related to the achievement of those objectives.[13]

The ordinance in question is indisputably facially neutral in that it does not, on its face, treat religious and secular entities differently. Here, plaintiff complains that, in applying the ordinance, the township treated it differently from one other entity: Rainbow Rascals. The United States Supreme Court allows such "class of one" claims to be brought, but requires a plaintiff to show that it was actually treated differently from others similarly situated and that no rational basis

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[10] *City of Cleburne*, 473 US at 440.

[11] *New York State Club Ass'n, Inc v City of New York*, 487 US 1, 17; 108 S Ct 2225; 101 L Ed 2d 1 (1988).

[12] *City of Cleburne*, 473 US at 440.

[13] *Craig v Boren*, 429 US 190, 197; 97 S Ct 451; 50 L Ed 2d 397 (1976).

exists for the dissimilar treatment.[14] The Court of Appeals erred in concluding that strict scrutiny applied to plaintiff's equal protection claim because, as discussed below, defendants' actions did not substantially burden plaintiff's free exercise of religion.[15]

In order to determine whether plaintiff's equal protection rights were violated, we begin by analyzing the threshold inquiry for an equal protection challenge, that being whether plaintiff was treated differently from a similarly situated entity. Plaintiff asserts that Rainbow Rascals and plaintiff are similarly situated and that defendants treated them differently. Plaintiff argued that defendants conceded Rainbow Rascals and plaintiff were similarly situated by stating in their brief that "[t]he similarity of the two entities is not in dispute." The Court of Appeals agreed and used this statement as the basis for holding that Rainbow Rascals and plaintiff were similarly situated. In reaching its conclusion, the Court stated:

> *Defendants conceded that plaintiff and Rainbow Rascals were similarly situated*, and defendants failed to offer a reason for refusing to permit plaintiff to operate its school

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[14] *Village of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."); *Congregation Kol Ami v Abington Twp*, 309 F3d 120, 133 (CA 3, 2002) ("[L]and use ordinances that do not classify by race, alienage, or national origin, will survive an attack based on the Equal Protection Clause if the law is 'reasonable, not arbitrary' and bears 'a rational relationship to a (permissible) state objective.' "), quoting *Village of Belle Terre v Boraas*, 416 US 1, 8; 94 S Ct 1536; 39 L Ed 2d 797 (1974) (quotation marks omitted).

[15] The Court of Appeals also held that defendants' denial of plaintiff's variance request does not substantially burden plaintiff's religious exercise, and plaintiff has not appealed that decision.

> in the same space that Rainbow Rascals had operated its day care program.
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> * * *
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> Thus, we hold that defendants have treated a secular entity more favorably than plaintiff, a religious entity. . . . Accordingly, the trial court erred when it failed to grant summary disposition to plaintiff. [*Shepherd III*, 280 Mich App at 455-456 (citation and quotation marks omitted; emphasis added).]

A review of the relevant document demonstrates that defendants' statement has been taken out of context. More importantly, this argument focuses the inquiry on an irrelevant factor. Defendants' brief states:

> The similarity of the two entities is not in dispute. Defendants' treatment of these entities is the real issue, and in truly comparable situations defendants did not treat plaintiff differently.

While plaintiff argues that this is a concession that the entities are similarly situated, defendants' statement only sets forth that the entities are similar to the degree that they both operate daycare facilities. However, the relevant inquiry in this instance focuses on Shepherd Montessori's current variance request as compared to Rainbow Rascals's previously granted requests.

In determining whether plaintiff and Rainbow Rascals are similarly situated entities that were treated differently, we must examine their respective variance requests. Plaintiff's current request is for a variance to operate a K-3 primary school. Under the OP district rules, primary school education is not a permitted use. Historically, both Rainbow Rascals and plaintiff have operated daycare facilities, not primary schools. Rainbow Rascals originally operated its daycare facility for

children of office park employees only. It requested a variance to expand the daycare operation to include children whose parents did not work in the office park. The township granted that variance. When Shepherd Montessori initially commenced its daycare operation, it was similarly limited to children of office park employees. Eventually, Shepherd Montessori made the same request as Rainbow Rascals: to expand operations to permit children whose parents were not office park employees to use the facility. The township granted this request, just as it had for Rainbow Rascals. Thus, when Rainbow Rascals and plaintiff made the same request, defendants treated the two entities the same and granted both requests.

In contrast, plaintiff's current request is to operate a primary school. There is no question that a primary school is *not* a permitted use in an OP district. Rainbow Rascals has never made a request for a variance to operate a primary school. Plaintiff does not allege that any other entity has ever made a request to operate a primary school in an OP district, or that any request to operate a primary school in an OP district has ever been granted. Thus, the record indicates that plaintiff is making a request that no entity has made before. Operating a daycare facility is not the same as operating a primary school. This OP district is simply not zoned for primary education. Thus, the township's consideration of plaintiff's variance request cannot be compared to any other variance request because plaintiff has provided no evidence that anyone has ever made a similar request of the township. There simply is no other entity to compare it to. Given this fact, we cannot compare defendants' denial of plaintiff's variance request to operate a primary school to Rainbow Rascals's request, because they are not the same request. The

township's consideration of different requests does not constitute different treatment of similarly situated entities.

Indeed, plaintiff is not seeking similar treatment; rather, plaintiff is asserting religion in an effort to obtain preferential treatment. However, the Equal Protection Clause does not require that plaintiff get better treatment than a secular entity. It only requires "equal" treatment, and that is exactly what plaintiff has received, because nobody within the township has been allowed to operate a school in an OP district. The township is not forbidding plaintiff from operating a primary school; it is simply regulating where that school can be operated. If plaintiff wants to operate a school, it can do so; it just has to operate it on property that is zoned for schools. If plaintiff wants to use the property for child care, then it can operate a daycare center on the property. In other words, in the realm of the operation of primary schools and daycare centers, plaintiff has to follow the law like everyone else. This does not amount to differential treatment of similarly situated entities. Thus, because plaintiff has failed to demonstrate that it was treated differently from similarly situated entities, we need not apply the rational basis test to determine whether the zoning ordinance is rationally related to a legitimate state interest.[16]

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[16] *Silver v Franklin Twp Bd of Zoning Appeals*, 966 F2d 1031, 1036-1037 (CA 6, 1992) ("The basis of any equal protection claim is that the state has treated similarly-situated individuals differently. Because [the plaintiff] does not claim an infringement of a fundamental right or discrimination against a suspect class, we would review the Board's actions using a rational basis test. . . . In this case, however, we need not even go so far as to apply the rational basis test because [the plaintiff] has failed to demonstrate that the Board treated him differently from similarly-situated individuals.").

Lastly, we address plaintiff's assertion that defendants discriminatorily applied the facially neutral zoning ordinance against it because of its religious affiliation, thereby treating it, a religious entity, differently from everyone else. As noted previously, it is not disputed that the zoning ordinance at issue in this case is facially neutral. "A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate" on the basis of a suspect classification such as religion.[17] A facially neutral law that only incidentally burdens a particular religious practice will not be held to discriminate on the basis of religion.[18] A facially neutral law will not be held unconstitutional solely because it results in disproportionate impact; proof of discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.[19] Discriminatory intent or purpose can be inferred from the totality of relevant facts.[20]

Plaintiff argues that the *reason* defendants denied plaintiff a variance to operate a Catholic school is because of religious animus, and that this denial infringed on plaintiff's free exercise of religion. In support

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[17] *Washington v Davis*, 426 US 229, 241; 96 S Ct 2040; 48 L Ed 2d 597 (1976).

[18] See *Church of Lukumi Babalu Aye v City of Hialeah*, 508 US 520, 531; 113 S Ct 2217; 124 L Ed 2d 472 (1993). See also *Employment Div v Smith*, 494 US 872, 878-879; 110 S Ct 1595; 108 L Ed 2d 876 (1990) (stating that an individual's religious beliefs do not excuse that person "from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" and that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that the religion prescribes (or proscribes))." (Citation and quotation marks omitted.)

[19] *Arlington Hts v Metro Housing Dev Corp*, 429 US 252; 264-265; 97 S Ct 555; 50 L Ed 2d 450 (1977).

[20] *Washington*, 426 US at 242.

of this argument, plaintiff asserts that the line of questioning regarding religion and preferential treatment by one of the ZBA members at the hearing shows that the ZBA members were biased against plaintiff's religion and that the variance was denied because of that bias. The record, however, does not support this conclusion. Plaintiff's attorney initially introduced the subject of plaintiff's religious affiliation during the ZBA hearing by intimating that plaintiff should receive "special consideration" because of its religious purpose. The minutes from the hearing describe the exchange as follows:

> [ZBA member] Laporte asked Attorney Davis about his initial presentation when he spoke about the Constitution and religious freedom. Laporte asked if the petitioner believed that she has some additional rights to the relief that she would not have as a non-sectarian private school without a religious affiliation based on the Constitution.
>
> Davis responded that he believes that the petitioner has rights afforded under the Constitution which do favor as a use education and religion. However, the petitioner is proceeding under Sec. 23.08,C of the Ordinance which allows for a substitution of use.
>
> On further questioning from Laporte, Davis stated that the petitioner believes she has the rights afforded to her that start with the US Constitution and the Michigan Constitution and as a property-owner tenant under the Township's zoning scheme. Davis stated that the Constitution has provisions that favor uses that promote education and religion.

ZBA member Laporte validly questioned plaintiff's attorney about the basis for the assertion that religious use should be favored over secular uses. Nothing in the exchange demonstrates bias against Catholics or Catholic primary education. The questions were asked to clarify plaintiff's attorney's own statements. Nothing in

the minutes of the ZBA hearing supports the conclusion that the ZBA denied plaintiff the variance because of a bias against plaintiff's religious affiliation.

Furthermore, plaintiff's director, Naomi Corera, admitted that she could not cite any proof that religious bias existed:

> *Q*. And was there something said at that hearing that said, we are doing this because of your religious exercise or the religious component of your program?
>
> *A*. No.
>
> *Q*. Did you ever hear of any such evidence or statements after the meeting for the application?
>
> *A*. No.
>
> *Q*. Where did you pick up that understanding [of anti-Catholic bias] if you didn't experience it there at that meeting?
>
> *A. Here, there, just different places*.
>
> *Q*. Is there any way that you can specify that? Did you have a conversation with any particular person about some sort of bias on the part of the township?
>
> *Mr. Davis*: I think the witness is entitled to have her own belief without having reasons for it.
>
> * * *
>
> *Q. Okay. So you can't point to any specific statements or any specific conversations?*
>
> *A. I can't, no. I cannot point a finger at one person, no.*
>
> [Emphasis added.]

Thus, this testimony clearly illustrates that there is no evidence to support plaintiff's claim of religious bias or animus. The burden of proof to demonstrate that religious bias or animus exists cannot be sustained by an assertion that a person's understanding comes from

"[h]ere, there, just different places." As plaintiff has presented no evidence to support its claim, we cannot conclude that the ZBA's decision to deny its variance request was based on religious animus. Defendants did not discriminatorily apply the ordinance against plaintiff on the basis of religion.[21]

The ordinance here is generally applicable and prohibits *all* schools in the OP zoning district. Plaintiff has presented no evidence that defendants have not uniformly applied the ordinance. The ordinance deals with zoning regulation, which this Court has long recognized as a reasonable exercise of the state's police power to regulate for the public health, safety, and welfare.[22] While the ordinance in this case does affect plaintiff's religious exercise by prohibiting the opening of a Catholic school, the effect is only incidental. The ordinance at issue prohibits schools in an area that is zoned as an office park, which is a valid exercise of defendants' police power. Thus, although plaintiff's religious exercise is restricted because it is not being allowed to open a Catholic school, the restriction only incidentally burdens religious exercise because the ordinance contem-

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[21] Although we find no scintilla of evidence that defendants discriminatorily applied the ordinance against plaintiff on the basis of religion, we note that only one member of the ZBA questioned plaintiff regarding its request for preferential treatment based on religious affiliation. Notably, the ZBA's decision to deny plaintiff's variance was a unanimous vote. Compare this case to *Mt Elliott Cemetery Ass'n v City of Troy*, 171 F3d 398 (CA 6, 1999), which held that a comment by the mayor of Troy that she would approve a new Catholic cemetery "over [her] dead body" did not demonstrate prejudice against Catholics and, since the mayor only represented one of the six votes against the rezoning request, the mayor's statement could not show that the city council's denial of the request was motivated by religious discrimination. *Id*. at 406. Given the Sixth Circuit's ruling in *Mt Elliott*, the ZBA member's comments could not have been a basis to prove that there was a discriminatory intent behind defendants' decision to deny plaintiff's variance request.

[22] See *Austin v Older*, 283 Mich 667, 674-675; 278 NW 727 (1938).

plates that all schools should be disallowed in the OP district, not just religious ones.[23] Plaintiff is free to operate a Catholic school, but it must do so on property that is zoned for schools. There is no evidence supporting the claim that defendants denied plaintiff's variance request because of religious animus, and the variance denial does not substantially burden plaintiff's religious exercise.

For these reasons, we conclude that plaintiff was not treated differently from a similarly situated entity on the basis of religion, and plaintiff has not met the threshold burden for an equal protection challenge. As a result, the Court of Appeals erred by holding that defendants' denial of plaintiff's variance request violates equal protection principles.

IV. CONCLUSION

We hold that defendants' denial of plaintiff's variance request does not violate equal protection principles because plaintiff has not met the threshold burden of proof for its equal protection challenge by showing disparate treatment of similarly situated entities, nor

[23] Plaintiff additionally cites *Vineyard Christian Fellowship of Evanston, Inc v City of Evanston*, 250 F Supp 2d 961 (ND Ill, 2003), to support its argument that defendants in this case treated religious entities differently than secular counterparts. We find *Vineyard* unpersuasive and distinguishable. In *Vineyard*, the plaintiff, a religious institution, owned property within the defendant's city limits. The city zoning ordinance prohibited the plaintiff from using the property for religious worship, but allowed other cultural uses. *Vineyard* held that, although the ordinance did not single out a particular religious group, it nevertheless classified on the basis of religion because of its wholesale bar against religious worship. The court held that the church's equal protection rights were violated. Conversely, in the case before us, the ordinance prohibits all schools in the OP zoning district, religious and secular alike. Thus, the ordinance here does not classify on the basis of religion and the rationale in *Vineyard* is inapplicable.

has plaintiff demonstrated that the variance was denied because of religious animus. Accordingly, we reverse the Court of Appeals judgment and reinstate the trial court's order granting defendants' motion for summary disposition.

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

PELLEGRINO v AMPCO SYSTEM PARKING

Docket No. 137111. Argued March 9, 2010 (Calendar No. 4). Decided June 28, 2010.

Anthony Pellegrino, individually and as the personal representative of his deceased wife, Shirley Pellegrino, brought a third-party no-fault action in the Wayne Circuit Court against Ampco System Parking after Shirley Pellegrino was killed and Anthony Pellegrino was injured in an accident involving an airport shuttle van operated by defendant. Liability was conceded, and the case proceeded to trial on the issue of damages. Before voir dire, the court, Michael James Callahan, J., indicated the court's goal of having a jury that represented the racial composition of Wayne County. During voir dire, defendant's counsel sought to use a peremptory challenge to dismiss a prospective juror who was African-American, and plaintiffs' counsel asserted that the peremptory challenge violated the rule of *Batson v Kentucky*, 476 US 79 (1986), prohibiting the exercise of peremptory challenges on the basis of race because defendant's counsel had already challenged two prospective jurors on that basis. Defendant's counsel argued that he wanted to excuse the prospective juror because she had been widowed twice and was grieving her mother's death. Defendant's counsel also argued that MCR 2.511(F), which prohibits discrimination during voir dire, supported his use of the peremptory challenges. Without making any findings concerning whether plaintiffs had established grounds for denying the use of the peremptory challenge, the court denied it and the challenged veniremember served on the jury. The jury unanimously awarded plaintiffs a verdict of $14.9 million. In a posttrial motion, defendant's counsel again asserted that the court had erred by denying the peremptory challenge, alleging a failure to follow *Batson* or MCR 2.511(F) and requesting a new trial. The Court of Appeals, BORRELLO and GLEICHER, JJ. (O'CONNELL, P.J., concurring in part and dissenting in part), affirmed in an unpublished opinion per curiam, issued May 27, 2008 (Docket No. 274743), concluding that although the trial court had not followed the *Batson* procedures, no constitutional error occurred because such an error occurs only when a prospective juror is excused on the basis of race, not included on that basis. Thus, the trial court's denial of the use of

a single peremptory challenge was subject to a harmless-error analysis, and the Court of Appeals concluded that the error was in fact harmless because the only issue in the trial was damages and the verdict was unanimous. The Court of Appeals further concluded that the trial court had not violated MCR 2.511(F)(2). The Supreme Court granted defendant leave to appeal, limited to consideration of whether defendant was entitled to a new trial on the basis of a violation of MCR 2.511(F)(2). 483 Mich 999 (2009).

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

Decisions to include particular jurors in, or exclude particular prospective jurors from, a jury must be undertaken without consideration of race. Taking race into account for the purpose of including, or excluding, a particular juror violates the equal protection guarantees of the United States and Michigan constitutions. Under MCR 2.511(F)(2), a trial court may not deny a party's use of a peremptory challenge on the basis of considerations of race to achieve what the court believes to be a balanced, proportionate, or representative jury.

1. The trial court's actions violated the race-neutral requirements of the United States and Michigan constitutions and MCR 2.511(F)(2). The retention of the veniremember on the jury was predicated on both her race and the races of the other jurors. Under MCR 2.511(F)(2), a trial court's desire to achieve a balanced, proportionate, or representative jury does not justify taking race into consideration when selecting a jury. Jurors must be selected pursuant to criteria that do not take race into account, with each juror chosen indifferently with respect to race. Despite this, the trial court premised its decision on the court's determination to secure proportional representation on the jury and thus violated the court rule.

2. Moreover, denying the use of the peremptory challenge violated the constitutional principles set forth in *Batson*, which requires the use of nondiscriminatory criteria for selecting a jury and requires jurors to be indifferently chosen rather than being chosen on the basis of race. The refusal to allow defendant to strike the prospective juror harmed defendant, the prospective juror who was excluded because the other juror was retained, and the entire community.

3. While *Batson* violations typically involve the exclusion of a prospective juror because of race, the constitutional principles articulated in *Batson* are not limited to that situation. *Batson* and its progeny prohibit discrimination involving the inclusion of

prospective jurors, not merely the exclusion of prospective jurors. The purposeful inclusion of a particular juror on account of race, which necessarily implies the exclusion of another individual from the jury, also offends the constitution and violates MCR 2.511(F)(2).

4. A *Batson* violation requires automatic reversal for the unlawful exclusion of a prospective juror because of race, without requiring an assessment of the harmlessness of the violation. The same rule applies to the unlawful inclusion of a juror.

5. The error in this case did not involve a simple good-faith mistake. Rather, the trial court deliberately refused to follow the *Batson* procedure and purposely rejected a court rule.

6. The trial court's comments and actions in this case require a retrial before a different judge and could supply a basis for the Judicial Tenure Commission to investigate whether judicial misconduct occurred should the commission choose to do so.

Reversed and remanded for retrial.

Justice WEAVER, joined by Justice HATHAWAY, dissenting, would not reverse and remand because she believed that leave to appeal was improvidently granted in this case. Justice WEAVER was not persuaded that the decision of the Court of Appeals was clearly erroneous or that defendant suffered any injustice. She further did not support the majority's discussion regarding possible referral of the trial judge to the Judicial Tenure Commission.

JURY — PEREMPTORY CHALLENGES — *BATSON V KENTUCKY* VIOLATIONS — RACIALLY BASED INCLUSION OF JURORS.

Decisions to include particular jurors in, or exclude particular prospective jurors from, a jury must be undertaken without consideration of race; jurors must be selected pursuant to criteria that do not take race into account, with each juror chosen indifferently with respect to race; a trial court may not deny on the basis of considerations of race a party's use of a peremptory challenge to achieve what the court believes to be a balanced, proportionate, or representative jury (US Const, Am XIV, § 1; Const 1963, art 1, § 2; MCR 2.511[F][2]).

Fieger, Fieger, Kenney, Johnson & Giroux, PC (by *Geoffrey N. Feiger*, *Robert M. Giroux, Jr.*, and *Heather A. Jefferson*), for plaintiffs.

Jacobs and Diemer, P.C. (by *John P. Jacobs* and *Timothy A. Diemer*), for defendant.

Amici Curiae:

Candace A. Crowley and *Clifford T. Flood* for the State Bar of Michigan.

Clark Hill PLC (by *James E. Brenner*) for Michigan Defense Trial Counsel.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Daniel M. Levy*, Special Assistant Attorney General, for the Civil Rights Commission and the Department of Civil Rights.

MARKMAN, J. This case raises the question whether, absent a finding that a peremptory challenge is barred by *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), because it is motivated by race, a trial court may nevertheless deny a party the use of a peremptory challenge on the basis of the court's desire to attain a racially proportionate jury. We hold that such a denial violates the rule of *Batson* that jurors must be "indifferently chosen" and is therefore in violation of both the equal protection guarantees of the federal and state constitutions, US Const, Am XIV, § 1 and Const 1963 art 1, § 2, and MCR 2.511(F)(2). Decisions to include, and to exclude, particular jurors must be undertaken without consideration of race. Accordingly, we reverse the contrary judgment of the Court of Appeals and remand for a new trial on the issue of damages only.

I. FACTS AND HISTORY

On April 7, 2003, Anthony Pellegrino and his wife, Shirley, were riding in an airport shuttle van operated by defendant, Ampco System Parking, when the van swerved on ice and hit a concrete barrier. Shirley was killed, and Anthony sustained serious injuries. As per-

sonal representative of Shirley's estate and individually on his own behalf, Anthony filed a third-party no-fault action against defendant, which conceded liability, leaving for trial only the question of damages.

Before voir dire, the trial court instructed the attorneys that "it would be a goal of [the court] to have a jury that represented the racial composition of this county." Subsequently at voir dire, defense counsel sought to peremptorily excuse prospective juror Sylvia Greene, an African-American woman, and plaintiffs' counsel raised an objection based on *Batson*, alleging that defense counsel had already peremptorily challenged two prospective jurors on the basis of race. In response, defense counsel argued that he wanted to excuse Greene because she had been widowed two times and was in the process of grieving over the death of her mother. Without making any finding about whether plaintiffs' counsel had established grounds for denying the peremptory challenge, the trial court denied it, and Greene remained on the jury.

After invoking MCR 2.511(F),[1] defense counsel asserted that he had supplied a legitimate nonracial rationale for his peremptory challenges and argued that

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[1] MCR 2.511(F) forbids taking race into account during voir dire for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury and provides:

> (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.

MCR 2.511(F) became effective January 1, 2006, and therefore applied in the instant trial.

plaintiffs' *Batson* issue was a "red herring" and unsupported. He then advised the trial court that he intended to file a motion either to remove Greene or for a mistrial, to which the trial court responded: "We have a jury of eight women. Three are African-American. In my view, it adequately represents the community from which this case arises." In a unanimous verdict, the six jurors who deliberated eventually awarded $14.9 million to plaintiffs.

Defense counsel again objected to the court's denial of his peremptory challenge in a posttrial motion and requested a new trial. He argued that the trial court had failed to follow *Batson* procedures, stating that, although it is an "emulative approach" to want to "equaliz[e] jurors because of the Wayne County problems of amassing enough minority jurors," it is "not the law." Defense counsel also asserted that MCR 2.511(F)(2) superseded the court's own view of its obligations in the selection of juries.

In denying the motion, the trial court rejected the notion that an objection based on *Batson* could only be sustained on a showing of racial considerations, asserting that "the federal threshold is dreadful and it renders nugatory the Batson challenge." After indicating further that it did not think defense counsel was "racist" or should be accused of "racism," the trial court stated:

> . . . I told you on the record, and this may get me into hot water with [the] Appeals Court, I won't find it. I will not do that.
>
> * * *
>
> . . . I have six African American children of my own. I am not going to indulge in the race baiting that that kind of an opinion or that kind of finding would require of me.

Defense counsel then interjected that the whole point of peremptory challenges is to excuse prospective jurors even though they do not meet the legal disqualification standards of MCR 2.511(D), and the trial court continued:

> Well I guess I'm [in] sufficient hot water with the appellate courts to say I'm not going to . . . indulge in . . . race baiting . . . . Now if the Supreme Court rules that way, I suspect they would not but if they do, then I'll have to decide whether I can function as a judge any longer.

Finally, the trial court stated that it understood that defense counsel was

> focusing upon the intent of the Batson challenge. However, there are competing interests. There is no other county in the state of Michigan with as diverse racial composition as Wayne County. . . .
>
> * * *
>
> . . . I am until either removed from the bench by the disciplinary committee or ordered to have a new trial, I am going to seek to have this proportional representation on the juries that hear cases in this court. I can't be clearer. I'm going to do it until I'm ordered not to do it and then when I'm ordered not to do it, then I'll have to decide what's next for me.

Defendant appealed in the Court of Appeals, raising a host of issues, including the trial court's denial of its peremptory challenge, and that Court affirmed in a split decision. *Pellegrino v Ampco Sys Parking*, unpublished opinion per curiam of the Court of Appeals, issued May 27, 2008 (Docket No. 274743). The majority concluded that although the trial court had not followed *Batson* procedures, no constitutional error occurred because such an error occurs only when a prospective juror is *excused* on the basis of race, rather than

included on that basis. Thus, the majority opined, the trial court had merely denied defendant the use of a single peremptory challenge, which was subject to a harmless-error analysis. The majority then concluded that the error was, in fact, harmless because the only issue at trial had been damages and the verdict had been unanimous. Finally, the majority asserted that MCR 2.511(F)(2) had not been violated:

> To the extent that the trial court desired a racially balanced jury, such a desire does not run afoul of MCR 2.511(F)(2). MCR 2.115(F)(2) [sic] prohibits "[d]iscrimination during voir dire on the basis of race[,]" and we cannot conceive how the trial court's desire to have a racially balanced jury could possibly be characterized as "discrimination" under MCR 2.115(F)(2) [sic]. [*Id.* at 9.]

Judge O'CONNELL, in partial dissent, stated:

> The trial court's refusal to follow the law was not confined to *Batson*. During jury selection, defendant's counsel also brought to the trial court's attention a Michigan Supreme Court order regarding what ultimately became MCR 2.511(F). Our Supreme Court had already stated in [*People v*] *Knight*, [473 Mich 324; 701 NW2d 715 (2005)], that "the right to a fair and impartial jury does not entail ensuring any particular racial composition of the jury."[3] *Id.* at 349. The footnote to the statement specifically notes that a "proposed court rule would expressly prohibit the use of peremptory challenges to achieve a racially proportionate jury" and cites the exact language now found in MCR 2.511(F). *Id*. at 349, n 17. The trial judge not only admitted that he told counsel before jury selection that he "was interested and it would be a goal of [his] to have a jury that represented the racial composition of this county," but also stated that he would refuse to adhere to MCR 2.511 unless ordered to do so:
>
> "I am until either removed from the bench by the disciplinary committee or ordered to have a new trial, I am going to seek to have this proportional representation on

> the juries that hear cases in this court. I can't be clearer. I'm going to do it until I'm ordered not to do it and then when I'm ordered not to do it, then I'll have to decide what's next for me."
>
> For a trial judge to state on the record that he refuses to follow the law and will continue to do so unless removed from office does more than imply prejudice in the proceedings, it admits them. I can think of no ground for reversal more clear than that.

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[3] This statement is consistent with the United States Supreme Court's ruling that "[r]ace cannot be a proxy for determining juror bias or competence." *Powers v Ohio*, 499 US 400, 410; 111 S Ct 1364; 113 L Ed 2d 411 (1991). Decisions about jurors may not be made based on race, good intentions notwithstanding.

[*Id*. at 5-6 (O'CONNELL, P.J., concurring in part and dissenting in part).]

Defendant appealed, and this Court granted leave to appeal, "limited to the issue whether the defendant is entitled to a new trial based on a violation of MCR 2.511(F)(2)." 483 Mich 999 (2009).

II. STANDARD OF REVIEW

We review constitutional questions de novo. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008). We also review lower courts' interpretations and applications of court rules de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

III. *BATSON v KENTUCKY*

In a civil trial, "[e]ach party may peremptorily challenge three jurors." MCR 2.511(E)(2). Before 1986, a party was free to peremptorily remove a prospective

juror for any reason. But in *Batson*, 476 US at 89, 96-98, the United States Supreme Court held that a prosecutor's peremptory challenge to strike a prospective juror may not be exercised on the basis of race because such an action violates the Equal Protection Clause of the Fourteenth Amendment.[2] Later that year, the Court expanded *Batson* to civil cases. *Edmonson v Leesville Concrete Co, Inc*, 500 US 614; 111 S Ct 2077; 114 L Ed 2d 660 (1991).[3]

The United States Supreme Court has reinforced *Batson* on several occasions. In 1991, the Court held that a defendant could raise a *Batson* issue even if the excused juror was not the same race as the defendant. *Powers v Ohio*, 499 US 400, 415; 111 S Ct 1364; 113 L Ed 2d 411 (1991).[4] Then, in *Georgia v McCollum*, 505 US 42, 59; 112 S Ct 2348; 120 L Ed 2d 33 (1992), the Court extended *Batson* to peremptory challenges by

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[2] *Batson* established a three-step process for determining whether a challenger has improperly exercised peremptory challenges. First, the opponent of the challenge must make a prima facie showing of discrimination based on race. *Id*. at 94-97. Once the prima facie showing is made, the burden then shifts to the party attempting to strike the prospective juror to come forward with a neutral explanation for the challenge. *Id*. at 97. Finally, the trial court must decide whether the opponent of the challenge has proved purposeful discrimination. *Id*. at 98. If so, the peremptory challenge will not be allowed. This Court has mandated that trial courts "meticulously follow *Batson*'s three-step test" and strongly urged them "to *clearly* articulate their findings and conclusions on the record." *People v Knight*, 473 Mich 324, 339; 701 NW2d 715 (2005).

[3] In *Edmonson*, 500 US at 630, the Court stated:

> Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal. . . .
>
> [I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution.

[4] "[R]ace neutrality in jury selection [is] a visible, and inevitable, measure of the judicial system's own commitment to the commands of

criminal defendants. Finally, in 1994, the Court expanded *Batson* to peremptory challenges on the basis of gender. *J E B v Alabama*, 511 US 127, 146; 114 S Ct 1419; 128 L Ed 2d 89 (1994).

This Court has also issued opinions addressing *Batson*, as well as enacting MCR 2.511 (F). In *People v Bell*, 473 Mich 275; 702 NW2d 128 (2005),[5] the trial court denied defense counsel's efforts to peremptorily strike two white males after defense counsel had already struck several other white males. In response to the prosecutor's claim that there was an inference of discrimination in such challenges, defense counsel argued: " '[T]he number of white males on that panel still exceeds the number of the minorities on that panel. Why don't you talk about the whole racial composition of that panel? There's still a vast majority of white members on that panel than . . . black members on that panel.' " *Id*. at 289. This Court concluded that the trial court had properly denied defense counsel's peremptory challenges and added that "[j]ust as a challenger may not exclude a prospective juror on the basis of race, it is equally improper for a challenger to engineer the composition of a jury to reflect the race of the defendant." *Id*. at 290.

In *People v Knight*, 473 Mich 324; 701 NW2d 715 (2005), decided the same day, defense counsel objected that the prosecutor was using peremptory challenges to exclude African-Americans from the jury. After hearing the prosecutor's reasons for his challenges, the trial court said:

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the Constitution. The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition." *Powers*, 499 US at 416.

[5] *Bell* was a divided case producing five opinions. Only parts I through III of the lead opinion in *Bell* garnered majority support. Justice WEAVER concurred, then Chief Justice TAYLOR dissented in part and concurred in part, then Justice KELLY dissented, and Justice CAVANAGH also separately dissented.

"[T]wo or three minority jurors [are] left on this panel. So I think we are getting close to a serious issue here."

* * *

". . . I think we're getting close to a sensitive issue here on [prospective jurors] Jones and Johnson. . . ."

* * *

"With the panel we ended up with, I think that any *Batson* problems that may have been there have been cured." [*Id*. at 331-334 (emphasis deleted).]

On appeal in this Court, in the course of explaining that the trial court had never found a *Batson* violation, we stated:

T]he record is susceptible to the fair inference that the trial judge acted to preserve the presence of minority jurors on the panel, knowing that the jury pool, as a matter of chance, was largely Caucasian. Protecting a defendant's right to a fair and impartial jury does not entail ensuring any particular racial composition of the jury. . . .

* * *

[T]he [judge's] comments demonstrate that her true motivation was to ensure some modicum of racial balance in the jury panel. Use of peremptory challenges, however, to ensure racial proportionality in the jury is prohibited by *Batson* and will be prohibited by proposed MCR 6.412(F)[6] if adopted.

* * *

The trial judge failed to recognize that a defendant is not entitled to a jury of a particular racial composition as long as no racial group is systematically and intentionally excluded. [*Id*. at 348-351.

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[6] The proposed court rule was eventually incorporated as MCR 2.511(F) rather than MCR 6.412(F).

Justice CAVANAGH, joined by then Justice KELLY and then Chief Justice TAYLOR, concurred in part and dissented in part. Although Justice CAVANAGH concluded that the trial court had found a *Batson* violation, as relevant here, he stated: "I tend to agree with the majority and suspect that some of the trial court's statements arguably stemmed from its desire to ensure a racially mixed jury and that such a desire is prohibited by *Batson* and its progeny." *Id*. at 361 (CAVANAGH, J., concurring in part and dissenting in part). In the end, all seven justices agreed that *Batson* prohibited a trial court from acting to preserve the presence of minority jurors on a jury panel because of a desire to ensure a racially mixed jury.

IV. APPLICATION

Plaintiffs argue that the trial court's refusal to allow defendant to exercise a peremptory challenge of prospective juror Greene was consistent with the constitution and court rules because the trial court was merely seeking to ensure that the jury represented a "fair cross-section of the community." We reject this argument because the trial court's actions violated the race-neutral requirements of both the constitution and MCR 2.511(F)(2). Greene's retention on the jury was predicated on her race, as well as the races of other jurors; each of these racial considerations was paramount in the decision of the trial court to reject defendant's peremptory challenge. As MCR 2.511(F)(2) makes explicit, a court's desire to achieve a "balanced, proportionate, or representative jury" does not justify taking race into consideration in selecting a jury. Notwithstanding this express prohibition, the trial court premised its jury-selection decisions on its determination to secure "proportional representation" based on

the racial composition of the county in which the trial occurred. In denying defendant's peremptory challenge, the court expressly took Greene's race into account and expressly evaluated her race in light of the race of every other juror on the panel. It is hard to conceive of a more flagrant and unambiguous violation of the court rule.

Moreover, the prohibition found in MCR 2.511(F)(2) is altogether consistent with, and indeed premised on, our federal and state constitutions,[7] as well as United States Supreme Court and Michigan Supreme Court precedents.[8] These demonstrate that a purpose or motive of attaining a racially balanced jury does not provide the trial court with the authority to deprive a party of a proper peremptory challenge.

In *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975), the United States Supreme Court held that defendants are not entitled to a jury of any particular composition: "[I]n holding that petit [trial] juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population."[9] And in *Lockhart v McCree*, 476 US 162,

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[7] US Const, Am XIV, § 1 provides: "[N]or shall any State . . . deny to any person . . . the equal protection of the laws." Indeed, Const 1963, art 1, § 2, unlike its federal counterpart contained in the Fourteenth Amendment, explicitly prohibits discrimination on the basis of race: "No person shall be denied the equal protection of the laws . . . because of . . . race . . . ."

[8] Justices CAVANAGH, KELLY, and WEAVER opposed the adoption of MCR 2.511(F) because, among other reasons, the rule, in their view, was "unnecessary" and added "no substantive value to the case law already in existence." 474 Mich ccxli, ccxliii (KELLY, J., dissenting). No justice questioned the consistency of the court rule with the federal or state constitutions or with federal or state caselaw.

[9] As earlier explained in *Batson,* 476 US at 86 n 6: "[I]t would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society." See also *United*

173; 106 S Ct 1758; 90 L Ed 2d 137 (1986), the United States Supreme Court observed: "We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large."[10] Subsequently, in *Holland v Illinois*, 493 US 474, 480; 110 S Ct 803; 107 L Ed 2d 905 (1990), the Court held that the fair-cross-section requirement cannot be interpreted as prohibiting peremptory challenges, stating: "[The] Sixth Amendment requirement of a fair cross section [of the community] on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)."

Thus, given that the trial court did not determine that defendant's peremptory challenge was racially motivated, the court's stated desire to have the racial composition of the jury be "representative of the community" did not justify or authorize the court's denial of that challenge.

Even more fundamentally, the trial court's denial of defendant's peremptory challenge violated the constitutional principles set forth in *Batson*:

States v Jackman, 46 F3d 1240, 1244 (CA 2, 1995), which held that the Sixth Amendment "guarantees the *opportunity* for a representative jury venire, not a *representative venire itself*." (Second emphasis added.)

[10] See *United States v Nelson*, 277 F3d 164, 172 (CA 2, 2002), in which the trial court replaced an excused black juror with another black juror, rather than the white first alternate, and at the same time replaced another empanelled white juror with a religious-minority white juror, also selected out of order from the list of alternates. The court justified its actions by reference to a desire for a racially and religiously balanced jury. *Id*. In response, the United States Court of Appeals for the Second Circuit stated: "[A]lthough the motives behind the district courts race- and religion-based jury selection procedures were undoubtedly meant to be tolerant and inclusive rather than bigoted and exclusionary, that fact cannot justify the district court's race-conscious actions." *Id*. at 207.

> [T]he defendant does have the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria. . . .
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> . . . Those on the venire must be "indifferently chosen" to secure the defendant's right under the Fourteenth Amendment . . . .
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> * * *
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> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. [*Batson*, 476 US at 85-87.]

The trial court's refusal to allow defendant to strike prospective juror Greene without finding any *Batson* violation led to at least one member of the jury having been selected, not pursuant to nondiscriminatory criteria, but precisely on the basis of race. Greene's presence on the jury was thus the result not of being "indifferently chosen," as required by *Batson*, but of having been chosen specifically on the basis of race. As asserted in *Batson*, this inflicts harm on defendant, on the prospective juror who was excluded because of Greene's retention, and indeed on the "entire community." The trial court's process transformed the jury from a group of mere citizens into a group in which a person's racial background became defining, and it transformed the selection process from one that was neutral in terms of race into one that was predicated on race. While this may be the process preferred by the trial court, it is not the process set forth by the federal or state constitutions or by federal or state law. As stated in *Powers*, 499 US at 415: "The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system." Quite simply, in the absence of a *Batson* violation, the trial court had no right to take

Greene's or any other prospective juror's race into account in denying defendant's peremptory challenge. When it did so, the selection of the jury ceased to be indifferent to race, but instead became preoccupied with race.

The Court of Appeals concluded that no *Batson* error occurred because a *Batson* error occurs only when a prospective juror is actually *dismissed* on account of race. We respectfully disagree. While *Batson* violations have typically involved the exclusion of a prospective juror on the basis of race, the constitutional principles articulated in *Batson* are not so limited. *Batson* and its progeny generally speak in terms of the prohibition of "discrimination" involving prospective jurors, not merely the *exclusion* of prospective jurors on the basis of race. See, e.g., *Powers*, 499 US at 404 ("Although a defendant has no right to a 'petit jury composed in whole or in part of persons of [the defendant's] own race,' he or she does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria.") (citation omitted). Furthermore, in stressing that no person should intentionally be excluded on account of race, these cases support the conclusion that the purposeful *inclusion* of a particular juror on account of race—which by its logic necessarily implies the *exclusion* of another individual in the "zero sum" process that characterizes jury selection—also offends the constitution. See, e.g., *Knight*, 473 Mich at 349 ("The goal of *Batson* and its progeny is to promote racial neutrality in the selection of a jury and to avoid the systematic and intentional exclusion of *any* racial group.") (emphasis added).

The United States Supreme Court has effectively adopted a "zero tolerance" approach toward racial considerations affecting the choosing of a jury. This

approach is implicated when a prospective juror has been excluded on account of race, and it is similarly violated when a proper peremptory challenge has been denied because of the prospective juror's race or the races of the other prospective jurors. See, e.g., *Cassell v Texas*, 339 US 282, 287; 70 S Ct 629; 94 L Ed 839 (1950), in which the lead opinion stated: "Proportional racial limitation is therefore forbidden. An accused is entitled to have charges against him considered by a jury in the selection of which there has been *neither inclusion nor exclusion because of race*." (Emphasis added.) And, as the lead opinion stated in *Bell*, "it is . . . improper . . . to engineer the composition of a jury to reflect the race" of a party. *Bell*, 473 Mich at 290 (opinion by CORRIGAN, J.).

As previously indicated, all seven justices of this Court agreed in *Knight* that *Batson* prohibits a trial court from acting to preserve the presence of minority jurors on a jury panel because of a desire to ensure a racially balanced jury. Here, however, the trial court expressly acknowledged that it was attempting to engineer the composition of the jury to reflect the "diverse racial composition" of the community. The trial court was not free to do this under the law and constitution and, by doing so, violated the constitutional right of defendant to a jury that, with regard to race, had been "indifferently chosen."

In sum, we find that the wrongful *inclusion* of a juror on account of race should be treated the same as the wrongful *exclusion* of a prospective juror on account of race. Each situation violates the constitutional command that jurors be selected pursuant to criteria that do not take race into account, each deprives a defendant of a jury that has been "indifferently chosen" in terms of race, and each involves the exercise of judicial power in support of a process in which race becomes disposi-

tive in terms of who can serve on a jury. Finally, each situation violates the plain language of MCR 2.511(F)(2).

V. REMEDY

The Court of Appeals majority concluded, and plaintiffs argue, that any error here was harmless. We again respectfully disagree. In *Batson*, 476 US at 86-87, the Court held, without determining that the jury as composed was biased in any way, that the unlawful exclusion of a prospective juror on the basis of race requires reversal because it "violates a defendant's right to equal protection," "unconstitutionally discriminate[s] against the excluded juror," and "undermine[s] public confidence in the fairness of our system of justice." The Court likewise reversed convictions or judgments outright, without assessing the harmlessness of the *Batson* violations, in *Powers*, 499 US at 416; *Edmonson*, 500 US at 631; and *J E B*, 511 US at 146. Here, the trial court's efforts to balance the composition of a jury violated *Batson* because these efforts entailed taking race into account—including, and necessarily excluding, with regard to jury duty, persons on the basis of their pigmentation.[11] We believe that the automatic reversal rule of *Batson* should also apply when there has been an unlawful inclusion of a juror as the result of a *Batson* violation by the trial court.[12] Such a rule vindicates the

[11] MCR 2.511(E)(1) states: "A juror peremptorily challenged *is excused* without cause." (Emphasis added.) The phrase "is excused" is mandatory language, not discretionary or permissive language. Thus, absent a *Batson* violation, a trial court has no discretion to deny a party the exercise of one of its peremptory challenges and thereby to deny that party the right to have seated on his or her jury the person who stands next in the jury queue.

[12] *Bell* discussed whether the improper denial of a peremptory challenge is subject to harmless-error analysis. The lead opinion

equal protection guarantees of the United States Constitution, Am XIV, § 1 and Const 1963, art 1, § 2, while ensuring that jury selection is not infected in any way by racial considerations.[13]

Plaintiffs also argue that, even if the trial court erred by denying defendant's peremptory challenge, any error was not of a federal constitutional dimension, citing *Rivera v Illinois*, 556 US 148; 129 S Ct 1446; 173 L Ed 2d 320 (2009). In *Rivera*, the United States Supreme Court stated:

> If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws.

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stated in dictum that the improper denial of a peremptory challenge on a basis *other* than race is subject to that analysis. *Bell*, 473 Mich at 293 (opinion by CORRIGAN, J.). Justice KELLY argued in her dissent that automatic reversal should occur for the wrongful denial of a peremptory challenge, even if it does not constitute a *Batson* error. *Id*. at 312-313 (KELLY, J., dissenting). Justice CAVANAGH dissented on similar grounds. *Id.* at 322 (CAVANAGH, J., dissenting). This debate need not be further addressed today because here the wrongful denial was, in fact, based on race. See, however, *Rivera v Illinois*, 556 US 148, 158-162; 129 S Ct 1446, 1454-1456; 173 L Ed 2d 320 (2009) (unanimously rejecting an automatic-reversal rule where a trial court made a "one-time, good-faith" error "without more" in disallowing a peremptory challenge, but noting that "[s]tates are free to decide, as a matter of state law, [whether] a trial court's mistaken denial of a peremptory challenge is reversible error *per se*").

[13] The dissenting justices say that they "would not reverse" because they are not persuaded that defendant "suffered any injustice . . . ." As explained, however, the wrongful denial of a peremptory challenge on the basis of race requires automatic reversal. The "injustice" suffered is being denied a legal right on account of race.

> [T]he mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution. . . .
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> * * *
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> . . . [T]here is no suggestion here that the trial judge repeatedly or deliberately misapplied the law or acted in an arbitrary or irrational manner. . . .
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> * * *
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> The automatic reversal precedents Rivera cites are inapposite. One set of cases involves *constitutional* errors concerning the qualification of the jury or judge. In *Batson*, for example, we held that the unlawful exclusion of jurors based on race requires reversal because it "violates a defendant's right to equal protection," "unconstitutionally discriminate[s] against the excluded juror," and "undermine[s] public confidence in the fairness of our system of justice." . . .
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> . . . Nothing in these decisions suggests that federal law renders state-court judgments void whenever there is a state-law defect in a tribunal's composition. Absent a federal constitutional violation, States retain the prerogative to decide whether such errors deprive a tribunal of its lawful authority and thus require automatic reversal. States are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error *per se*. [*Id.* at 157-162.]

Rivera is inapplicable. In *Rivera*, the Court held that a state court's "one-time, good-faith" error in disallowing a peremptory challenge did not "without more" require reversal. *Id*. at 158-160; 129 S Ct at 1454-1455. The Court contrasted a judge's good-faith mistake with one arising because the judge deliberately misapplied the law or because the judge had acted in an arbitrary or irrational manner. In the case at bar, we can conclude neither that the trial court's error was made in good

faith nor that a good-faith error occurred "without more." Rather, the trial court deliberately refused to follow the three-step process required under *Batson* because it thought that process required the court to "indulge" in "race baiting." And unlike the trial court in *Rivera,* which merely erred in good faith by finding a *Batson* error, the trial court in the instant case, despite never finding such an error in the first place, nonetheless arbitrarily proceeded as if it had. Furthermore, the court purposely rejected a court rule that incorporated established federal and state constitutional principles, and that rejection occurred in furtherance of the trial court's stated determination to take race explicitly into consideration in the jury selection process.[14]

VI. JUDICIAL OBLIGATION

In this case, the trial judge (a) indicated that he was determined to attain a racially "representative" jury and "proportional representation" on the basis of race, notwithstanding explicit prohibitions in the law concerning discrimination in pursuit of a racially representative jury or proportional representation on the basis of race; (b) indicated that he would not engage in the sort of "race baiting" he believed was compelled by the law even thought this might get him in "hot water" with the appellate courts; (c) indicated that he viewed as "dreadful" *Batson*'s threshold requirement of a judicial finding of racial bias motivating a peremptory challenge in the course of dispensing with that require-

[14] There is no question that peremptory challenges are not constitutionally required. And we agree that *Rivera* stands for the proposition that a good-faith erroneous denial of a peremptory challenge without more does not implicate the federal constitutional right to an impartial jury. However, what is perhaps most significant in *Rivera* is the implication that *Batson* errors are, in fact, "structural" and require "automatic" reversal.

ment and denying a peremptory challenge to which defendant was otherwise entitled by law; (d) indicated that if his view of the law did not prevail—a view that he recognized as being contrary to the law of this state and that he proceeded to apply in this case—he would "have to decide whether [he] can function as a judge any longer;" (e) indicated that he would continue to apply his own personal view of the law, rather than the law of this state, until "either removed from the bench by the disciplinary committee or ordered to have a new trial;" and (f) indicated that

> until either removed from the bench by the disciplinary committee or ordered to have a new trial, I am going to seek to have this proportional representation on the juries that hear cases in this court. I can't be clearer. I'm going to do it until I'm ordered not to do it and then when I'm ordered not to do it, then I'll have to decide what's next for me.

These comments, and the trial judge's attendant actions taken in conformity in denying defendant's peremptory challenge, establish a basis for concluding that this is the unusual case in which retrial should occur before a different judge. Moreover, we believe that these same comments and actions could supply a basis for the Judicial Tenure Commission to investigate whether judicial misconduct has occurred should it choose to do so.[15] Michigan has a hierarchical judicial system, and trial courts are required to follow appli-

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[15] While a trial court's "erroneous decision . . . made in good faith and with due diligence is not judicial misconduct," MCR 9.203(B), an intentional refusal to follow the law or a court rule can be judicial misconduct. See, e.g., *In re Hague*, 412 Mich 532, 547-554; 315 NW2d 524 (1982), where this Court stated:

> . . . Judge Hague knew exactly what the superintending control orders forbade him to do, and did so anyway. The record reveals

cable rules, orders, and caselaw established by appellate courts, including the United States Supreme Court. This structure is essential to the orderly, uniform, and equal administration of justice. A trial court is not free to disregard rules, orders, and caselaw with which it disagrees or to become a law unto itself. Although a trial court is not required to agree with appellate rules, orders, and caselaw, as with litigants and all other citizens seeking to comply with the law, the court is required in good faith to follow those rules, orders, and caselaw.[16] Judges, like all other persons, are required

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> that the respondent made no serious good-faith attempt to obey the various orders from superior courts, either the circuit court or the Court of Appeals. . . .
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> The maintenance of public confidence in the integrity of the judiciary required Judge Hague to avoid even the *appearance* of defiance of valid judicial orders. . . .
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> * * *
>
> It seems clear beyond peradventure that, in this case, Judge Hague's intentional disobedience of valid orders constitutes judicial misconduct. Public confidence in the integrity and impartiality of the judiciary can only be eroded by the spectacle of a judge refusing to follow the law. . . .
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> * * *
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> . . . A judge who may disagree with the appellate authority must, nevertheless, lay aside his own opinion of the validity of the law and dispose of the cases before him in accordance with the precedent.

[16] An order entered by a court with proper jurisdiction must be obeyed—even if the order is clearly incorrect. *State Bar of Mich v Cramer*, 399 Mich 116, 125; 249 NW2d 1 (1976) ("[A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.") (citations and quotation marks omitted); *City of Troy v*

to act *within* the law. This is the essence of the rule of law, and this is the essence of the equal rule of the law. These are obligations that apply equally to this Court with regard to the federal decisions of the United States Supreme Court and to our Court of Appeals.[17]

VII. CONCLUSION

A trial court may not deny a party a proper peremptory challenge "for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury . . . ." MCR 2.511(F)(2). Rather, jurors must be selected pursuant to criteria that do not take race into consideration, with each juror being chosen indifferently with respect to race. Whether for the purpose of including or excluding a particular juror, taking race into account violates the equal protection guarantees of both the federal and state constitutions, US Const, Am XIV, § 1 and Const 1963, art 1, § 2, and MCR 2.511(F)(2). The judgment of the Court of Appeals is reversed, and this case is remanded for a new trial on damages only before a different judge.

Holcomb, 362 Mich 163, 169; 106 NW2d 762 (1961) ("No citizen, having had certain activities enjoined, may resume them upon his individual determination that the injunction is for some reason no longer applicable . . . ."); *Lester v Oakland Co Sheriff*, 84 Mich App 689, 697-698; 270 NW2d 493 (1978) (acknowledging that while the "order was improperly entered, it must still be obeyed until vacated by appropriate judicial action").

[17] See *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004) ("[S]tate courts are bound by the decisions of the United States Supreme Court construing federal law . . . ."). It is the Supreme Court's obligation to overrule or modify caselaw, and until it takes such action, the Court of Appeals and all lower courts are bound by that authority. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), overruled on other grounds by *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007).

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

WEAVER, J. (*dissenting*). I dissent. I would not reverse and remand this case because I believe that leave to appeal was improvidently granted. I am not persuaded that the decision of the Court of Appeals was clearly erroneous or that defendant has suffered any injustice in this case.

Further, I do not support the majority's discussion regarding possible referral of the trial judge to the Judicial Tenure Commission.

HATHAWAY, J., concurred with WEAVER, J.

FOSTER v WOLKOWITZ

Docket No. 139872. Argued March 10, 2010 (Calendar No. 7). Decided July 1, 2010.

Leah R. Foster brought a paternity action in Monroe Circuit Court, Family Division, against David K. Wolkowitz, with whom she had a child in 2006. The parties were never married, but in January 2007 they executed and filed an acknowledgment of parentage pursuant to the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., naming defendant as the father. In April 2007, the parties relocated to Illinois, but plaintiff and the child returned to Michigan in May 2008 after the parties' relationship ended. Upon her return, plaintiff filed this action along with an ex parte petition for alternative service, temporary custody, and the scheduling of a conference under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*. The court, Michael A. Weipert, J., entered an ex parte order granting plaintiff's request for alternative service and a UCCJEA conference, but declined to address the custody issue. Shortly thereafter, defendant filed a custody action in Illinois. After an evidentiary hearing to determine which state had home-state jurisdiction, the case was reassigned to Judge Pamela A. Moskwa, who ruled that Michigan had jurisdiction because, by executing an acknowledgment of parentage, the parties had consented to Michigan jurisdiction with regard to custody-related issues. The court further ruled that the case was governed by the Acknowledgment of Parentage Act rather than the UCCJEA because the parents had voluntarily invoked the Acknowledgment of Parentage Act by signing an acknowledgment of parentage. The court ultimately awarded joint legal custody to both parties and physical custody to the plaintiff, and defendant appealed. The Court of Appeals, O'CONNELL, P.J., and TALBOT and STEPHENS, JJ., affirmed in an unpublished opinion per curiam, issued September 15, 2009 (Docket No. 291825), holding that the circuit court could properly exercise home-state jurisdiction under the UCCJEA because a properly executed acknowledgment of parentage operates as an initial custody determination as a matter of law. The Supreme Court granted defendant's application for leave to appeal. 485 Mich 999 (2009).

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

The statutorily required presumptive award of custody given to a mother when an acknowledgment of parentage is executed pursuant to the Acknowledgment of Parentage Act does not serve as an initial custody determination under the UCCJEA. However, the presumptive award of custody contained in the Acknowledgment of Parentage Act remains part of a valid agreement into which the parents entered, and may be set aside only when a custody determination has been made by the judiciary.

1. Although the plain language of the Acknowledgment of Parentage Act conditions the parents' ability to execute an acknowledgment of parentage on the mother's being granted initial custody of the minor child, the statutory language also makes clear that this initial grant of custody, which occurs by operation of law, does not prevent either parent from seeking a judicial determination of custodial rights. Further, an acknowledgment of parentage does not satisfy the statutory definition of "child-custody determination" provided in the UCCJEA, which requires a judgment, decree, or other court order.

2. The parties' consent to the general personal jurisdiction of Michigan courts regarding custody-related issues that resulted from their execution of an acknowledgment of parentage provides no basis for Michigan to exert home-state jurisdiction pursuant to the UCCJEA, because jurisdiction over a person is not the same as jurisdiction over a case.

3. Under the UCCJEA, the child's home state has jurisdiction, and it is the home state that must decide whether to decline to exercise its jurisdiction on the ground that it is an inconvenient forum. The child's home state in this case is Illinois, because that is where the child resided for at least six consecutive months immediately before the child custody proceeding was commenced. Accordingly, arguments regarding which state provides the more convenient forum must be addressed to the state of Illinois.

Reversed and remanded to the Monroe Circuit Court.

1. PARENT AND CHILD — CHILD CUSTODY — ACKNOWLEDGMENT OF PARENTAGE ACT — UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT — PRESUMPTIVE MATERNAL CUSTODY AWARDS — INITIAL CUSTODY DETERMINATIONS.

The statutorily required presumptive award of custody given to a mother when an acknowledgment of parentage is executed pursuant to the Acknowledgment of Parentage Act does not serve as an

initial custody determination under the Uniform Child Custody Jurisdiction and Enforcement Act (MCL 722.1001 *et seq*.; MCL 722.1101 *et seq*.).

2. PARENT AND CHILD — CHILD CUSTODY — ACKNOWLEDGMENT OF PARENTAGE ACT — UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT — JURISDICTION.

The consent to the general personal jurisdiction of Michigan courts regarding custody-related issues that arises from the execution of an acknowledgment of parentage provides no basis for Michigan to exert home-state jurisdiction pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act (MCL 722.1001 *et seq*.; MCL 722.1101 *et seq*.).

3. PARENT AND CHILD — CHILD CUSTODY — UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT — JURISDICTION — FORUM NON CONVENIENS.

In cases involving interstate custody disputes, arguments regarding which state's forum is most convenient must be addressed to and decided by the child's home state, which has jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act (MCL 722.1207[1]).

4. PARENT AND CHILD — CHILD CUSTODY — ACKNOWLEDGMENT OF PARENTAGE ACT — PRESUMPTIVE MATERNAL CUSTODY AWARDS.

The statutorily required presumptive award of custody given to a mother when an acknowledgment of parentage is executed pursuant to the Acknowledgment of Parentage Act may be set aside only when a custody determination has been made by the judiciary (MCL 722.1001 *et seq*.).

LaVoy & Zagorski, P.C. (by *Maria Zagorski*), and *Adray & Grna* (by *James S. Adray*) for plaintiff.

Daniel R. Victor for defendant.

YOUNG, J. At issue in this case is whether the statutorily required presumptive award of custody given to a mother when an acknowledgment of parentage (AOP) is executed pursuant to the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., serves as an "initial custody determination" under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA),

MCL 722.1101 *et seq*. We hold that it does not. An acknowledgment of parentage, signed by the parents and filed with the State Registrar, is not an "initial custody determination" under the UCCJEA because it is does not satisfy the definition of "initial custody determination" provided in that act. Nevertheless, the presumptive award of custody contained in the Acknowledgment of Parentage Act remains part of a valid agreement into which the parents entered, and may be set aside only when a custody determination has been made by the judiciary.

Under the UCCJEA, a child's initial custody determination must take place in the child's home state, unless the home state declines to exercise home-state jurisdiction under the UCCJEA because another state would be a more appropriate forum. In this case, we conclude that Illinois is the child's home state, and thus only it has the authority to determine whether Michigan is the more appropriate forum. We remand to the Monroe Circuit Court for further proceedings consistent with this opinion. Pending resolution of the home-state jurisdictional issue, the award of custody to the mother that was stipulated by the parties pursuant to Acknowledgment of Parentage Act, as well as the temporary orders concerning parenting time and child support, remain intact.

FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant are the biological parents of M., born October 12, 2006. Plaintiff and defendant cohabitated but never married. The parties moved from Illinois to Michigan months before M. was born in Michigan. On January 25, 2007, plaintiff and defendant executed and filed an AOP naming defendant as the child's father and establishing paternity.

In April 2007, the parties and the child returned to Illinois and continued to reside together. Plaintiff attended college and worked, while defendant attended law school. Both parties had Illinois driver's licenses, and M. received state health insurance that required Illinois residency. During the time that the family resided in Illinois, plaintiff regularly returned to Michigan with the child for extended visits with Michigan family members.

In May 2008, the relationship between the parties ended, and plaintiff and the child returned to Michigan to live with plaintiff's parents. Five days after returning to Michigan, plaintiff filed a paternity action in the Monroe Circuit Court. Additionally, plaintiff filed an ex parte petition for alternative service, temporary custody, and the scheduling of a UCCJEA conference. On May 18, 2008, the Michigan trial judge entered an ex parte order granting the request for alternative service and a UCCJEA conference, but declined to address the custody issue. On June 4, 2008, defendant filed a custody action in Illinois.

On July 7, 2008, a telephone conference was held between the judges from the Michigan and Illinois courts, as well as the parties, to discuss which state had home-state jurisdiction under the UCCJEA. Defendant argued that Illinois had jurisdiction under the UCCJEA. Plaintiff argued that Michigan should exercise jurisdiction because the child was residing with plaintiff in Michigan, plaintiff's petition had been filed first, and both plaintiff and the child had significant ties to Michigan. Both the Illinois and Michigan judges expressed initial agreement that jurisdiction should lie in Michigan, but also agreed that an evidentiary hearing should be held in Michigan in order to determine which state had home-state jurisdiction. Defendant was granted parenting time in Michigan "at his convenience."

After adjournments, discovery, and failed settlement attempts, the jurisdictional hearing was conducted on January 6, 2009. The AOP was entered into evidence in the court record for the first time at this hearing. On February 17, 2009, the trial court entered a five-page "decision and order regarding jurisdiction." The court ruled that Michigan had jurisdiction to hear the case because, by executing an AOP, the parents "consent[ed] to the jurisdiction of Michigan specifically on the issues of custody, support and parenting time." Furthermore, because an AOP granted "initial custody" of a minor to the mother, the judge reasoned that the "UCCJEA would not be invoked" because the "grant of initial custody was already made by the parents who voluntarily invoked the Acknowledgment of Parentage law."[1]

Subsequently, a trial was held to determine custody. After taking testimony from a number of witnesses, the trial court applied the best interest factors contained in MCL 722.23, awarding joint legal custody to both parties, and physical custody to the plaintiff. Defendant was awarded parenting time, and a child support order was entered.

Defendant appealed the order of custody. On September 15, 2009, the Court of Appeals affirmed the trial court's exercise of jurisdiction, "albeit for a different reason."[2] The panel held that the trial court could properly exercise home-state jurisdiction under the

[1] On March 3, 2009, after the Michigan court held that Michigan had jurisdiction over the case, the Illinois circuit court entered an order transferring the case to Michigan and dismissing defendant's Illinois case with prejudice. Subsequently, a motion was filed to vacate that order. The Illinois court refused to vacate the order transferring the case to Michigan, but did amend the previous order to indicate that the case would be "merely taken off call" rather than dismissed with prejudice pending defendant's Michigan appeal.

[2] *Foster v Wolkowitz*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2009 (Docket No. 291825), p 1.

UCCJEA because a properly executed AOP operated as an initial custody determination as a matter of law. Because the Michigan AOP operated as an "initial custody determination" under the UCCJEA, Michigan had continuing jurisdiction and it was "not necessary to consider defendant's argument that Illinois is the home state."[3]

This Court granted leave to appeal, asking the parties to address whether the Court of Appeals erred in relying on the Acknowledgment of Parentage Act rather than the UCCJEA to determine that Michigan should exercise subject-matter jurisdiction, and, if jurisdiction properly lies in Illinois as the child's "home state" under the UCCJEA, whether Michigan is the more convenient forum for resolution of this matter.[4]

STANDARD OF REVIEW

This case involves the requirements of the UCCJEA and the interplay between the UCCJEA and the Acknowledgment of Parentage Act. Issues of statutory construction are questions of law reviewed de novo.[5] Additionally, in the absence of any factual dispute, whether Michigan may exercise home-state jurisdiction[6] under the UCCJEA is a question of law reviewed de novo.[7]

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[3] *Id*., unpub op at 7.

[4] 485 Mich 999 (2009). Given our resolution of this case, we find it unnecessary to address defendant's constitutional challenge to the Acknowledgment of Parentage Act.

[5] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

[6] Black's Law Dictionary (8th ed) defines "home-state jurisdiction" as "jurisdiction based on the child's having been a resident of the state for at least six consecutive months immediately before the commencement of the suit" where there is an interstate child-custody dispute governed by the UCCJEA.

[7] *In re Petition by Wayne Co Treasurer*, 478 Mich 1, 6; 732 NW2d 458 (2007); *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002); *Jodway v Kennametal, Inc*, 207 Mich App 622, 632; 525 NW2d 883 (1994).

RELEVANT STATUTORY PROVISIONS

The Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., provides a voluntary means for both parents, acting together, to establish paternity of a child born out of wedlock. An AOP is "valid and effective" when the unwed parents complete the form, sign it, and have their signatures notarized.[8] A validly executed AOP establishes paternity and may provide the "basis for court ordered child support, custody, or parenting time without further adjudication under the paternity act . . . ."[9] The act further provides that the AOP is to be filed with the State Registrar and kept "in a parentage registry in the office of the state registrar."[10]

The Acknowledgment of Parentage Act further provides that when an AOP is executed, "initial custody" is granted to the mother:[11]

> After a mother and father sign an acknowledgment of parentage, the mother has *initial custody* of the minor child, *without prejudice to the determination of either parent's custodial rights*, until otherwise determined by the court or otherwise agreed upon by the parties in writing and acknowledged by the court. This grant of initial custody to the mother *shall not*, by itself, *affect the rights of either parent* in a proceeding to seek a court order for custody or parenting time.[12]

Lastly, parents who execute an AOP agree to consent to the "general, *personal* jurisdiction" of Michigan

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[8] MCL 722.1003.

[9] MCL 722.1004.

[10] MCL 722.1005(1).

[11] MCL 722.1007(c) requires that the AOP form provide notice to the parties that the mother has initial custody of the child. This is consistent with the AOP signed by the parties in this case.

[12] MCL 722.1006 (emphasis added).

courts "regarding the issues of the support, custody, and parenting time of the child."[13]

The UCCJEA, MCL 722.1101 *et seq*., governs interstate child custody disputes. At issue in this case is MCL 722.1201, which governs a state court's authority to make an "initial child-custody determination."[14] That provision states:

> (1) Except as otherwise provided in section 204,[15] a court of this state has jurisdiction to make an initial child-custody determination *only* in the following situations:
>
> (a) This state is the *home state* of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.
>
> (b) A court of another state does not have jurisdiction under subdivision (a), or a court of the home state of the child has *declined to exercise jurisdiction* on the ground that this state is the more appropriate forum under section 207 or 208, and the court finds both of the following:
>
> (*i*) The child and the child's parents, or the child and at least 1 parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.

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[13] MCL 722.1010 (emphasis added).

[14] If a state court has jurisdiction to make an initial child-custody determination under the UCCJEA, that court retains "exclusive, continuing jurisdiction" over the child custody matter. MCL 722.1202(1) and 722.1203(a).

[15] MCL 722.1204(1) permits a state to exercise "temporary emergency jurisdiction" when a child has been abandoned or it is necessary to protect the child on an emergency basis because the child, his siblings, or his parent is "subjected to or threatened with mistreatment or abuse." The temporary emergency orders remain in effect until an order is obtained from the state court having proper jurisdiction under the UCCJEA.

(*ii*) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

(c) All courts having jurisdiction under subdivision (a) or (b) have declined to exercise jurisdiction on the grounds that a court of this state is the more appropriate forum to determine the custody of the child under section 207 or 208.

(d) No court of another state would have jurisdiction under subdivision (a), (b), or (c).

(2) Subsection (1) is the *exclusive jurisdictional basis* for making a child-custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child-custody determination. [Emphasis added.]

The UCCJEA also defines statutory terms that are critical to our resolution of this case. Of note, a "child-custody determination" is defined as "a judgment, decree, or *other court order* providing for legal custody, physical custody, or parenting time with respect to a child. Child-custody determination includes a permanent, temporary, initial, and modification order. Child-custody determination *does not* include an order relating to child support or other monetary obligation of an individual."[16] Additionally, the child's "home state" is defined as the state in which a child lived with a parent "*for at least 6 consecutive months immediately before the commencement of a child-custody proceeding*."[17]

ANALYSIS

The Court of Appeals in this case held that an AOP, executed pursuant to the Acknowledgment of Parent-

[16] MCL 722.1102(c) (emphasis added).

[17] MCL 722.1102(g) (emphasis added).

age Act, operated as an initial custody determination for the purposes of the UCCJEA. It is true that the plain language of the Acknowledgment of Parentage Act effectively conditions the parents' ability to execute an AOP on their willingness to allow the mother to be granted "initial custody of the minor child . . . ."[18] While this grant of initial custody occurs by operation of law when the parties stipulate to the child's paternity, the statutory language also makes clear that the initial grant of custody creates no impediment should either parent wish to seek a judicial determination of custodial rights. MCL 722.1006 indicates that the grant of initial custody is "*without prejudice* to the determination of either parent's custodial rights" and that the grant of initial custody "shall not, by itself, *affect the rights of either parent* in a proceeding to *seek a court order* for custody or parenting time." (Emphasis added.) Thus, nothing in the plain language of the Acknowledgment of Parentage Act equates the execution of an AOP to a judicial determination regarding custody; rather, the statutory language leads to the opposite conclusion.[19]

Additionally, for the purposes of an interstate custody dispute, an AOP does not satisfy the statutory definition of "child-custody determination" provided in the UCCJEA, because the acknowledgment is not a

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[18] MCL 722.1006.

[19] Equating an AOP to a judicial determination would necessarily be prejudicial to the father, even if the child custody dispute were purely intrastate. MCL 722.27(1)(c) provides that a court cannot modify or amend previous orders so as to change the established custodial environment of a child "unless there is presented clear and convincing evidence that it is in the best interest of the child." The father would bear a heightened evidentiary burden when seeking to modify or amend the initial grant of custody to the mother, despite the clear directive contained in MCL 722.1006 stating that the filing of an AOP does not, by itself, "*affect the rights of either parent* in a proceeding to seek a court order for custody or parenting time." (Emphasis added.)

"judgment, decree, *or other court order* providing for legal custody, physical custody, or parenting time with respect to a child." MCL 722.1102(c) (emphasis added). An AOP is not issued or entered by *any* court, nor is it in the form of a "judgment, decree, or other court order . . . ." Rather, the parental stipulation is filed in the executive branch with the State Registrar and kept in a specific parentage registry. The judicial branch has absolutely no involvement in the execution of an AOP. Indeed, the involvement of the judicial branch occurs, if ever, only *after* the AOP has been filed, as the acknowledgment serves as the "basis for court ordered child support, custody, or parenting time without further adjudication under the paternity act . . . ."[20] Simply put, the initial grant of custody to the mother required under the Acknowledgment of Parentage Act is not an "initial child-custody determination" under the UCCJEA, and the Court of Appeals erred by concluding otherwise.

It is true that the Acknowledgment of Parentage Act requires, as a condition of executing an AOP, that parents consent "to the general, personal jurisdiction" of Michigan courts regarding "the issues of the support, custody, and parenting time . . . ."[21] However, jurisdiction over a *person*[22] has never been synonymous with jurisdiction over a *case*, and the parties' consent to personal jurisdiction provides no support for the conclusion that Michigan has home-state jurisdiction under the UCCJEA. The plain language of the UCCJEA indicates that it provides "the *exclusive* jurisdictional basis for making a child-custody determination."[23]

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[20] MCL 722.1004.

[21] MCL 722.1010.

[22] Black's Law Dictionary (8th ed) defines "personal jurisdiction" as a "court's power to bring a person into its adjudicative process."

[23] MCL 722.1201(2) (emphasis added).

Merely having personal jurisdiction over a party or child is insufficient to make a child custody determination.[24] Therefore, the consent to personal jurisdiction required by the Acknowledgment of Parentage Act provides no basis for Michigan to exert home-state jurisdiction pursuant to the UCCJEA.

The record reveals that the child's home state for the purposes of the UCCJEA is the state of Illinois, because that is the state in which the child resided "for at least 6 consecutive months immediately before the commencement of a child-custody proceeding."[25] Plaintiff argues that, despite the fact that the state of Illinois has home-state jurisdiction, the state of Michigan is a more convenient forum for the resolution of the custody dispute. However, under the UCCJEA, it is the *home state* that must decide whether to "decline to exercise its jurisdiction" because "it determines" that "it is an inconvenient forum" and that "a court of another state is a more appropriate forum."[26] Thus, while plaintiff presents persuasive arguments supporting the conclusion that Michigan is the more appropriate forum in which to resolve the interstate custody dispute, these arguments are best directed to the Illinois court.

Finally, we take care to note that, pending resolution of the interstate child custody dispute, the stipulation of the parties granting custody to the mother, as contained in the AOP, remains intact.[27] Additionally, the child

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[24] "Physical presence of, or *personal jurisdiction* over, a party or a child is neither necessary *nor sufficient* to make a child-custody determination." MCL 722.1201(3) (emphasis added).

[25] MCL 722.1102(g).

[26] MCL 722.1207(1); 750 Ill Comp Stat 36/207(a).

[27] The AOP signed by the parties specifically acknowledges that "[t]he mother has custody of the child *unless otherwise determined by the court* or agreed by the parties in writing." (Emphasis added.)

support order, as well as the order concerning parenting time, likewise remains intact.[28]

CONCLUSION

The Court of Appeals erred by concluding that the presumptive award of custody given to a mother when an AOP is executed pursuant to the Acknowledgment of Parentage Act serves as an "initial custody determination" under the UCCJEA. We therefore reverse the judgment of the Court of Appeals and remand this matter to the Monroe Circuit Court for further proceedings consistent with this opinion.

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

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[28] The UCCJEA does not concern orders "relating to child support or other monetary obligation of an individual." MCL 722.1102(c). However, the Family Support Act, MCL 552.451 *et seq*., specifically permits a custodial parent to petition the circuit court for support "to provide necessary shelter, food, care, and clothing for the child . . . ." MCL 552.451 and 552.451a. Where there is a dispute regarding custody, the judge is required to issue "specific temporary provisions" concerning custody and parenting time pending resolution of the custody dispute. MCL 552.452(4).

INSURANCE INSTITUTE OF MICHIGAN v COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE SERVICES

Docket Nos. 137400 and 137407. Argued October 7, 2009 (Calendar No. 3). Decided July 8, 2010.

The Insurance Institute of Michigan and others brought an action in the Barry Circuit Court against the Commissioner of the Office of Financial and Insurance Services (OFIS), seeking declaratory and injunctive relief from rules promulgated by the Insurance Commissioner that prevent insurers from using a person's credit information as a rating factor when setting that person's insurance premiums, a practice known as "insurance scoring." The Michigan Insurance Coalition and Citizens Insurance Company of America were allowed to intervene as plaintiffs. The court, James H. Fisher, J., determined that the rules were illegal, invalid, and unenforceable, and permanently enjoined defendant from enforcing them against any of the plaintiffs or intervening plaintiffs. Defendant appealed, asserting that the validity of the rules could only be challenged by a petition for judicial review under the Administrative Procedures Act (APA), MCL 24.201 *et seq*., which confines review to the agency record. Defendant also argued that even if an original action were proper, MCL 24.264 requires a plaintiff to request a declaratory ruling from the agency before bringing a court action. Despite these claims of procedural error, defendant nevertheless asked the court to reach the substantive issues and reverse the trial court's holding that the rules are invalid. In three separate opinions, the Court of Appeals, WHITE, P.J., and ZAHRA (concurring in part and dissenting in part) and K. F. KELLY, JJ. (concurring in part and dissenting in part), vacated the trial court's opinion and order. Judge WHITE voted to vacate the trial court's judgment in part because the court had erred by failing to base its review on the administrative record, by accepting additional evidence, and in part on the merits. Judge K. F. KELLY agreed that the trial court's order should be vacated, but for a different reason: namely, because the court had erred by permitting plaintiffs to maintain an original action. Judge ZAHRA dissented from the decision to vacate the trial court's order because he concluded that the trial court had properly allowed plaintiffs to bring an original action. Although he agreed with Judge WHITE that the court had erred by failing to base its review on the administrative record, he concluded

that the error was harmless because the trial court had resolved a purely legal question. Judge ZAHRA agreed with the trial court that the rules were illegal and invalid because the Commissioner exceeded her authority in promulgating them. This Court granted the parties' applications for leave to appeal. 483 Mich 1000 (2009).

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

Defendant exceeded her authority by promulgating rules that ban the practice of insurance scoring because this practice is consistent with the Insurance Code.

1. It is not necessary to determine whether the trial court erred by permitting plaintiffs to maintain an original action or whether judicial review of administrative rules is limited to the record because defendant expressly waived any error concerning these procedural issues by arguing that a remand to the trial court is unnecessary and requesting a determination on the substantive issues in this case.

2. To conclude that the rules promulgated by an agency are valid, a reviewing court must determine that they are within the matter covered by the enabling statute, comply with the underlying legislative intent, and are neither arbitrary nor capricious.

3. Insurance scoring may be used to establish a premium discount plan under Chapter 21 of the Insurance Code. Chapter 21 permits insurers to establish and maintain a premium discount plan using factors in addition to those specifically enumerated in MCL 500.2111 if that plan is consistent with the purposes of the Insurance Code, reflects reasonably anticipated reductions in losses or expenses, and is uniformly applied to all the insurer's insureds. The evidence in this case establishes that a premium discount plan based on insurance scoring may reflect reasonably anticipated reductions in losses or expenses on the part of the insurer employing the plan. Evidence in the administrative record also supports the conclusion that there is a correlation between low insurance scores and increased risk of loss. Prohibiting insurance scoring would lead to an increase in rates for most Michigan residents and decreased competition among insurers in Michigan, which is inconsistent with the Insurance Code's purpose of increasing the availability and affordability of insurance.

4. Defendant has not established that insurance scoring results in rates that are unfairly discriminatory on the ground that the scores are based on unreliable credit reports. Generally, insurers may establish any rating plan that measures any differences among risks that may have a probable effect on losses or expenses as long as the

resulting rates are not excessive, inadequate, or unfairly discriminatory. The Insurance Code defines a rate as unfairly discriminatory if the differential between it and an another rate for the same coverage is not reasonably justified by differences in losses, expenses, or both, or by differences in the uncertainty of loss, for the individuals or risks to which the rates apply. A reasonable justification must be supported by a reasonable classification system, by sound actuarial principles when applicable, and by actual and credible loss and expense statistics (or, for new coverages and classifications, by reasonably anticipated loss and expense experience). The argument that insurance scoring is not a reasonable classification system because credit reports are unreliable is supported by materials that are inconclusive. Most errors in credit reports are minor ones that have little or no substantive effect on the actual insurance scoring itself, and such errors are irrelevant for purposes of the Insurance Code. Furthermore, the Legislature has effectively determined that credit reports are reliable by requiring some state agencies to obtain them. In order for any unreliability to produce rates that are unfairly discriminatory within the meaning of the Insurance Code, the unreliability would have to result in a differential between the rates that is not reasonably justified by differences in losses, expenses, or both, or by differences in the uncertainty of loss, for the individuals or risks to which the rates apply. In this case, plaintiffs have submitted actual and credible loss statistics that demonstrate a direct, linear relationship between insurance scores and risk for both automobile and homeowners policies. These statistics were filed with OFIS, which never challenged them.

Justice CORRIGAN, joined by Justices WEAVER and YOUNG, concurring, wrote separately to state that she would overrule *Mich Ass'n of Home Builders v Dep't of Labor & Economic Growth Dir*, 481 Mich 496 (2008), and hold that the trial court's review of the OFIS rules was not limited to the administrative record.

Court of Appeals judgment vacated; trial court order reinstated.

Chief Justice KELLY, joined by Justices CAVANAGH and HATHAWAY, dissenting, agreed with the majority's decision to reach the substantive issues in this case, but would affirm the Court of Appeals judgment by holding that defendant did not exceed her rulemaking authority and that the OFIS rules are valid and enforceable.

1. ADMINISTRATIVE LAW — AGENCY RULES — JUDICIAL REVIEW OF AGENCY RULES.

To conclude that the rules promulgated by an agency are valid, a reviewing court must determine that they are within the matter

covered by the enabling statute, comply with the underlying legislative intent, and are neither arbitrary nor capricious.

2. INSURANCE — INSURANCE RATES — INSURANCE SCORING — CREDIT INFORMATION ACCURACY — UNFAIR DISCRIMINATION.

In order for the unreliability of credit information to produce insurance rates that are unfairly discriminatory within the meaning of the Insurance Code, the unreliability would have to result in a differential between the rates that is not reasonably justified by differences in losses, expenses, or both, or by differences in the uncertainty of loss, for the individuals or risks to which the rates apply (MCL 500.2109[1][c]; 500.2403[1][d]; 500.2603[1][d]).

Dickinson Wright PLLC (by *Peter H. Ellsworth* and *Jeffery V. Stuckey*) for plaintiffs.

Dykema Gossett PLLC (by *Lori McAllister*) for intervening plaintiffs.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Christopher L. Kerr*, *William A. Chenoweth*, and *David W. Silver*, Assistant Attorneys General, for defendant.

Amici Curiae:

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Deborah A. Hebert*), *Martin R. Brown*, and *Kathleen A. Lopilato* for the Insurance and Indemnity Law Section of the State Bar of Michigan.

McClelland & Anderson, L.L.P. (by *Gregory L. McClelland* and *Gail A. Anderson*), for the Michigan Association of Realtors.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Michael J. Hodge* and *Kelly M. Drake*), for the Property Casualty Insurers Association of America, the American Insurance Company, and the National Association of Mutual Insurance Companies.

Eric J. Ellman and *Kelley Cawthorne* (by *Steven D. Weyhing*) for the Consumer Data Industry Association.

Fraser Trebilcock Davis & Dunlap, P.C. (by *Mark R. Fox* and *Graham K. Crabtree*), for the Michigan Chamber of Commerce.

McClelland & Anderson, L.L.P. (by *Gregory L. McClelland* and *Gail A. Anderson*), for the Michigan Association of Home Builders.

CORRIGAN, J. This case concerns the validity of rules promulgated by defendant Commissioner of Financial & Insurance Services (the OFIS rules)[1] banning the practice of "insurance scoring" under Chapters 21, 24, and 26 of the Insurance Code. The trial court ruled that the rules were "illegal, invalid, and unenforceable" and permanently enjoined defendant from enforcing them. The Court of Appeals issued three separate opinions, which vacated the circuit court's order but did not agree on a rationale. We hold that the Commissioner exceeded her authority by promulgating the OFIS rules because they are contrary to the Insurance Code. Accordingly, we vacate the judgment of the Court of Appeals and reinstate the trial court's order.

I. FACTS AND PROCEEDINGS

As explained in a 2002 report from then-OFIS Commissioner Frank Fitzgerald, "insurance scoring" or

[1] On February 1, 2008, Governor Jennifer Granholm signed Executive Order 2008-01, which reorganized the Office of Financial & Insurance Services (OFIS) and changed its name to the Office of Financial & Insurance Regulation (OFIR). The order took effect April 6, 2008. <http://www.michigan.gov/dleg/0,1607,7-154-10555---,00.html> (accessed June 21, 2010.) We use the former name in order to maintain consistency with the parties' briefs and the Court of Appeals opinions.

"insurance credit scoring" is "the use of select credit information to help insurance companies establish automobile and homeowners premiums." Frank Fitzgerald, The Use of Credit Scoring in Automobile and Homeowners Insurance (2002) (Fitzgerald Report),[2] p 5. An individual's credit score is calculated by applying a standard formula to information from the individual's credit history. These formulas are developed either by the insurance companies themselves or by credit scoring companies. *Id*. Insurance companies that use insurance scoring offer discounts to individuals with good insurance scores. Not all insurance companies use insurance scoring. Of those that do, their practices vary concerning the extent of the discounts offered and how the insurance scores are calculated. *Id*. at 5-6.

In 1997, the Legislature enacted MCL 500.2110a, which allows insurers to establish and maintain a premium discount plan without prior approval by the Legislature or the insurance commissioner. As a result, insurance companies in Michigan began using insurance scoring. Fitzgerald Report, *supra* at 9. In 2002, Commissioner Fitzgerald undertook a statewide study of this practice in order "to gather information on the use of insurance credit scoring in personal automobile and homeowners insurance policies and to take testimony concerning its effect on Michigan citizens." *Id*. at 1. In December 2002, OFIS issued the Fitzgerald Report, which concluded that "Michigan law permits a discount based on insurance credit scoring" but that "significant and legitimate concerns" identified during the course of the study "must be addressed to adequately protect the rights of Michigan consumers

[2] Available at <http://www.michigan.gov/documents/cis_ofis_credit_scoring_report_52885_7.pdf> (accessed June 21, 2010).

under the Insurance Code." *Id*. at 24. To address these concerns, the report included several "Administrative Recommendations," or "action[s] that [are] available to the commissioner under current law." *Id*. The report concluded that "[o]ther concerns are beyond the statutory authority of the commissioner to remedy and will require action by the Michigan Legislature." *Id*. The report thus "respectfully submitted" several "Legislative Recommendations" "for the consideration of legislators in their policy deliberations." *Id*. None of the legislative recommendations totally prohibited the use of insurance scoring.

On February 14, 2003, Commissioner Fitzgerald issued a bulletin setting forth several directives taken from the December 2002 report. *In the Matter of Conforming Insurance Credit Scoring Practices With Insurance Code Requirements*, OFIS Bulletin 2003-01-INS (February 14, 2003).[3] On the same date, he issued an order directing OFIS staff to monitor insurance companies' compliance with the directives and to initiate compliance actions as appropriate. *Order to Monitor Insurer Practices and To Initiate Compliance Actions as Appropriate*, OFIS Order No. 03-005-M (February 14, 2003).[4] The bulletin directed insurance companies using insurance scoring to file with OFIS such information as "the formula used to apply the discount," "the specific credit classification factors used to calculate the insurance credit score," and an annual "actuarial certification justifying the discount levels and discount tiers offered by the company." OFIS Bulletin, *supra*. The bulletin also directed insurance companies to "re-

[3] Available at <http://www.michigan.gov/dleg/0,1607,7-154-10555_12900_12906-61601--,00.html> (accessed June 21, 2010).

[4] Available at <http://www.michigan.gov/documents/cis_ofis_03_055_m_57777_7.pdf> (accessed June 21, 2010).

calculate and then apply an insured's insurance credit score at least once annually" and to "annually inform . . . policyholders or applicants of the credit score used to apply an insurance credit scoring discount . . . ." *Id*.

On May 13, 2003, then-OFIS Commissioner Linda A. Watters[5] issued an "update" to her predecessor's February 14, 2003 bulletin. *In the Matter of Insurance Credit Scoring Practices—Update to Bulletin 2003-01-INS*, OFIS Bulletin 2003-02-INS (May 13, 2003) (Watters Bulletin).[6] The bulletin began by stating that "[i]nsurance scoring is problematic at best. Perhaps no other widespread practice of insurers presents so many technical and social issues." After providing several examples, the bulletin continued:

> Such considerations led Governor Granholm to call for a ban on the use of insurance credit scoring altogether. In February, two bills were introduced that would ban the use of insurance credit scoring in the rating of automobile and home insurance. . . .
>
> If a ban cannot be achieved, at least significant reform legislation is imperative to protect the interests of consumers on such an important matter as the amount they pay for automobile and home insurance. This agency will be fully supportive of the Governor in these matters.
>
> In the meantime, it is incumbent upon the Commissioner to make the most of current law in addressing the concerns above. Bulletin 2003-01-INS was designed to conform insurance credit scoring practices to Insurance Code requirements.

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[5] The current OFIR Commissioner is Ken Ross. <http://www.michigan.gov/dleg/0,1607,7-154-10555-32386--,00.html> (accessed June 21, 2010).

[6] Available at <http://www.michigan.gov/dleg/0,1607,7-154-10555_12900_12906-75302--,00.html> (accessed June 21, 2010).

The bulletin also reiterated that insurers must inform policyholders or applicants of the credit score used to apply a discount and revised the directive requiring annual recalculation of insurance scores to require recalculation only upon the request of the insured. *Id*.

In July 2004, after neither of the above-mentioned bills was enacted into law, OFIS developed proposed administrative rules prohibiting the use of insurance scoring. It held four public hearings—in Lansing, Detroit, Grand Rapids, and Flint—"to receive public comments on proposed rules clarifying a reasonable classification system under the Insurance Code, by requiring insurers to adjust base rates and by prohibiting the use as a rating factor after January 1, 2005, of a credit-based insurance score." See OFIS Notice of Public Hearing on Proposed Rules to Reduce Insurance Base Rates and To Ban the Use of Credit Scoring.[7]

After submission to and approval by the Office of Regulatory Reform,[8] the Commissioner formally adopted the rules. See MCL 24.245. On February 17, 2005, the Joint Committee on Administrative Rules (JCAR)[9] issued a notice of objection to the proposed rules. See MCL 24.245a.[10] JCAR determined that "[t]he agency is exceeding the statutory scope of its rule-

[7] Available at <http://www.michigan.gov/documents/2004-022_newspaper_hrg_notice_94059_7.pdf> (accessed June 21, 2010).

[8] The Office of Regulatory Reform has now been restructured and renamed the State Office of Administrative Hearings and Rules. <http://www.michigan.gov/dleg/0,1607,7-154-10576_35738-15543--,00.html> (accessed June 21, 2010).

[9] According to the website of the Michigan Legislative Council, JCAR "is a statutorily created bipartisan legislative committee, comprised of 5 house and 5 senate members, which is responsible for the legislative oversight of administrative rules proposed by state agencies." <http://council.legislature.mi.gov/jcar.html> (accessed June 21, 2010).

[10] Pursuant to MCL 24.245a(1), JCAR has 15 days after receipt to consider a proposed rule and to object by filing a notice of objection.

making authority" and that "[t]he rule is in conflict with state law, the Insurance Code of 1956," and "is arbitrary or capricious." JCAR Revised Notice of Objection, # 05-3 (February 17, 2005). Bills to rescind the OFIS rules upon their effective date were introduced in both the House and Senate on February 22, 2005. SB 233; HB 4374. See MCL 24.245a(3).[11] After Governor Granholm indicated her intention to veto these bills, however, Senator Mike Bishop stated during a March 9, 2005 session of the Senate that "it would be futile for us to take up these bills and pointless to pursue passage of Senate Bill No. 233." Statement of Senator Bishop, Journal of the Senate, March 9, 2005, pp 247-248. No legislative action ensued.

Under MCL 24.245a(5),[12] ORR filed the rules with the Secretary of State on March 25, 2005. On March 29, 2005, plaintiffs filed a complaint for declaratory and injunctive relief, and the Michigan Insurance Coalition and Citizens Insurance Company of America filed a

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[11] MCL 24.245a(3) provides, in relevant part:

> If the committee files a notice of objection within the time period prescribed in subsection (1), the committee chair, the alternate chair, or any member of the committee shall cause bills to be introduced in both houses of the legislature simultaneously. Each house shall place the bill or bills directly on its calendar. The bills shall contain 1 or more of the following:
>
> (a) A rescission of a rule upon its effective date.

[12] MCL 24.245a(5) provides:

> If the legislation introduced pursuant to subsection (3) is defeated in either house and if the vote by which the legislation failed to pass is not reconsidered in compliance with the rules of that house, or if legislation introduced pursuant to subsection (3) is not adopted by both houses within the time period specified in subsection (4), the office of regulatory reform may file the rule with the secretary of state. The rule shall take effect immediately upon filing with the secretary of state unless a later date is specified within the rule.

complaint and a motion to intervene as plaintiffs.[13] Plaintiffs and proposed intervening plaintiffs also sought a preliminary injunction. The parties subsequently stipulated to the intervention of the proposed intervening plaintiffs as plaintiffs.

Defendant moved for a change of venue and also argued that plaintiffs were not permitted to bring an original action in the circuit court, but were limited to filing a petition for judicial review under MCL 500.244(1). On April 15, 2005, the trial court heard arguments on both defendant's motion and on the merits of the case. It denied defendant's motion for a change of venue. At the close of plaintiffs' arguments on the merits, defense counsel declined to present any additional testimony or evidence, stating the defense position that review should be limited to the administrative record.[14] The court then stated it would "consolidate this hearing with the final trial."

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[13] According to plaintiffs' brief in Docket No. 137407, p 1 n 4, plaintiff Insurance Institute of Michigan "is a trade association comprised of 38 property and casualty insurance companies," including plaintiffs Hastings Mutual Insurance Company (Hastings), Farm Bureau General Insurance Company of Michigan (Farm Bureau), and Frankenmuth Casualty Insurance (Frankenmuth). "Plaintiffs Walter Stafford, Jr. and Michael Flohr are policyholders of Farm Bureau whose insurance premiums would be increased by the OFIS rules." *Id*. Intervening plaintiff Michigan Insurance Coalition "is a property-casualty trade association based in Michigan" and intervening plaintiff Citizens Insurance Company of America (Citizens) "is a property and casualty company based in Michigan." *Id*. at 2 n 4.

[14] The following exchange took place on the record:

> *The Court*: Okay, let me just ask [defense counsel].
>
> My understanding is that you do not wish to present any additional testimony or evidence at this hearing today. Is that correct?
>
> [*Defense Counsel*]: That's correct.
>
> *The Court*: Or — or in the case itself. Is that true?

In its opinion and order issued April 25, 2005, the trial court concluded that the OFIS rules were "illegal, invalid, and unenforceable," and permanently enjoined the Commissioner from enforcing them. The court "decline[d] to review the record of the public hearings for the reason that it consists largely of position statements and opinions which may not be admissible under the rules of evidence, and more importantly because the [c]ourt [found] it unnecessary to address whether the rules are arbitrary and capricious . . . ." *Id*. at 3. Rather, it viewed the dispositive issue as "the legality of the Defendant's rules, given the Commissioner's rule-making authority." *Id*. It concluded that the Commissioner had exceeded her authority in promulgating the rules by ordering an industry-wide reduction in rates rather than challenging rates on an individual basis through the contested case hearing process set forth in the Insurance Code. *Id*. at 4. The court also concluded that the rules' "blanket prohibition" on rating plans using insurance scoring violated the Insurance Code because the evidence established a correlation between insurance scores and risk of loss, and the Commissioner lacks the authority to ban rating plans that meet the requirements of the Code. *Id*. at 5.

[*Defense Counsel*]: It's our position that the scope of judicial review is limited to making a decision whether the Commissioner was arbitrary and capricious based on the record that we filed with the court.

The Court: Okay. And the Plaintiffs — with that understanding, my further understanding is the Plaintiffs do not intend to present any further evidence or testimony either today or at any subsequent trial?

[*Intervening Plaintiffs' Counsel*]: As — if they are not permitted to introduce the administrative record, that's true. If your Honor is going to consider all of the paperwork that they filed at four o'clock or so yesterday afternoon, then my answer is different. [Tr., April 15, 2005, pp 47-49.]

Defendant appealed. On August 21, 2008, the Court of Appeals issued three separate opinions. *Ins Institute of Mich v Comm'r of the Office of Fin & Ins Servs*, 280 Mich App 333; 761 NW2d 184 (2008). Judge WHITE voted to vacate the trial court's judgment in part because the court had erred by failing to base its review on the administrative record, by accepting additional evidence, and in part on the merits. *Id*. at 343-365. Judge K. F. KELLY also thought that the trial court's order should be vacated, but for a different reason: namely, because the court had erred by permitting plaintiffs to maintain an original action. *Id*. at 379-382. Judge ZAHRA dissented from the decision to vacate the trial court's order. He concluded that the court had properly allowed plaintiffs to bring an original action. *Id*. at 366-372. Although he agreed with Judge WHITE that the court had erred by failing to base its review on the administrative record, he concluded that the error was harmless "because the issue resolved by the lower court was a purely legal question[.]" *Id*. at 366. Judge ZAHRA agreed with the trial court that the rules were illegal and invalid because the Commissioner exceeded her authority in promulgating them. *Id*. at 373-379.

In February 2009, despite pending applications for leave to appeal in this Court, defendant began issuing notices that disapproved new rate filings. At least some of the notices acknowledged the trial court's order enjoining enforcement of the OFIS rules, but they stated that the Commissioner's disapproval of the particular rate filing was "based on the conclusion that insurance scoring is directly prohibited by the Insurance Code because rates based on insurance scoring are unfairly discriminatory and not in reliance on the enjoined administrative rules." As a result of the Commissioner's issuance of these notices, plaintiffs moved in the trial court to enforce the court's April 25, 2005

order. On April 10, 2009, the court issued an order granting plaintiffs' motion and precluding defendant from "challenging or denying rate filings on the basis that the rate filing uses insurance scores as a rating factor." The order further provided that defendant's notices were "VOID and RESCINDED as violative of this Court's prior injunction" and ordered the Commissioner to "REFRAIN from taking further action based on a blanket prohibition on the use of insurance scores."

Both parties filed applications for leave to appeal. By order of May 7, 2009, we granted leave to resolve the various procedural and substantive issues in this case. *Ins Institute of Mich v Comm'r Fin & Ins Servs*, 483 Mich 1000 (2009).

II. JUDICIAL REVIEW OF AGENCY RULEMAKING

The first set of issues before us concerns defendant's claim that the trial court erred by permitting plaintiffs to maintain an original declaratory judgment action. Defendant argues that, under § 64 of the Administrative Procedures Act (APA), MCL 24.201 *et seq*., plaintiffs were not permitted to bring an original declaratory judgment action in the trial court without having first requested a declaratory ruling from the OFIS. Defendant also argues that MCL 500.244(1) provides the exclusive means of seeking judicial review of rules promulgated by the Commissioner and that, under that provision, as well as this Court's decision in *Mich Ass'n of Home Builders v Dep't of Labor & Economic Growth Dir*, 481 Mich 496; 750 NW2d 593 (2008), judicial review of administrative rules is limited to the "administrative record," i.e., the record compiled during the rulemaking process.

We decline to reach these issues because it is unnecessary for us to do so. Defendant has expressly waived any error concerning the procedural issues by arguing that a remand to the trial court is unnecessary and asking this Court to reach the substantive issues in this case.[15] Moreover, even if the trial court erred by not limiting its review to the administrative record, the error was harmless because there is ample evidence in that record to support the trial court's conclusion that insurance scoring is permissible under the Insurance Code.[16]

III. VALIDITY OF THE RULES UNDER THE INSURANCE CODE

A. STANDARD OF REVIEW

This case presents the legal question of the validity of the OFIS rules under the Insurance Code. In *Luttrell v Dep't of Corrections*, 421 Mich 93, 100; 365 NW2d 74

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[15] Defendant states:

> Although this case was erroneously commenced as an original action under [chapter 3] of the APA, remand to the lower courts would unnecessarily delay a final resolution in a case[] that was filed in March 2005. Judicial review is proper under MCL 500.244(1) based on the agency record, which is before this Court. [Defendant's Brief in Docket No. 137400, p 50.]

In addition, defense counsel stated at oral argument that he wanted the Court to decide the substantive issue in this case. Oral Argument Transcript at 5, 37-38.

[16] We reject the dissent's assertion that we err by not confining our review to the administrative record "to conform to [our] 'harmless error' analysis." We conclude that *even if* the trial court erred by not limiting its review to the administrative record, the error was harmless because there is ample evidence in that record to support the trial court's conclusion that insurance scoring is permissible under the Insurance Code. Thus, we do not decide whether the trial court properly reviewed the circuit court record or whether it should have limited its review to the administrative record. We conclude that ample evidence on either record supports the trial court's conclusion.

(1984), we adopted the test for judicial review of agency rules articulated by the Court of Appeals in *Chesapeake & Ohio R Co v Pub Serv Comm*, 59 Mich App 88, 98-99; 228 NW2d 843 (1975):

> "Where an agency is empowered to make rules, courts employ a three-fold test to determine the validity of the rules it promulgates: (1) whether the rule is within the matter covered by the enabling statute; (2) if so, whether it complies with the underlying legislative intent; and (3) if it meets the first two requirements, when *[sic]* it is neither arbitrary nor capricious."

An agency's construction of a statute "is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons," but "the court's ultimate concern is a proper construction of the plain language of the statute." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008). "[T]he agency's interpretation cannot conflict with the plain meaning of the statute." *Id*.

As discussed in part III(D) of this opinion, we conclude that the Commissioner exceeded her authority in promulgating the OFIS rules. The rules purport to prohibit a practice—insurance scoring—that is permissible under the Insurance Code. Accordingly, the OFIS rules are not "within the matter covered by the enabling statute." *Luttrell*, 421 Mich at 100 (citation and quotation marks omitted).[17]

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[17] We reject the dissent's assertion that we improperly shift the burden to defendant. As thoroughly discussed in this opinion, plaintiffs have established that insurance scoring may be used to establish and maintain a premium discount plan that complies with Chapter 21, and that it may be used as a rating factor consistently with the requirements of Chapter 24 and 26. Thus, plaintiffs have established that the OFIS ban on insurance scoring is not "within the matter covered by" the Insurance Code because insurance scoring is permissible under the plain language of the code.

B. THE INSURANCE CODE

The OFIS rules apply to "personal insurance," which they define as "private passenger automobile, homeowners, motorcycle, boat, personal watercraft, snowmobile, recreational vehicle, mobile-homeowners and noncommercial dwelling fire insurance policies" that are "underwritten on an individual or group basis for personal, family, or household use." Mich Admin Code, R 500.2151(2).

Accordingly, three chapters of the Insurance Code are relevant here: Chapter 21, which applies to individual automobile and home insurance; Chapter 24, which applies to group automobile and home insurance as well as personal lines covering mobile homes, rental properties, recreational vehicles, motorcycles, and boats; and Chapter 26, which applies to group home insurance and the other personal property lines to which Chapter 24 also applies. MCL 500.2105; MCL 500.2401; MCL 500.2601; OFIS Report to JCAR (October 1, 2004), p 2.

Under all three chapters, the insurers, rather than the Commissioner or OFIS, formulate the plans they use to establish insurance rates. In formulating rating plans under Chapters 24 and 26, "[d]ue consideration shall be given to past and prospective loss experience . . . and to all other relevant factors within and outside this state." MCL 500.2403(1)(a); MCL 500.2603(1)(a). "Risks may be grouped by classifications for the establishment of rates and minimum premiums," and "[t]he rating plans may measure any differences among risks that may have a probable effect upon losses or expenses . . . ." MCL 500.2403(1)(c); MCL 500.2603(1)(c). "Rates shall not be excessive, inadequate, or unfairly discriminatory." MCL 500.2403(d); MCL 500.2603(d).

For home and automobile insurance under Chapter 21, classifications must be "based only upon 1 or more"

of the factors set forth in MCL 500.2111. MCL 500.2111(2). These factors include such things as the age of the driver, average weekly or annual mileage, and amount of insurance. In addition, MCL 500.2110a permits insurers to "establish and maintain a premium discount plan utilizing factors in addition to those permitted by section 2111," provided that "the plan is consistent with the purposes of this act and reflects reasonably anticipated reductions in losses or expenses" and the insurer applies the plan uniformly to all its insureds. Rates under Chapter 21, like those established under Chapters 24 and 26, "shall not be excessive, inadequate, or unfairly discriminatory." MCL 500.2109(1)(a).

The Commissioner derives her rulemaking authority from MCL 500.210, which provides:

> The commissioner shall promulgate rules and regulations in addition to those now specifically provided for by statute as he may deem necessary to effectuate the purposes and to execute and enforce the provisions of the insurance laws of this state in accordance with the provisions of [the APA].[18]

In addition, MCL 500.2484 (Chapter 24) and MCL 500.2674 (Chapter 26) provide: "The commissioner may make reasonable rules and regulations necessary to effect the purposes of this chapter."

C. THE OFIS RULES

The OFIS rules on insurance scoring, Mich Admin Code, R 500.2151 through 500.2155, provide:

> Rule 1. As used in these rules:
>
> (1) "Insurance score" means a number, rating, or grouping of risks that is based in whole or in part on credit

[18] MCL 500.210 refers to former provisions of the Insurance Code that have now been repealed and replaced by the APA. Any reference to these provisions is deemed to be a reference to the APA. MCL 24.312.

information for the purposes of predicting the future loss exposure of an individual applicant or insured.

(2) "Personal insurance" means private passenger automobile, homeowners, motorcycle, boat, personal watercraft, snowmobile, recreational vehicle, mobile-homeowners and non-commercial dwelling fire insurance policies. "Personal insurance" only includes policies underwritten on an individual or group basis for personal, family, or household use. [Mich Admin Code, R 500.2151.]

Rule 2. These rules apply to personal insurance. [Mich Admin Code, R 500.2152.]

Rule 3.

(1) For new or renewal policies effective on and after July 1, 2005, an insurer in the conduct of its business or activities shall not use an insurance score as a rating factor.

(2) For new and renewal policies effective on and after July 1, 2005, an insurer in the conduct of its business or activities shall not use an insurance score as a basis to refuse to insure, refuse to continue to insure, or limit coverage available. [Mich Admin Code, R 500.2153.]

Rule 4.

(1) For new and renewal policies effective on or after July 1, 2005, an insurer shall adjust base rates in the following manner:

(a) Calculate the sum of earned premium at current rate level for the period January 1, 2004 through December 31, 2004.

(b) Calculate the sum of earned premium at current rate level with all insurance score discounts eliminated for the period January 1, 2004 through December 31, 2004.

(c) Reduce base rates by the factor created from the difference of the number 1 and the ratio of the amount of subdivision (a) to the amount of subdivision (b).

(2) The insurer shall file with the commissioner a certification that it has made the base rate adjustment and documentation describing the calculation of the base rates

adjustment. The insurer shall file the certificate and documentation not later than May 1, 2005. [Mich Admin Code, R 500.2154.]

Rule 5. If an insurer fails to make the filing required under R 500.2154, in any proceeding challenging a related rate filing, then the insurer shall be subject to the presumption that the rate filing does not conform to rate standards. [Mich Admin Code, R 500.2155.]

D. ANALYSIS

i. INTRODUCTION

We conclude that the trial court properly held the OFIS rules invalid and unenforceable. Plaintiffs have demonstrated that the OFIS rules are not "within the matter covered by the enabling statute" as required by *Luttrell*, 421 Mich at 100, because insurance scoring is permissible under the Insurance Code. The record supports plaintiffs' contention that insurance scoring may be used to establish a premium discount plan under Chapter 21. Insurance scores may also be used as a rating factor under Chapters 24 and 26, and defendant has failed to show that insurance scoring produces rates that are "unfairly discriminatory." The Commissioner has the authority to "promulgate rules and regulations" to "effectuate the purposes" of the Insurance Code and to "execute and enforce" its provisions. MCL 500.210. By enacting a total ban on insurance scoring, a practice that may be employed in a manner that is consistent with the Insurance Code, defendant exceeded her authority as the OFIS Commissioner.[19]

[19] The dissent states that the proper inquiry is not whether insurance scoring is permissible under the Insurance Code, but "whether rules banning the use of insurance scoring in setting insurance rates are within the matters covered by MCL 500.210." We question how the latter question can be answered without addressing the former. The Commis-

ii. INSURANCE SCORING MAY BE USED TO ESTABLISH A PREMIUM DISCOUNT PLAN

Chapter 21 of the Insurance Code, MCL 500.2110a,[20] permits insurers to establish and maintain a premium discount plan using factors in addition to those specifically enumerated in MCL 500.2111, provided that the plan "is consistent with the purposes of this act and reflects reasonably anticipated reductions in losses or expenses" and is uniformly applied to all the insurer's insureds.

The evidence establishes that a premium discount plan using insurance scoring may reflect reasonably anticipated reductions in losses or expenses on the part of the insurer employing the plan. Commissioner Fitzgerald's 2002 report concluded that

> [t]here exists a correlation between a person's insurance credit score and the likelihood that a claim will be filed. A thorough review of material submitted by ChoicePoint and by a number of companies demonstrates that better scores are connected to fewer claims and thus lower expenses than are the scores of persons with weaker credit histories. [Fitzgerald Report, *supra* at 22.]

In addition, several affidavits submitted by plaintiffs in the lower court record indicate a correlation between insurance scores and risk of loss. The affidavit of Morrall Claramunt, Executive Vice President and Secretary of plaintiff Frankenmuth Mutual Insurance

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sioner's authority to "execute and enforce" the provisions of the Insurance Code and to "effect [its] purposes" does not encompass the authority to rewrite the Insurance Code.

[20] MCL 500.2110a provides, in relevant part:

> If uniformly applied to all its insureds, an insurer may establish and maintain a premium discount plan utilizing factors in addition to those permitted by section 2111 for insurance if the plan is consistent with the purposes of this act and reflects reasonably anticipated reductions in losses or expenses.

Company, is representative. Claramunt stated in his affidavit that "Frankenmuth's experience shows that there is a clear and direct correlation between insurance scores and risk. Among our insureds, people with higher insurance scores are better risks." Claramunt stated that 91 percent of Frankenmuth's homeowners insurance customers and 89 percent of its automobile insurance customers receive insurance score discounts on their premiums. He estimated that 68.1 percent of Frankenmuth's homeowners insurance customers and 43.5 percent of its automobile insurance customers would experience premium increases as a result of the OFIS rules' ban on insurance scoring. Claramunt stated that "[t]hese premiums do not reflect a shift in corresponding risk of loss, but result in low-risk insureds subsidizing the insurance rates of high-risk insureds." Proposed Intervenors' Appendix to Brief in Support of Motion for Preliminary Injunction, March 29, 2005, included in Plaintiffs Appendix in Docket No. 137407, p 116a. Affidavits of representatives of plaintiffs Farm Bureau Insurance Company, Progressive Michigan Insurance Company, Hastings Mutual Insurance Company, and Citizens Insurance Company of America similarly stated that those companies' experiences show a correlation between insurance scores and risk, and that the OFIS rules would result in lower-risk insureds subsidizing the rates of higher-risk insureds. See *id*. at 115a-152a.

Evidence in the administrative record also supports the conclusion that there is a correlation between insurance scores and risk of loss. For example, according to a statement submitted by Allstate Insurance Company, "the use of credit information is the most powerful predictor of losses to be developed in the past 30 years." Plaintiffs' Appendix in Docket No. 137400, p 200b. A chart submitted by Allstate Insurance Com-

pany based on Michigan data demonstrates that "insureds . . . that have superior insurance scores have [a] corresponding superior loss cost experience," and that insureds with the lowest insurance scores have "over 50% more claims paid" than insureds with the highest insurance scores. *Id.* at 203b. In addition, Michigan data submitted by Farm Bureau Insurance of Michigan "clearly suggests that, as a group, insureds with better insurance scores have better loss experience." *Id.* at 98b. The personal auto product manager for Progressive Michigan Insurance Company testified that "[o]ur data shows that credit information is highly predictive of loss . . . ." *Id.* at 105b. A comprehensive study conducted by EPIC Actuaries, LLC, concluded that "the propensity for loss decreases as [the] insurance score increases." *Id.* at 59b. Finally, the Virginia Bureau of Insurance Study concluded that "there is a concrete statistical correlation between insurance scores based on credit bureau data and the likelihood of an individual filing an insurance claim." *Id.* at 132b.[21]

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[21] Contrary to the dissent's contention, these studies cannot be summarily dismissed on the basis that they used "univariate analysis" and "analyzed data from states other than Michigan." The EPIC study cited above, "[u]sing *multivariate* analysis techniques to adjust the data for interrelationships between risk factors, [concluded that] insurance scores were found to be correlated with the propensity for loss." *Id.* at 30b (emphasis added). This same study also explained that "graphs for *each state* . . . exhibit strikingly similar patterns of decreasing claim frequencies with increasing insurance scores to the pattern observed in the countrywide data." *Id.* at 33b (emphasis added). In addition, the Allstate chart mentioned above includes Michigan-only data, *id.* at 203b, and Farm Bureau's data cited above are also exclusively from Michigan. *Id.* at 102b. Finally, the dissent incorrectly asserts that none of these studies includes data on Michigan home policies. Allstate provided a chart that includes data on Michigan home policies and this chart shows that insureds with the highest insurance scores also incur "far less loss costs" than do insureds with lower insurance scores. *Id.* at 203b.

Defendant acknowledges that "there is no dispute that [MCL 500.2110a] authorizes a premium discount plan based on factors that correlate to expected reductions in losses or expenses. For example, discounts may be based on maintaining fire extinguishers in the home

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Concerning the EPIC study, the dissent further argues, relying on the 2004 OFIS report to JCAR, *supra* at 20, 24, that the actual Michigan data in the EPIC study undermine the authors' assertion that the graphs for each state exhibit similar patterns of decreasing claims frequencies with increasing insurance scores. Michael J. Miller, one of the authors of the EPIC study, has specifically responded to these claims. In an April 12, 2005 affidavit, Miller states that "[t]he OFIS is wrong" in claiming "that the conclusions in our June 2003 report are 'totally contradicted' by the Michigan data in our sample." Miller explains that the EPIC study was based on data from six automobile coverages: bodily injury liability, property damage liability, medical payments, personal injury protection, comprehensive, and collision. The study's conclusions were based on the results from all six coverages, but because of the sheer size of the report, the authors chose to exhibit in the report results from only one of the six coverages: property damage liability. While that was a good choice for 49 states, it was not an ideal choice for Michigan because of Michigan's unique no-fault law, which causes the frequency of property damage claims in Michigan to be about one-fifth of the rate countrywide. "The relatively few claims resulted in substantial random variations in the data, making the correlation between credit-based insurance scores and losses less obvious in the Michigan data for this coverage." Miller continues:

> Attached to this affidavit are five exhibits of the Michigan data from our June 2003 study. Each of the five Michigan coverages is represented by a separate graph. *These exhibits show for Michigan exactly what we found from the countrywide data: credit-based insurance scores are correlated with the propensity for an insurance claim, or loss*.
>
> Given this strong correlation which is evident in Michigan and across the country, it would be unreasonable to assume that there is no relationship between credit-based insurance scores and auto insurance claims. The knowledge that credit-based insurance scores are related and predictive of insurance losses, means that rates established without reflection of credit scores will be inadequate for some insureds, excessive for other insureds, and unfairly discriminatory for all. [Plaintiffs' Appendix in Docket No. 137407 at 169a-170a (emphasis added).]

because it is expected that the presence of fire extinguishers will be associated with reduced losses." Defendant's Brief in Docket No. 137400, p 18. Defendant argues, however, that MCL 500.2110a does not permit a premium discount plan using insurance scoring "because insurance scoring is not associated with anticipated reductions in overall losses. In other words, insurers do not expect their overall losses to change whether or not they have an insurance-scoring discount plan." *Id*. (emphasis omitted). In support of this conclusion, defendant states that "insurers admitted" at the public hearings and as part of the public comment process "that doing away with insurance scoring would not change overall premiums." *Id*. Defendant quotes testimony from a spokesperson for State Farm Insurance Company: "Insurance scoring does not change the total amount of premium collected by the insurance companies and a ban of its use will not change the total amount either." *Id*. at 19.

From insurers' testimony that the OFIS rules banning insurance scoring would not result in an industry-wide reduction in premiums for insurance consumers,[22] defendant argues that insurers do not expect a reduction in "overall losses" to be associated with offering discounts for insurance scores. Defendant's argument

[22] The State Farm representative defendant quotes was testifying in opposition to the OFIS rules. She was voicing State Farm's "strong disagree[ment]" with the claim that the OFIS rules would result in rate reductions for consumers. The representative testified that the rules would not result in "across the board thirty to forty percent premium reductions" and that "the amount paid by each individual consumer would be less reflective of their individual risk." As a result of the OFIS rules, "[p]olicyholders with higher insurance scores, and also less likelihood for future losses, will lose this discount and experience an increase in insurance premiums. They will be subsidizing those policyholders with lower insurance scores and higher chances of future losses." Defendant's Appendix in Docket No. 137400, p 112a-113a.

misreads MCL 500.2110a, which says nothing about *overall* losses or expenses. MCL 500.2110a allows "an insurer" to establish "*a plan*" "if *the plan* . . . reflects reasonably anticipated reductions in losses or expenses." The plain meaning of this provision is that an insurer may establish a plan that it reasonably anticipates will reduce *its own* losses or expenses. It is unclear how an insurer would "reasonably anticipate[]" the effect of its premium discount plan on *industry-wide* losses or expenses.[23] Individual insurers *do*, of course, anticipate reductions in their own losses or expenses to result from the use of premium discount plans using insurance scoring. Specifically, they anticipate that insurance score discounts will enable them to attract and retain more low-risk customers by offering these customers lower rates. Plaintiffs have demonstrated a clear correlation between insurance scores and risk of loss, as already discussed. Therefore, they have established that a discount plan that enables an insurer to attract and retain more lower risk insureds "reflects reasonably anticipated reductions in losses or expenses for that insurer."[24]

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[23] The dissent correctly observes that "nowhere does defendant specifically contend that a discount plan is permissible under MCL 500.2110a only if it reflects anticipated reductions in losses or expenses across the entire insurance industry." Given defendant's reliance on testimony that clearly refers to the effect of insurance scoring on industry-wide insurance premiums, however, it appears that defendant's repeated references to "overall" premiums and "overall" losses are to industry-wide premiums and losses.

Moreover, defendant's effort to distinguish discounts for safety devices from discounts for good insurance scores appears to be premised on an assumption that the former discounts reduce losses on an industry-wide basis in a way the latter do not.

[24] The illustration provided by defendant (Defendant's Brief in Docket No. 137400, p 19-20) and adopted by the dissent does not "show[]," *id*. at 20, that insurance scores do not reflect reasonably anticipated losses or

Defendant's attempts to distinguish the use of insurance scores to establish a premium discount plan from the use of safety devices to establish such a plan fails to acknowledge that MCL 500.2111 already permits insurers to take into account "[s]ecurity and safety devices," including "smoke detectors" and "similar, related devices." MCL 500.2111(7)(b). Similarly, for automobile insurance, the statute permits "[u]se of a safety belt" to be used as a classification factor. MCL 500.21112(b)(*iv*). The Legislature added MCL 500.2110a in 1997 to permit insurers to offer discounts on the basis of factors "in addition to those permitted by" MCL 500.2111. Defendant's effort to distinguish discounts for safety devices from discounts for higher insurance scores also fails to recognize that offering discounts for high insurance scores, like offering discounts for safety devices, allows insurers to attract insureds who present less risk (because they currently have safety devices or high insurance scores), and may provide future incentives for insureds to acquire safety devices or improve their insurance scores, and thus become statistically less risky customers. There is little difference between providing a discount for anti-lock brakes, for example, and providing a discount based on high insurance scores.[25]

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expenses; it merely assumes that an insurer's expected losses are $900 both before and after instituting a premium discount plan using insurance scoring. See *id*. ("To illustrate, assume that an insurer's actuaries conclude it needs to collect $900 in premium[s] to pay for its expected losses and expenses. . . . If the insurer initiates insurance scoring, it still needs to collect $900 because there is no evidence that insurance scoring affects the overall expected losses.")

[25] In 2002, the then-Insurance Commissioner concluded that "if responsible behavior in general leads to the predictive link between credit histories and insurance losses, as insureds change behavior to obtain better insurance credit scores they may experience fewer losses." Fitzgerald Report, *supra* at 19. Therefore, even if, as defendant and the dissent contend, offering a discount to insureds with high insurance scores will not change the total premiums that insurers collect from their insureds

Discounts for anti-lock brakes are offered because they reduce the risk of loss, and discounts for high insurance scores are offered because they reduce the risk of loss. The more insureds there are with anti-lock brakes, the lower the risk of overall loss. Likewise, the more insureds there are with high insurance scores, the lower the risk of overall loss.

Defendant also argues that a premium discount plan using insurance scoring is impermissible under MCL 500.2110a because it ignores one of the express purposes of the Insurance Code: to make insurance available and affordable for everyone.[26] Defendant contends

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today, just as with offering a discount to insureds with anti-lock brakes will not change such premiums *today*, offering such discounts may well reduce premiums in the future, as insureds learn what is required in order to reduce their own risks of loss, and, thereby, to also reduce their premiums. The dissent complains that "setting premium rates on the basis of insurance scoring simply reallocates the amount each insured pays based on its insurance score." However, the dissent overlooks the obvious fact that setting premium rates without considering insurance scoring *also* reallocates the amount insureds pay—in that instance, by requiring those who have been the most successful in meeting their financial obligations to subsidize those who have not, despite clear evidence that those in the former group do pose less of a risk of loss than those in the latter group.

As our analysis of the evidence in the preceding pages ought to make clear, we do not "presuppose[]" that insurance scoring is predictive of loss, as the dissent contends. Having concluded that plaintiffs have established a correlation between insurance scores and risk of loss, our purpose here is to (1) explain that MCL 500.2110a does not require a premium discount plan to result in an "overall reduction in premiums," and (2) point out that offering discounts to insureds with high insurance scores may nonetheless reduce premiums in the future, just as offering discounts for safety devices may reduce premiums in the future.

[26] See MCL 500.100, which states that the Insurance Code is "[a]n act to . . . provide for the continued availability and affordability of automobile insurance and homeowners insurance in this state and to facilitate the purchase of that insurance by all residents of this state at fair and reasonable rates . . . ."

that, unless a premium discount plan reduces overall losses and reduces premiums for some policyholders without a corresponding increase in premiums for others industry-wide, it is inconsistent with the Legislature's purpose of making insurance available and affordable for everyone. These assertions about the overarching purposes of the insurance code are unavailing because, as discussed above, MCL 500.2110a expressly permits "*an* insurer" to establish "*a plan*" "if *the plan* . . . reflects reasonably anticipated reductions in losses or expenses."

Moreover, in his 2002 report, Commissioner Fitzgerald concluded that "insurance credit scoring contributes to the continued availability and affordability of automobile and homeowners insurance." Fitzgerald Report, *supra* at 17. There is also evidence in the administrative record that the majority of Michigan residents will see an increase in their insurance premiums *if insurance scoring is prohibited*. See Plaintiffs' Appendix in Docket No. 137400 at 98b, 106b, 169b, 194b, and 204b. If so, the prohibition of insurance scoring would obviously make insurance less affordable for many Michigan policyholders. The availability of insurance would be diminished because insurers would no longer be able to use "the most powerful predictor of losses" to determine rates. *Id.* at 200b. A number of insurers submitted testimony indicating that competition in Michigan would likely decrease because of the increased risks associated with a less sophisticated and precise classification structure, thereby decreasing the availability of insurance. *Id.* at 100b and 177b. For example, one insurer opined:

> If Michigan joins the distinct minority of states rejecting [insurance scoring] and depriving carriers of this highly predictive rating tool, [we] fear[] that many national carriers will decline to write in this state. Declining carrier

> presence will translate to fewer options for consumers and ultimately, higher rates. [*Id*. at 177b.]

The Federal Trade Commission (FTC) also explained in a report to Congress that using insurance scoring is of broad benefit:

> Insurance companies have a strong economic incentive to try to predict risk as accurately as possible. In a competitive market for insurance in which all firms have access to the same information about risk, competition for customers will force insurance companies to offer the lowest rates that cover the expected cost of each policy sold. If an insurance company is able to predict risk better than its competitors, it can identify consumers who currently are paying more than they should based on the risk they pose, and target those consumers by offering them a slightly lower price. Thus, developing and using better risk prediction methods is an important form of competition among insurance companies.[27]

It seems unlikely that more available and more affordable insurance will result from decreased competition among insurers any more than such a market phenomenon would likely result in the increased availability or affordability of any other product or service. That is, it is the *prohibition*, not the *allowance*, of insurance scoring that will, in fact, make insurance both less available and less affordable to Michigan residents. It is noteworthy in this regard that after the Maryland legislature banned the use of insurance scoring for homeowners insurance, rates increased as much as 20 percent for homeowner policyholders, and at least one

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[27] See Federal Trade Commission, *Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance* (July 2007), p 8, available at <http://www.ftc.gov/os/2007/07/P044804FACTA_Report_Report_Credit-Based_Insurance_Scores.pdf> (accessed June 23, 2010).

insurer indicated that about 75 percent of its homeowner policyholders incurred rate increases.[28]

Even defendant does not appear to dispute that while banning insurance scoring would lower insurance premiums for insurance customers with lower credit scores, it would *raise* premiums for many others with higher insurance scores who are now receiving discounts on the basis of those scores. It is difficult to see how offering discounts to some insureds on the basis of good insurance scores is inconsistent with the Insurance Code's general purpose of availability and affordability of insurance for all consumers. Defendant has not shown that insurance scoring cannot be used to establish a premium discount plan that complies with MCL 500.2110a.

iii. INSURANCE SCORING DOES NOT PRODUCE RATES THAT ARE UNFAIRLY DISCRIMINATORY

For the reasons explained above, insurance scoring may be used to establish a premium discount plan under Chapter 21. For insurance under Chapters 24 and 26, insurers must give due consideration to "past and prospective loss experience" and "all other relevant factors . . . ." MCL 500.2403(1)(a); MCL 500.2603(1)(a). "Risks may be grouped by classifications for the establishment of rates and minimum premiums," and "rating plans may measure any differences among risks that may have a probable effect upon losses or expenses . . . ." MCL 500.2403(1)(c); MCL 500.2603(1)(c). "Rates shall not be excessive, inadequate, or unfairly discriminatory." MCL 500.2403(1)(d); MCL 500.2603(1)(d).

Thus, under Chapters 24 and 26, insurers may generally establish any rating plan that "measures any differ-

[28] Statement of Westfield Group to the Commissioner, dated July 29, 2004, attached to letter received from plaintiff following oral arguments.

ences among risks that may have a probable effect upon losses or expenses." As discussed above, the experience of the insurance industry, as established in the lower court record, demonstrates a correlation between insurance scores and risk of loss. Thus, just as insurance scoring may be used to establish a premium discount plan under Chapter 21, the use of insurance scoring as part of a rating plan is consistent with Chapter 24 and 26. All three chapters, however, prohibit rates that are "excessive, inadequate, or unfairly discriminatory." MCL 500.2109(1)(a); MCL 500.2403(1)(d); MCL 500.2603(1)(d).

Defendant argues that insurance scoring is contrary to the Insurance Code because it produces rates that are unfairly discriminatory. As noted, Chapters 21, 24, and 26 all provide that "[r]ates shall not be . . . unfairly discriminatory." MCL 500.2109(1)(a); MCL 500.2403(1)(d); MCL 500.2603(1)(d). Chapters 21, 24, and 26 define "unfairly discriminatory" in a nearly identical fashion:

> A rate for a coverage is unfairly discriminatory in relation to another rate for the same coverage if the differential between the rates is not reasonably justified by differences in losses, expenses, or both, or by differences in the uncertainty of loss, for the individuals or risks to which the rates apply. A reasonable justification shall be supported by a reasonable classification system; by sound actuarial principles when applicable; and by actual and credible loss and expense statistics or, in the case of new coverages and classifications, by reasonably anticipated loss and expense experience. A rate is not unfairly discriminatory because it reflects differences in expenses for individuals or risks with similar anticipated losses, or because it reflects differences in losses for individuals or risks with similar expenses. [MCL 500.2109(1)(c); see also MCL 500.2403(1)(d); MCL 500.2603(1)(d).][29]

[29] MCL 500.2403(1)(d) and MCL 500.2603(1)(d) are nearly identical, except that they add a sentence at the end of the definition: "Rates are

An existing OFIS rule defines "reasonable classification system" as

> a system designed to group individuals or risks with similar characteristics into rating classifications which are likely to identify significant differences in mean anticipated losses or expenses, or both, between the groups, as determined by sound actuarial principles and by actual and credible loss and expense statistics or, in the case of new coverages or classifications, by reasonably anticipated loss and expense experience. [Mich Admin Code, R 500.1505(3).]

Defendant and the dissent argue that insurance scoring is not a reasonable classification system because credit reports are unreliable and their use therefore results in misclassification of policyholders. Significantly, however, although the Commissioner also regulates the state banking and finance industries, the Commissioner has taken no action to curtail the use of credit reports in these industries. Indeed, the state of Michigan, including the Commissioner's own office, employs credit reports to make thousands of decisions each year that affect Michigan residents. In 2009 alone, the state spent over $250,000 of taxpayer dollars to obtain thousands of credit reports.[30] Indeed, by requiring the Commissioner and other state agencies to obtain credit reports, the Legislature has effectively determined that credit reports are reliable. See, e.g., MCL 493.137(4)(b)(*i*) and MCL 493.163(1)(a)(*ii*).

In support of its argument that credit reports are inaccurate, defendant primarily relies on a 2003 report

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not unfairly discriminatory if they are averaged broadly among persons insured on a group, franchise, blanket policy, or similar basis."

[30] Contract No. 071b6200274, On-Line Credit Reporting Services for the Department of Labor & Economic Growth, available at <http://www.michigan.gov/documents/buymichiganfirst/6200274_257338_7.pdf> (accessed June 23, 2010).

by the United States General Accounting Office (GAO). The report is entitled "Limited Information Exists on Extent of Credit Report Errors and Their Implications for Consumers."[31] As the title suggests, the GAO study detailed in the report essentially found that too little information existed to draw any conclusions about the accuracy of credit reports. The GAO Report Highlights explain that "[i]nformation on the frequency, type, and cause of credit report errors is limited to the point that a comprehensive assessment of overall credit report accuracy using currently available information is not possible." It further notes that "[i]ndustry officials and studies indicated that credit report errors could either help or hurt individual consumers depending on the nature of the error and the consumer's personal circumstances." Defendant cites three studies discussed in the report that raised concerns about the accuracy of credit reports: one by the Consumer Federation of America and National Credit Reporting Association, one by the U.S. Public Interest Research Group, and a survey conducted by Consumers Union and published by Consumer Reports. GAO Report, *supra* at 4-6. With respect to these studies, the GAO report concluded:

> We cannot determine the frequency of errors in credit reports based on the Consumer Federation of America, U.S. PIRG, and Consumers Union studies. Two of the studies did not use a statistically representative methodology because they examined only the credit files of their employees who verified the accuracy of the information, and it was not clear if the sampling methodology in the third study was statistically projectable. Moreover, all three studies

[31] GAO, Statement for the Record Before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Consumer Credit, Limited Information Exists on Extent of Credit Report Errors and Their Implications for Consumers (July 31, 2003). Available at <http://www.gao.gov/new.items/d031036t.pdf> (accessed June 23, 2010).

> counted any inaccuracy as an error regardless of potential impact. Similarly, the studies used varying definitions in identifying errors, and provided sometimes obscure explanations of how they carried out their work. Because of this, the findings may not represent the total population of credit reports maintained by the [consumer reporting agencies, or] CRAs. Moreover, none of these groups developed their findings in consultation with members of the credit reporting industry, who, according to a [Consumer Data Industry Association][32] representative, could have verified or refuted some of the claimed errors.
>
> Beyond these limitations, a CDIA official stated that these studies misrepresented the frequency of errors because they assessed missing information as an error. According to CRA officials errors of omission may be mitigated in certain instances because certain lenders tend to use merged credit report files in making lending decisions . . . . [*Id*. at 9.]

The materials defendant cites for the proposition that credit reports are unreliable are inconclusive at best. Moreover, there is evidence in the administrative record that most of the "errors" in credit reports are minor ones, such as misspelled street names, that have little or no substantive effect on the actual insurance scoring itself. Plaintiffs' Appendix in Docket No. 137400 at 118b-119b, 206b. See also the written testimony of Allstate Insurance Company, indicating that its "internal data," derived from the more than 43.5 million credit reports it ordered in 2001, 2002, 2003, in connection with the use of insurance scoring models, "indicat[e] a minute amount of error." *Id*. at 206b.[33] Any

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[32] The Consumer Data Industry Association is a trade association for the consumer reporting agencies.

[33] Further, the Fair Credit Reporting Act requires furnishers to carefully evaluate the accuracy and completeness of account information before it is furnished to any CRA. 15 USC 1681s-2. The FTC advises consumers that credit reports are a predictor of risk of loss and may affect their insurance

"unreliability" resulting from minor errors that have little or no effect on insurance scoring is irrelevant for purposes of the Insurance Code. In order for any unreliability to produce rates that are unfairly discriminatory within the meaning of the Insurance Code, the unreliability would have to result in a "differential between the rates" that "is not reasonably justified by differences in losses, expenses, or both, or by differences in the uncertainty of loss, for the individuals or risks to which the rates apply." MCL 500.2109(1)(c); see also MCL 500.2403(1)(d); MCL 500.2603(1)(d). A rate is not unfairly discriminatory if there is a "reasonable justification" for the differential in rates "supported by a reasonable classification system." *Id*. Here, plaintiffs have demonstrated that insurance scoring may be used to establish a "reasonable classification system." Plain-

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premiums. FTC Facts for Consumers, <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre24.shtm> (accessed on June 23, 2010). Consumers have many opportunities to obtain all of their credit report file information, without charge, from every CRA to see whether the information is inaccurate or incomplete. 15 USC 1681j(a)(1)(A). Every time a Michigan consumer is denied any credit, insurance, or other benefit based in whole or in part on credit report information (including insurance scores), the consumer receives an adverse action notice informing him of the right to obtain a free copy of his credit report. 15 USC 1681m(a)(3). Even if the consumer obtains the applied-for insurance, he will still receive an adverse action notice informing him of the right to obtain a free credit report if he is charged a premium that is higher than it would have been had the insurance score not been considered. *Safeco Ins Co of America v Geico Ins Co*, 551 US 47, 64; 127 S Ct 2201; 167 L Ed 1045 (2007) (". . . Congress meant to require notice and prompt a challenge by the consumer only when the consumer would gain something if the challenge succeeded."). With this information, the consumer may obtain his credit report and determine whether any inaccurate information caused the adverse action. If the consumer disputes the accuracy or completeness of his information through the CRA that furnished the credit report, the CRA must conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate, and within 30 days the CRA must delete any information that is determined to be inaccurate or cannot be verified. 15 USC 1681i(a)(1)(A) and (a)(5)(A).

tiffs' "actual and credible loss statistics" indicate that insurance scoring may be used to establish a "system designed to group individuals or risks with similar characteristics which are likely to identify significant differences in mean anticipated losses or expenses, or both, between the groups." Mich Admin Code, R 500.1505(3). For example, an affidavit of Dawn Elzinga, Director of Property Casualty Actuarial and an employee of plaintiff Farm Bureau, summarizes data collected by Farm Bureau reflecting its losses since Farm Bureau began using insurance scoring premium discounts for personal automobile insurance on July 1, 2000. From 2000 through 2004, insureds with the highest insurance scores (those receiving the largest discounts) filed 20 claims for every 100 cars insured, while insureds with the lowest insurance scores (those who were not receiving any discount) filed 28 claims for every 100 cars insured. See Plaintiff's Appendix in Docket No. 137407 at 124a-125a. Similarly, plaintiff Hastings submitted to the trial court actuarial analyses it commissioned in 2004 in order to comply with OFIS filing requirements. The analyses demonstrate a direct, linear relationship between insurance scores and risk for both automobile and homeowners policies. According to an affidavit of Keith E. Jandahl, Vice President of Underwriting for Hastings, these analyses were filed with OFIS, which never challenged the filing. See *id*. at 140a, 143a, and 145a.[34]

Accordingly, we reject defendant's argument that the use of insurance scoring inherently violates the Insurance Code's prohibition on rates that are "unfairly

[34] In response to the dissent's argument that "the circuit court record provides little that undermines defendant's factual findings made at the public hearings," we note that, in addition to the affidavits cited above, Commissioner Fitzgerald's 2002 report, which found a correlation between insurance scores and risk of loss, Fitzgerald Report, *supra* at 17, is part of the circuit court record.

discriminatory." Because the Commissioner has no authority under the Insurance Code to ban a practice that the code permits, the OFIS rules exceed the scope of the Commissioner's rulemaking authority under the Insurance Code. Under *Luttrell*, 421 Mich at 100, the OFIS rules are invalid.[35]

IV. CONCLUSION

The Commissioner has the authority to insure that insurers' practices comply with the Insurance Code. Nothing about the practice of insurance scoring, however, amounts to a violation of the Insurance Code per se. The Commissioner exceeded her authority by enacting a total ban on a practice that the Insurance Code permits. Accordingly, we vacate the judgment of the Court of Appeals and reinstate the trial court's order declaring the OFIS rules invalid and permanently enjoining their enforcement.

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

CORRIGAN, J. (*concurring*). I write separately to explain that I would overrule *Mich Ass'n of Home Builders v Mich Dep't of Labor & Economic Growth Dir*, 481 Mich 496; 750 NW2d 593 (2008), because I believe that it was wrongly decided and I see no reason not to correct the error now.

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[35] In this Court's order granting the applications for leave to appeal, we also directed the parties to address whether the OFIS rules "violated plaintiffs' due process rights" and "were arbitrary and capricious." *Ins Institute*, 483 Mich at 1000. Because we resolve this case on statutory grounds, we do not reach the constitutional issue. We need not address whether the rules are arbitrary and capricious because we conclude that they are not "within the matter covered by the enabling statute." *Luttrell*, 421 Mich at 100 (citation and quotation marks omitted).

In *Home Builders*, we held in a memorandum opinion that "judicial review of an administrative rule, which by definition constitutes a non-contested case, is limited to the administrative record and that the administrative record may not be expanded by a remand to the administrative agency." *Id*. at 498. Noting the definition of "contested case," MCL 24.203(3), we reasoned that "[a] non-contested case would therefore encompass administrative determinations that do not fall within the definition of a contested case." *Id*. We concluded that, because the issue before us involved a "rule," which is not a contested case, MCL 24.207(f), "the review of an administrative rule is categorized as involving a non-contested case." *Home Builders*, 481 Mich at 498.

We then reviewed the procedure applicable to a contested case under chapter 6 of the Administrative Procedures Act (APA), MCL 24.201 *et seq*., including its express provision for expansion of the record. *Home Builders*, 481 Mich at 499-501. We concluded that "[t]he absence of a similar provision for non-contested cases strongly suggests the limited scope of judicial review in these cases under the legal maxim *expressio unius est exclusio alterius*." *Id*. at 500-501. "Accordingly, we hold that judicial review of an administrative rule is limited to the administrative record and that the administrative record may not be expanded by a remand to the administrative agency." *Id*. at 501.

Professor Don LeDuc subsequently criticized our decision in *Home Builders* as "fail[ing] to recognize [] that all administrative actions or outcomes covered by the Michigan APA that are not contested cases are not the same." LeDuc, Michigan Administrative Law § 4:35 (2009 Supp), p 30. According to Professor LeDuc,

> [t]he correct analysis should have been premised on the definition of rule and the nature of the rulemaking process,

> and it should have proceeded then to discussing the role of the rulemaking record in judicial review and in the determination of the validity of rules. Because a rule under the Michigan structure does not result from an evidentiary record, discussions about adding evidence are irrelevant. . . .
>
> The Court concluded that the lower court erred when it remanded the matter to the agency so that it could add to the record or explain its decision. That conclusion was correct, but virtually all [of] its analysis was wrong. [*Id*.]

Although we generally adhere to the principle of *stare decisis*, we should reexamine a precedent where legitimate questions have been raised about its correctness. *Robinson v Detroit*, 462 Mich 439, 463-464; 613 NW2d 307 (2000). If we determine that a prior case was wrongly decided, we also "examine the effects of overruling, including most importantly the effect on reliance interests and whether overruling would work an undue hardship because of that reliance." *Id*. at 466. "As to the reliance interest, the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Id*.

Professor LeDuc correctly analyzed the flaw in *Home Builders*. "Non-contested case" is not a designation that appears in the APA, and, as discussed above, the record created during a contested case proceeding is different from the record of a public hearing held during the rulemaking process. We wrongly based our analysis in *Home Builders* on the absence in the APA of a provision for adding evidence in a "non-contested case." I see no reason not to correct our error. Our decision in *Home Builders* has not become "so embedded, so accepted, so fundamental, to everyone's expectations that

to change it would produce not just readjustments, but practical real-world dislocations." *Robinson*, 462 Mich at 466. Only one Court of Appeals case—this one—has cited our decision in *Home Builders*.

Accordingly, I would overrule *Home Builders* and hold that the trial court's review of the OFIS rules was not limited to the administrative record.

WEAVER and YOUNG, JJ., concurred with CORRIGAN, J.

KELLY, C.J. (*dissenting*). I agree with the majority that the Court should reach the substantive issues in this case.[1] I respectfully dissent from its conclusion regarding the validity of the rules promulgated by defendant that prohibit insurers from classifying insureds on the basis of their credit records (the OFIS rules). Also, of particular concern to me is the majority's harmless-error analysis. It is seriously flawed and sets a dangerous precedent for the future.

THE STANDARD OF REVIEW

In *Luttrell v Dep't of Corrections*,[2] this Court adopted a three-pronged test for analyzing the validity of an administrative agency's rules:

> Where an agency is empowered to make rules, courts employ a three-fold test to determine the validity of the rules it promulgates: (1) whether the rule is within the matter covered by the enabling statute; (2) if so, whether it complies with the underlying legislative intent; and (3) if it

[1] I disagree with the majority's waiver analysis. I reach the substantive issues because, like the majority, I have determined that, if there are procedural errors, they do not affect my conclusion on the substantive issues.

[2] *Luttrell v Dep't of Corrections*, 421 Mich 93; 365 NW2d 74 (1984).

> meets the first two requirements, when *[sic]* it is neither arbitrary nor capricious.[3]

In *In re Complaint of Rovas against SBC Michigan*, we held that an administrative agency's interpretation of statutes is entitled to "respectful consideration" and "should not be overruled without cogent reasons."[4]

THE MAJORITY'S CRITICAL ERRORS

In my view, the majority goes awry in at least five significant ways. First, it misapplies the applicable standards of review. Under the first prong of *Luttrell*, the proper inquiry is not whether "insurance scoring is permissible under the Insurance Code."[5] The Code says nothing about insurance scoring. The relevant inquiry is whether rules banning the use of insurance scoring in setting insurance rates are within the matters covered by MCL 500.210.[6]

Second, by considering and rejecting each argument offered in support of the OFIS rules, the majority

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[3] *Id.* at 100 (citation and quotation marks omitted).

[4] *In re Complaint of Rovas against SBC Michigan*, 482 Mich 90, 108; 754 NW2d 259 (2008).

[5] *Ante* at 389; MCL 500.100 *et seq*.

[6] Unlike the majority, I do see a difference between this inquiry and its phrasing of the question. Under MCL 500.210, the Commissioner has the authority to promulgate rules and regulations to effectuate the purposes of the Insurance Code. In my view, the power to enact rules to "effectuate the purposes" of the Insurance Code provides a broader grant of authority than the power simply to inquire whether the Code permits a particular practice. Because the majority hinges its conclusion on this prong of the *Luttrell* test, its precise application is imperative.

As the majority observes, I do question whether the Insurance Code authorizes insurance scoring. However, I do so as part of the second prong of my *Luttrell* analysis, ascertaining whether the OFIS rules comply with legislative intent.

improperly shifts the burden of proof to defendant.[7] Third, the majority fails to give "respectful consideration" to defendant's interpretation of the applicable statutes as *In re Rovas Complaint* requires.[8]

Fourth, the majority errs by not confining its review of the record to conform to its "harmless error" analysis. The majority holds that "even if the trial court erred by not limiting its review to the administrative record, the error was harmless because there is ample evidence *in that record* to support the trial court's conclusion that insurance scoring is permissible under the Insurance Code."[9] Yet the majority subsequently expands its review by referring to evidence outside that record.

The majority has it backwards. If the circuit court erred by creating its own evidentiary record, its conclusion must be wholly supportable on appeal by evidence in the administrative record. For an error to be considered harmless, the conclusion reached in the case must be supportable notwithstanding the alleged error.[10] If the majority deems it necessary, as evidenced by its analysis, to examine both the administrative record and the circuit court record to support its conclusion, the error cannot be "harmless."[11]

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[7] For example, the majority offers no authority to support its conclusion that the Commissioner exceeded her authority by "enacting a total ban on a practice that the Insurance Code permits." *Ante* at 407.

[8] *In re Rovas Complaint*, 482 Mich at 108.

[9] *Ante* at 384 (emphasis added).

[10] For an error to be "harmless," it cannot "affect a party's substantive rights or the case's outcome." Black's Law Dictionary (8th ed), p 582.

[11] The majority seems to miss this point. *Ante* at 384 n 16. It can be paraphrased as follows: The majority says it can reach its result based on X (the administrative record), even if Y (the circuit court record) was erroneously admitted. Yet the majority refuses to rely solely on X, despite its assertion that X is sufficient to support its conclusion. Instead, it relies—and relies *primarily*—on Y, the record that it admits may have

After conducting a proper "harmless error" analysis, I reach the opposite conclusion from the majority. Any procedural error was harmless because the evidence in both the administrative record and the circuit court record failed to establish that the OFIS rules are invalid. Thus, my inquiry gives plaintiffs the benefit of every doubt and examines the evidence in both records. The result is that, if a procedural error occurred, it was harmless. By expanding the scope of its review, the majority fails to accord defendant the same treatment, thereby making its harmless-error analysis erroneous.

Fifth and finally, the majority's overly broad review of the record goes beyond even the administrative and circuit court records. It relies on sources outside any record provided to this Court.[12]

These errors are crucial to the outcome of the case.[13] As the discussion of the merits of plaintiffs' claims demonstrates, much conflicting evidence exists on whether insurance scoring is predictive of loss. The majority appears willing to overrule defendant's decision simply because it disagrees with it. However, when

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been erroneously admitted. If the majority refuses to rely solely on X to reach its conclusion, on what basis can it logically assert that X provides sufficient evidence for its conclusion?

[12] See, e.g., *ante* at 402 n 30.

[13] A careful reading of the majority opinion reveals that, of all the evidence relied on, only a small fraction is part of the administrative record. To the extent that the majority does rely on the administrative record, it cites it primarily for conclusory statements by plaintiffs, not actual data. *Ante* at 391 (" '[T]he use of credit information is the most powerful predictor of losses to be developed in the past 30 years.' "); *ante* at 392 ("[O]ur data shows that credit information is highly predictive of loss . . . ."). This stands in stark contrast to the short shrift the majority gives to even attempting to accurately summarize defendant's arguments. See *ante* at 395 n 23 ("it appears that defendant's repeated references to 'overall' premiums and 'overall' losses are to industry-wide premiums and losses.").

the proper level of deference is applied, it is irrelevant whether the majority would decide the issue differently. Rather, after examining the conflicting evidence, one can only conclude that defendant did not exceed her authority by promulgating the rules banning the practice.

HOME BUILDERS

Under *Home Builders*,[14] the circuit court indisputably erred by creating and considering an evidentiary record outside of what was created during the rulemaking process. However, despite the fact that the circuit court impermissibly expanded the record in contravention of *Home Builders*, I do not believe that the error is outcome determinative. Under the proper standard of review, neither the circuit court record nor the administrative record supports the trial court's conclusion that the OFIS rules are invalid.

After declining to review the administrative record and instead constructing its own record, the circuit court concluded that the OFIS rules were invalid. It did so on the basis of its independent factual conclusion that insurance scores accurately reflect differences in risk. I believe that, by reaching its own factual conclusions and failing to consider the administrative record at all, the circuit court erred.

We long ago held that "courts accord due deference to administrative expertise and [may] not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views."[15] Although this holding arose in the context of judicial review of quasi-judicial administrative decisions, I see no basis for limiting it to such cases. Judicial

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[14] *Michigan Ass'n of Home Builders v Dep't of Labor & Economic Growth Dir*, 481 Mich 496; 750 NW2d 593 (2008).

[15] *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974).

review of agency actions implicates significant questions about the separation of powers.[16] The Court of Appeals in *Home Builders* cited ample authority in summarizing this point:

> The federal courts generally limit judicial review to the administrative record already in existence, rather than permitting either review de novo or trial de novo. *Florida Power & Light Co v Lorion*, 470 US 729, 743-744; 105 S Ct 1598; 84 L Ed 2d 643 (1985); *Camp v Pitts*, 411 US 138, 142; 93 S Ct 1241; 36 L Ed 2d 106 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."); *Nat'l Treasury Employees Union v Horner*, 272 US App DC 81, 89; 854 F2d 490 (1988) ("Stated most simply, our task is to determine . . . whether [the agency] considered the relevant factors and explained the facts and policy concerns on which it relied, and whether those facts have some basis in the record."); *Norwich Eaton Pharmaceuticals, Inc v Bowen*, 808 F2d 486, 489 (CA 6, 1987). For example, in *Florida Power*, *supra* at 744, the United States Supreme Court stated:
>
> "If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. *The reviewing court is not generally empowered to conduct a* de novo *inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry*."[17]

Moreover, agency actions taken in a judicial or quasi-judicial capacity, as contrasted with those taken in a

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[16] See, e.g., *In re Rovas Complaint*, 482 Mich at 97-99.

[17] *Michigan Ass'n of Home Builders v Dep't of Labor & Economic Growth Dir*, 276 Mich App 467, 476; 741 NW2d 531 (2007) (emphasis in original), vacated in part on other grounds in *Home Builders*, 481 Mich at 501.

quasi-legislative capacity, are subject to a heightened standard of review.[18] Thus, quasi-legislative agency actions are afforded greater deference.

Accordingly, the factual findings on which an administrative agency's rule is based certainly must be considered in reviewing the validity of that rule. To allow a court to make factual findings based solely on a record made in the court would allow the judiciary to substitute its own judgment for that of the agency. Moreover, it would allow the courts to usurp the authority that the Legislature granted to administrative agencies.

THE VALIDITY OF THE OFIS RULES

The first prong of the *Luttrell* analysis requires plaintiffs to show that the OFIS rules banning insur-

[18] Compare the deferential *Luttrell* standard for review of quasi-legislative administrative agency actions, *supra* at 410-411, with the standard of review for judicial and quasi-judicial actions. The latter must be " 'authorized by law' " and its factual findings " 'supported by competent, material and substantial evidence on the whole record.' " *Viculin v Dep't of Civil Serv*, 386 Mich 375, 384; 192 NW2d 449 (1971), quoting Const 1963, art 6, § 28.

Moreover, MCL 24.306, which governs judicial review involving judicial and quasi-judicial actions, allows for reversal of an agency's decision when a decision or order of the agency is "any of the following":

> (a) In violation of the constitution or a statute.
>
> (b) In excess of the statutory authority or jurisdiction of the agency.
>
> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) Not supported by competent, material and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
>
> (f) Affected by other substantial and material error of law.

ance scoring are not "within the matter covered" by the Insurance Code.[19] In that way, plaintiffs are given the burden of showing that a total ban on insurance scoring is inconsistent with the Code. Because I conclude that the OFIS rules are within the matter covered by the Insurance Code, I conclude that plaintiffs have not met their burden. Plaintiffs cannot demonstrate either that the rules are incompatible with the underlying legislative intent or that they are arbitrary and capricious.

"WITHIN THE MATTER COVERED BY THE ENABLING STATUTE"

When courts apply the first prong of the *Luttrell* test, the most relevant authorities are the enabling statutes of the Insurance Code. MCL 500.210 defines the scope of the Insurance Commissioner's regulatory powers. Section 210 provides that

> [t]he commissioner shall promulgate rules and regulations in addition to those now specifically provided for by statute as he may deem necessary to effectuate the purposes and to execute and enforce the provisions of the insurance laws of this state in accordance with the provisions of Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to 24.80 of the Compiled Laws of 1948, and subject to Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Compiled Laws of 1948.[20]

MCL 500.210 delegates broad discretionary authority to the Commissioner to promulgate rules "as he may deem necessary" to enforce insurance laws and "effectuate the purposes" of the Insurance Code. Even Judge ZAHRA's opinion, which would have held the OFIS rules invalid, conceded that "[i]n the broadest sense, the rules

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[19] *Luttrell*, 421 Mich at 100, quoting *Chesapeake & Ohio R Co v Pub Serv Comm*, 59 Mich App 88, 98-99; 228 NW2d 843 (1975).

[20] See also MCL 500.2484 ("The commissioner may make reasonable rules and regulations necessary to effect the purposes of this chapter."); MCL 500.2674 (same).

under review do not offend the first prong of the *Luttrell* standard."[21] Moreover, as Judge WHITE noted,[22] the OFIS rules were promulgated in compliance with the prescribed procedures in the Administrative Procedures Act (APA).[23]

I agree that, on their face, the OFIS rules are within the broad discretionary authority that the Legislature bestowed on defendant to "effectuate the purposes" of the Insurance Code. The majority reaches the opposite conclusion because, as noted previously, it merely asks whether insurance scoring is "permissible" under the Insurance Code.[24]

COMPLIANCE WITH THE UNDERLYING LEGISLATIVE INTENT

The title of the Insurance Code provides that the purpose of the Code is "to provide for the continued availability and affordability of automobile insurance and homeowners insurance in this state and to facilitate the purchase of that insurance by all residents of this state at fair and reasonable rates . . . ."[25] Thus, the OFIS rules cannot satisfy this prong of the *Luttrell* standard if they are contrary to that intent. Ascertaining legislative intent necessitates a close examination of the statutory language of the applicable statutes. I would hold that the OFIS rules do not comply with the Legislature's intent if Chapters 21, 24, and 26 of the Insurance Code authorize insurance scoring.

CHAPTER 21

It is undisputed that insurance scoring is not included within the enumerated permissible rating fac-

[21] *Ins Institute*, 280 Mich App at 375 (opinion of ZAHRA, J.).

[22] *Id.* at 358 (opinion of WHITE, P.J.).

[23] MCL 24.201 *et seq*.

[24] See *ante* at 389.

[25] 1956 PA 218.

tors in MCL 500.2111. Therefore, using insurance scoring to set insurance rates is only permissible under Chapter 21 if it is a permissible "premium discount plan" under MCL 500.2110a. Affording the required "respectful consideration" to defendant's interpretation of MCL 500.2110a, I agree that setting rates based on insurance scoring does not constitute a "premium discount plan."

At the public hearings held before the OFIS rules were adopted, insurers conceded that eliminating insurance scoring would not change the total premiums that they collect from their insureds.[26] It follows that the proposed "discount plan" based on insurance scoring does not reflect a belief on the part of the insurers that insurance scoring will reduce its overall losses. If it did, the insurers would surely be forced to increase their premiums to reflect the expected increase in losses that would be incurred once their "discount plans" had been disallowed.

Rather, setting premium rates on the basis of insurance scoring simply reallocates the amount each insured pays on the basis of its insurance score. Defendant uses an example in which an insurer must collect $900 in premiums to pay for its expected losses and expenses. Dividing these losses evenly across Class A, Class B, and Class C, each class of insureds would be charged $300. However, using insurance scoring to predict losses, the insurer charges its highest scoring insureds (Class A) a $200 premium. The insurer charges its less favored policyholders a $300 premium, and its lowest scoring policyholders a $400 premium.

[26] Despite this concession, the majority feels free to conclude that "insurers do, of course, anticipate reductions in their own losses or expenses to result from the use of premium discount plans using insurance scoring." *Ante* at 395 (emphasis omitted).

The insurer still collects $900 in premiums.[27] I agree with Judge WHITE that this classification scheme constitutes an unapproved rating factor rather than a discount.[28] Therefore, I see no cogent reasons to overrule defendant's interpretation of MCL 500.2110a.[29]

CHAPTER 24 AND CHAPTER 26

Chapter 24 and Chapter 26 of the Insurance Code allow insurers greater authority in setting premiums than does Chapter 21.[30] MCL 500.2403(1)[31] and

[27] The majority's discussion of industry-wide losses and expenses is a red herring, as this illustration demonstrates. Defendant's brief frequently refers to "overall" losses. However, nowhere does defendant specifically contend that a discount plan is permissible under MCL 500.2110a only if it reflects anticipated reductions in losses or expenses across the entire insurance industry, nor does my analysis impose such a requirement.

Rather, I interpret MCL 500.2110a as the majority does, as requiring that a discount plan reasonably anticipate a reduction in losses or expenses to each insurer. Initially, I note that an insurer cannot "reasonably" anticipate a reduction in losses or expenses based on a discount plan premised on insurance scoring if credit reports are unreliable. See *infra* at 16-20.

Moreover, defendant's example illustrates that insurance rates that are set on the basis of insurance scoring will not reduce the premiums that an individual insurer collects. Instead, such rates will reallocate the dollar amount of the premium paid by each insured. I fail to see how such rates can reflect "reasonably anticipated reductions in losses or expenses" if the insurer continues to collect the same amount in total premiums.

[28] *Ins Institute*, 280 Mich App at 361.

[29] *In re Rovas Complaint*, 482 Mich at 108.

[30] MCL 500.2426 and MCL 500.2626 both state that no "rating plan" that is filed pursuant to the requirements of their respective chapters shall be disapproved if the rates thereby produced meet the requirements of the chapter.

[31] MCL 500.2403(1) provides in part:

MCL 500.2603(1)[32] provide the limitation on setting rates at issue here.

Plaintiffs argue that under MCL 500.2426 and MCL 500.2626, defendant may not disapprove rates that are based on insurance scores because insurance scoring is actuarially sound. Defendant counters that insurance scoring is not a "reasonable classification system" under MCL 500.2403(1)(d) and MCL 500.2603(1)(d). A "reasonable classification system" is defined as

> a system designed to group individuals or risks with similar characteristics into rating classifications which are likely to identify significant differences in mean anticipated losses

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(c) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans that measure variations in hazards, expense provisions, or both. The rating plans may measure any differences among risks that may have a probable effect upon losses or expenses as provided for in subdivision (a).

(d) Rates shall not be excessive, inadequate, or unfairly discriminatory. A rate shall not be held to be excessive unless the rate is unreasonably high for the insurance coverage provided and a reasonable degree of competition does not exist with respect to the classification, kind, or type of risks to which the rate is applicable. . . . A rate for a coverage is unfairly discriminatory in relation to another rate for the same coverage, if the differential between the rates is not reasonably justified by differences in losses, expenses, or both, or by differences in the uncertainty of loss for the individuals or risks to which the rates apply. A reasonable justification shall be supported by a reasonable classification system; by sound actuarial principles when applicable; and by actual and credible loss and expense statistics or, in the case of new coverages and classifications, by reasonably anticipated loss and expense experience. A rate is not unfairly discriminatory because the rate reflects differences in expenses for individuals or risks with similar anticipated losses, or because the rate reflects differences in losses for individuals or risks with similar expenses. Rates are not unfairly discriminatory if they are averaged broadly among persons insured on a group, franchise, blanket policy, or similar basis.

[32] The pertinent parts of MCL 500.2603 are identical to the portions of MCL 500.2403 cited in note 31 of this opinion.

> or expenses, or both, between the groups, as determined by sound actuarial principles and by actual and credible loss and expense statistics or, in the case of new coverages or classifications, by reasonably anticipated loss and expense experience.[33]

Thus, defendant claims that rates set based on insurance scores are "unfairly discriminatory" because they are not "likely to identify significant differences in mean anticipated losses or expenses."

An examination of both the circuit court record and the administrative record reveals the reasonableness of defendant's conclusion that rates based on insurance scores are unfairly discriminatory. First, the accuracy of credit reports, on which insurance scores are based, is unclear. The GAO report cited by the majority concluded that "a comprehensive assessment of overall credit report accuracy using currently available information is not possible."[34] As defendant noted, the evidence on this point is inconclusive.[35]

The majority appears to concede that the reliability of credit reports is subject to question. Yet it proceeds by effectively requiring defendant, rather than plaintiffs, to show that "the unreliability [in credit scores] would have to result in a 'differential between the rates' that 'is not reasonably justified . . . .' "[36]

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[33] Mich Admin Code, R 500.1505(3).

[34] United States General Accounting Office (GAO), Statement for the Record Before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Consumer Credit, Limited Information Exists on Extent of Credit Report Errors and Their Implications for Consumers (July 31, 2003). Available at: <http://www.gao.gov/new.items/d031036t.pdf> (accessed June 24, 2010).

[35] OFIS Report to JCAR (October 1, 2004), p 23 (observing the "wide divergence in opinion" regarding the accuracy of credit reports).

[36] *Ante* at 405.

I would conclude the contrary and hold that the uncertainty surrounding the accuracy of credit reports is evidence per se that a classification system based on those reports is unreasonable. It should be plaintiffs' burden to rebut this conclusion by producing evidence that such a classification is reasonable. To do so, plaintiffs would need to demonstrate that classifying persons on the basis of insurance scores is "likely to identify significant differences in mean anticipated losses or expenses."[37]

The record simply does not establish that credit scores correlate with the risk of loss in a way that makes insurance scoring a "reasonable classification system" under MCL 500.2403(1)(d) and MCL 500.2603(1)(d). Defendant reasonably rejected some of the studies submitted at the public hearings in opposition to the OFIS rules because they used "univariate analysis"[38] and analyzed data from states other than Michigan.[39] The only study not conducted by plaintiffs that included data on Michigan automobile policies, which plaintiffs cited often as supporting their position, showed "a total

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[37] In my view, if insurance scores are based on credit reports containing inaccurate information, they cannot be "likely to identify significant differences in mean anticipated losses." However, I do not further address this issue because I conclude that plaintiffs have not shown a correlation between credit scores and risk of loss.

[38] A "univariate analysis" is an analysis that takes only one factor or variable into consideration. See *Anmol's Dictionary of Statistics* (2005); *Oxford Dictionary of Statistical Terms* (2003).

Other authors have criticized the use of univariate analysis in some of the studies cited in the administrative record. See Cheng-Sheng Peter Wu and James Guszcza, *Does Credit Score Really Explain Insurance Losses? Multivariate Analysis from a Data Mining Point of View*, <http://casualtyactuaries.com/pubs/forum/03wforum/03wf113.pdf> (accessed June 24, 2010), p 9 ("Unfortunately, univariate statistical studies such as Tillinghast's do not always tell the whole story.").

[39] OFIS Report to JCAR, *supra* at 20.

lack of correlation."[40] Moreover, defendant noted that "the agency is not aware of any study at all . . . that

[40] *Id.* The study that included data from Michigan was Michael Miller and Richard Smith, *The Relationship of Credit-Based Insurance Scores to Private Passenger Automobile Insurance Loss Propensity*, available at <http://www.progressive.com/shop/EPIC-CreditScores.pdf> (accessed June 24, 2010).

The Michigan-specific data, which showed no correlation between insurance scores and frequency in filing of insurance claims, is Appendix Q of this study. It is available at <http://www.michigan.gov/documents/Attachment_5_-_EPIC_Charts_-_MI_113194_7.pdf> (accessed June 24, 2010).

The majority correctly observes that, in the body of its report, the authors asserted that the "graphs for each state . . . exhibit strikingly similar patterns of decreasing claim frequencies with increasing insurance scores to the pattern observed in the countrywide data." *Ante* at 392 n 21 (emphasis omitted), quoting Plaintiffs' Appendix in Docket No. 137400, at 33b. However, this assertion is undermined by the actual data, which show that claim frequency in Michigan based on insurance scoring ranged from only 0.5% to 0.8%. While the claimants with the highest insurance score did have the lowest rate of claims (0.5%), claimants with the third highest insurance score had one of the highest rates of claims (0.8%). Therefore, one is hard-pressed to square the actual data with the authors' conclusion that the majority quotes.

The majority excuses this disparity by citing Michael Miller's affidavit, in which Miller attempts to explain it away. *Ante* at 393 n 21. The affidavit claims that "the relatively few claims resulted in substantial random variations in the data, making the correlation between credit-based insurance scores and losses less obvious in the Michigan data for this coverage." The existence of an excuse for why the Michigan data makes the connection between credit scoring and losses "less obvious" does nothing to justify the majority's reliance on it.

Finally, Miller attached five graphs to his affidavit with Michigan-specific data purporting to buttress the EPIC study's conclusion. Again, the majority takes the author's stated conclusion at face value. However, as with the data from the EPIC study, most of the actual numbers do not show a strong correlation between credit scoring and propensity for loss. Instead, the portion of the graphs charting Michigan-specific data often deviate significantly from that pattern and do not demonstrate the "strong correlation" that the majority posits.

includes data on Michigan home policies."[41] The majority entirely ignores these findings and picks and chooses from among the available data to independently consider whether a classification system based on credit scores is reasonable.[42]

However, the circuit court record provides little that undermines defendant's factual findings made at the public hearings. Plaintiffs continued to rely heavily on the studies that defendant reasonably rejected. The new evidence introduced in the circuit court consisted primarily of affidavits from various insurance industry executives. These cite statistics that purportedly show a correlation between credit scores and risk. While generally supporting plaintiffs' position, the affidavits are

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[41] OFIS Report to JCAR, *supra* at p 20.

[42] The majority's response to this dissent on the substantive issues involved is unavailing because it presupposes the majority's ultimate conclusion: that insurance scoring is predictive of loss. *Ante* at 397, 397 n 25. Thus, its conclusions that "[d]iscounts for anti-lock brakes are offered because they reduce the risk of loss, and discounts for high insurance scores are offered because they reduce the risk of loss" do not advance its position. *Ante* at 397. Similarly, I see little value in speculating that offering discounts based on insurance scoring might lead sometime in the future to reductions in premiums. *Ante* at 397 n 25. Indeed, for defendant to rely on such speculation as a basis for formulating administrative rules is, in my view, erroneous.

Finally, the majority's contention that "setting premium rates without considering insurance scoring also reallocates the amount insureds pay" is similarly unavailing. *Ante* at 397 n 25 (emphasis omitted). Plaintiffs contend that the use of insurance scoring is permissible because it constitutes a "discount plan" under MCL 500.2110a. However, as previously noted, if insurance scoring simply reallocates rates, rather than resulting in an overall reduction in premiums, it is an unapproved rating factor, not a discount plan.

By contrast, no party has contended that setting premium rates without considering insurance scoring constitutes a "discount plan" within the meaning of MCL 500.2110a. That system simply reallocates the amount insureds pay based on permissible rating factors laid out in the relevant statutes.

insufficient to rebut defendant's conclusion that the use of insurance scoring to set rates is not a "reasonable classification system." The statistical data in the affidavits, like the studies in the administrative record, are based on a univariate analysis. For reasons cited previously, it was not unreasonable for defendant to reject this analysis.[43] Finally, I do not address the majority's discussion of sources outside the administrative and circuit court records because the majority improperly relies on them.[44] Reference to statutes that are not applicable to this case may be appropriate when discerning the proper interpretation of a statute; however, it is not warranted simply as a means of bolstering the evidence that is on the record.

As with Chapter 21, defendant's interpretation of the applicable statutory provisions in Chapters 24 and 26 is entitled to "respectful consideration" under *In re Rovas Complaint*. Because setting rates using insurance scoring is not clearly permissible under any chapter, I conclude that the OFIS rules do not violate the legislative intent behind the Insurance Code.

ARBITRARY AND CAPRICIOUS

The majority concludes that it need not decide whether the OFIS rules are arbitrary and capricious because "they are not 'within the matter covered by the enabling statute.' "[45] Given that I disagree with the majority's conclusion on the latter point, I am com-

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[43] See note 38 of this opinion.

[44] *Ante* at 402 & n 30 (citing sources outside the existing record, including a contract between the state and Credit Technologies, Inc, and references to credit scores in MCL 493.137(4)(b)(*i*) and MCL 493.163(1)(a)(*ii*) as "evidence" that credit reports are reliable).

[45] *Ante* at 407 n 35.

pelled to also address the former issue regarding whether the OFIS rules are arbitrary and capricious.

"A rule is not arbitrary or capricious if it is rationally related to the purpose of the enabling act."[46] For the reasons stated previously, I conclude that the OFIS rules are rationally related to the purpose of the Insurance Code: to provide for continued availability and affordability of insurance in this state and to facilitate the purchase of that insurance by all residents at fair and reasonable rates.

DUE PROCESS

Plaintiffs also argue that the OFIS rules are invalid because they deprive them of due process. They argue that the rules invalidate existing insurance rates without a contested case hearing and an opportunity for judicial review. I disagree.

The rules do not invalidate existing insurance rates. They are prospective only and apply solely to new and renewal policies issued after their effective date. Moreover, the rules are not self-enforcing; they do not invalidate rates. Defendant acknowledges that, after the rules take effect, insurers are entitled to notice and an opportunity for a hearing before rates may be invalidated. If an insurer's rate filing uses insurance scoring, that rate filing will be disapproved as a violation of the OFIS rules. Plaintiffs' argument conflates their right to a contested case hearing before a rate filing may be invalidated into a right to such a hearing before new rules may be promulgated. To create such a right would cripple an agency's authority to promulgate

[46] *Blank v Dep't of Corrections*, 462 Mich 103, 128; 611 NW2d 530 (2000) (opinion by KELLY, J.), citing *Dykstra v Dep't of Natural Resources*, 198 Mich App 482, 491; 499 NW2d 367 (1993).

rules and be duplicative of the procedural protections already present in the APA.

Finally, plaintiffs contend that any rate hearing will be a meaningless exercise because the outcome will be predetermined and the filing will be disapproved. This argument is disingenuous because plaintiffs chose to file this action for declaratory judgment attacking the *facial* validity of the rules. To accept plaintiffs' due process argument would be to ignore that plaintiffs chose this forum, rather than individual contested case hearings, to challenge the OFIS rules. Moreover, this argument could just as easily be raised by an insurer that sets rates on the basis of impermissible factors such as race or gender; however, it is inconceivable that such rates would be allowed simply because the result of the contested case hearing was predetermined.

CONCLUSION

I agree with the majority's decision to reach the substantive issues in this case. However, I dissent from its conclusion that the Insurance Commissioner exceeded her rulemaking authority under *Luttrell v Dep't of Corrections*.

I would hold that the OFIS rules are valid and enforceable. Therefore, I would affirm the Court of Appeals judgment vacating the circuit court's order granting a permanent injunction and declaring defendant's rules illegal, unenforceable, and void.

CAVANAGH and HATHAWAY, JJ., concurred with KELLY, C.J.

HOLMAN v RASAK

Docket No. 137993. Argued November 3, 2009 (Calendar No. 5). Decided July 13, 2010.

Andrea L. Holman, as personal representative of the estate of Linda Clippert, deceased, brought a wrongful-death medical-malpractice action in the Oakland Circuit Court against Mark Rasak, D.O. Defendant moved for a qualified protective order allowing him to conduct an ex parte interview with the decedent's treating physician. The court, John J. McDonald, J., denied the motion, ruling that the provision of the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq*., regarding protective orders pertains to documentary evidence only and that HIPAA does not authorize ex parte oral interviews. The Court of Appeals, JANSEN, P.J., and O'CONNELL and OWENS, JJ., reversed and remanded, holding that if written consent or an agreement for the disclosure of confidential health information is not provided, a treating physician may only disclose such information under conditions set out in HIPAA regulations, one of which, 45 CFR 164.512(e)(1), provides for qualified protective orders. If a qualified protective order consistent with this regulation is in place, an ex parte discussion with the health-care provider is permissible. 281 Mich App 507 (2008). The Supreme Court granted plaintiff's application for leave to appeal. 483 Mich 1001 (2009).

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

Ex parte interviews by defense counsel with treating physicians in a medical-malpractice action are permitted under Michigan law and under HIPAA if reasonable efforts have been made to secure a qualified protective order that meets the requirements of 45 CFR 164.512(e)(1)(v).

1. HIPAA does not preempt Michigan law permitting ex parte interviews because Michigan law is not "contrary" to HIPAA as that term is defined in the applicable regulations. Under HIPAA, a standard, requirement, or implementation specification of HIPAA that is contrary to a provision of state law preempts that provision unless, among other exceptions, the provision relates to the

privacy of individually identifiable health information and is more stringent—that is, provides greater privacy protection for the individual who is the subject of the individually identifiable health information—than a standard, requirement, or implementation specification adopted under HIPAA. "Contrary" means either that a covered entity would find it impossible to comply with both the state and federal requirements or that the provision of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA.

2. A covered entity would not find it impossible to comply with both Michigan law and HIPAA. Ex parte interviews are permitted under Michigan law, and nothing in HIPAA specifically precludes them. It is possible for defense counsel to insure that any disclosure of protected health information by the covered entity complies with the applicable HIPAA regulation, 45 CFR 164.512(e), by making "reasonable efforts" to obtain a qualified protective order. That regulation allows a covered entity to disclose protected health information in the course of any judicial or administrative proceeding in response to a subpoena, discovery request, or other lawful process as long as the covered entity receives satisfactory assurance that reasonable efforts have been made to secure a qualified protective order that meets the requirements of 45 CFR 164.512(e)(1)(v). "Health information" explicitly includes oral information.

3. Michigan law allowing ex parte interviews does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. Although HIPAA is concerned with protecting the privacy of individuals' health information, it does not enforce that goal to the exclusion of all other interests; rather, it balances the need to protect individual privacy with the need for disclosure in some situations.

Affirmed and remanded to the trial court for further proceedings.

Justice WEAVER, dissenting, stated that although she understood the merits of the majority's argument, she was more persuaded by the reasoning and result of Justice HATHAWAY's dissent.

Justice HATHAWAY, dissenting, would hold that ex parte interviews are not allowed in Michigan because HIPAA does not specifically authorize them, and state law that formerly authorized ex parte interviews has been preempted by HIPAA. She also disagreed with the majority's conclusion that a party need only

make a reasonable effort to obtain a qualified protective order pursuant to MCR 2.302(C) before conducting an ex parte interview.

HEALTH — HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT — MEDICAL MALPRACTICE — PROTECTIVE ORDERS — EX PARTE INTERVIEWS WITH HEALTH-CARE PROVIDERS.

Ex parte interviews by defense counsel with treating physicians in a medical-malpractice action are permitted under Michigan law and under the federal Health Insurance Portability and Accountability Act if reasonable efforts have been made to secure a qualified protective order that meets the requirements of the applicable federal regulation (42 USC 1320d *et seq*., 45 CFR 164.512[e][1][v]).

Blum, Konheim, Elkin & Ceglarek (by *Joseph L. Konheim* and *Kamron K. Lessani*) for plaintiff.

O'Connor, DeGrazia, Tamm & O'Connor, P.C. (by *Julie McCann O'Connor* and *Drew W. Broaddus*), for defendant.

Amici Curiae:

Donald M. Fulkerson for the Michigan Association for Justice.

Siemion Huckabay, P.C. (by *Raymond W. Morganti*), for the Michigan Defense Trial Counsel, Inc.

Fraser Trebilcock Davis & Dunlap, P.C. (by *Graham K. Crabtree* and *Mark R. Fox*), for ProAssurance Casualty Company and American Physicians Assurance Corporation.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Beth A. Wittman* and *Susan Healy Zitterman*) for the Michigan Health and Hospital Association.

Kerr, Russell and Weber, PLC (by *Daniel J. Schute* and *Michael N. Pappas*), for the Michigan State Medical Society.

CORRIGAN, J. We granted leave to consider whether the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq*., permits ex parte interviews by defense counsel with treating physicians under a qualified protective order. We hold that ex parte interviews, which are permitted under Michigan law, are also consistent with HIPAA regulations, provided that "reasonable efforts have been made . . . to secure a qualified protective order that meets the requirements of [45 CFR 164.512(e)(1)(v)]." 45 CFR 164.512(e)(1)(ii)(B). Accordingly, we affirm the judgment of the Court of Appeals.

I. FACTS AND PROCEEDINGS

The Court of Appeals summarized the relevant facts and trial court proceedings:

> Plaintiff filed this wrongful-death medical-malpractice action alleging that defendant had failed to properly diagnose or treat plaintiff's decedent, Linda Clippert, thereby proximately causing her death. Defendant sought to interview Clippert's treating physician, but plaintiff refused to waive Clippert's confidentiality rights under the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq*. Plaintiff signed a waiver allowing the release of medical records, but refused to provide a release for oral communications. Defendant moved for a qualified protective order to permit an ex parte interview with Clippert's treating physician, but the circuit court denied the motion. The court concluded that "the HIPAA provision relative to a protective order only . . . pertains to documentary evidence" and "that HIPAA does not authorize ex parte oral interviews." [*Holman v Rasak*, 281 Mich App 507, 508; 761 NW2d 391 (2008).]

The Court of Appeals granted defendant's application for leave to appeal and concluded that defense counsel may conduct an ex parte interview with a

plaintiff's treating physician "if a qualified protective order, consistent with 45 CFR 164.512(e)(1), is first put in place." *Id*. at 513. The Court "agree[d] with plaintiff that HIPAA supersedes Michigan law to the extent that its protections and requirements are more stringent than those provided by state law," but disagreed with the trial court's conclusion "that a defendant's ex parte interview with a treating physician may not be the subject of a qualified protective order under HIPAA." *Id*. at 511-512. It reasoned that the relevant HIPAA regulation, 45 CFR 164.512(e)(1)(ii), does not exclude oral communication from the regulations governing disclosure of protected health information. *Id*. at 512. Moreover, "45 CFR 160.103 specifically provides that HIPAA applies to both oral and written information, and 45 CFR 164.512(e)(2) makes clear that the regulations concerning qualified protective orders 'do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.' " *Id*., quoting 45 CFR 164.512(e)(2). The panel also rejected plaintiff's argument that defendants may rely on written medical records and conduct depositions if more information is required. It quoted this Court's observation in *Domako v Rowe*, 438 Mich 347, 361; 475 NW2d 30 (1991), that informal interviews are " 'routine practice' " and that " '[t]here is no justification for requiring costly depositions . . . without knowing in advance that the testimony will be useful.' " *Holman*, 281 Mich App at 512-513. The panel reversed the trial court's order and remanded for further proceedings.

We granted plaintiff's application for leave to appeal to consider whether HIPAA permits defense counsel to seek ex parte interviews with a plaintiff's treating physicians.

II. HIPAA

Congress enacted the Health Insurance Portability and Accountability Act in 1996. HIPAA provided that if Congress did not enact "legislation governing standards with respect to the privacy of individually identifiable health information within 36 months after HIPPA was enacted," the Secretary of Health and Human Services would be required to "promulgate final regulations containing such standards . . . ." PL 104-191, § 264(c)(1), 110 Stat 2033. Pursuant to that legislative mandate, 45 CFR 164.502(a) provides that "[a] covered entity may not use or disclose protected health information, except as permitted or required by this subpart . . . ."[1]

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[1] Additionally, the Department of Health and Human Services (HHS), the federal agency charged with administering HIPAA, has provided the following gloss on its role under HIPAA:

> The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, was enacted on August 21, 1996. Sections 261 through 264 of HIPAA require the Secretary of HHS to publicize standards for the electronic exchange, privacy and security of health information. Collectively these are known as the *Administrative Simplification* provisions. HIPAA required the Secretary to issue privacy regulations governing individually identifiable health information, if Congress did not enact privacy legislation within three years of the passage of HIPAA. Because Congress did not enact privacy legislation, HHS developed a proposed rule and released it for public comment on November 3, 1999. . . . The final modifications were published in final form on August 14, 2002. [U.S. Dept. of Health and Human Services, Office for Civil Rights, Summary of the HIPAA Privacy Rule at 1-2 ("HHS Summary") (footnotes omitted). Available at: <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf> (accessed May 14, 2010.)]

The HIPAA "Privacy Rule" promulgated by the HHS Secretary "establishes . . . a set of national standards for the protection of certain health information." *Id*. at 1. "The Privacy Rule standards address the use and disclosure of individuals' health information—called 'protected health information' by organizations subject to the

"[C]overed entity" means: (1) "[a] health plan"; (2) "[a] health care clearinghouse," or (3) "[a] health care provider who transmits any health information in electronic form in connection with a transaction" for which the Department of Health and Human Services (HHS) has adopted standards under HIPAA. 45 CFR 160.103. With exceptions not relevant here, "protected health information" means "individually identifiable health information" transmitted by or maintained in electronic media or "[t]ransmitted or maintained in any other form or medium." 45 CFR 160.103. "Health information" includes both "oral" information and information that is "recorded in any form or medium . . . ." *Id*. "Individually identifiable health information"

> is information that is a subset of health information, including demographic information collected from an individual, and:
>
> (1) [i]s created or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> (2) [r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
>
> (i) [t]hat identifies the individual; or
>
> (ii) [w]ith respect to which there is a reasonable basis to believe the information can be used to identify the individual. [*Id*.]

Thus, "protected health information" is any health information, oral or recorded, that is individually iden-

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Privacy Rule—called 'covered entities,' as well as standards for individuals' privacy rights to understand and control how their health information is used." *Id*.

tifiable and transmitted or maintained by a covered entity in any form or medium. 45 CFR 160.103.[2]

III. STANDARD OF REVIEW

Although a trial court's decision on a motion regarding discovery is reviewed for an abuse of discretion, *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003), this case presents questions of statutory interpretation, which we review de novo as questions of law, *In re Investigation of March 1999 Riots*, 463 Mich 378, 383; 617 NW2d 310 (2000).

IV. ANALYSIS

Under Michigan law, defense counsel in a medical malpractice action is permitted to seek an ex parte interview with a plaintiff's treating physician once the plaintiff has waived the physician-patient privilege with respect to that physician. *Domako*, 438 Mich at 361. MCL 600.2157 establishes the physician-patient privilege and also sets forth the rule on waiver of the privilege. It provides, in relevant part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon. *If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a*

[2] See also HHS Summary, *supra* at 3, citing 45 CFR 160.103 ("The Privacy Rule protects all '*individually identifiable health information*' held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. The Privacy Rule calls this information '*protected health information (PHI).*' ").

witness in the patient's own behalf who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition. [Emphasis added.]

In *Domako*, we explained that

"[N]o party to litigation has anything resembling a proprietary right to any witness's evidence. *Absent a privilege no party is entitled to restrict an opponent's access to a witness* . . . ." While we recognize that the physician is different from an ordinary witness as a result of the confidential nature of the physician's potential testimony, that confidentiality is adequately preserved by the physician-patient privilege. *Once the privilege is waived, there are no sound legal or policy grounds for restricting access to the witness*. [*Domako*, 438 Mich at 361, quoting *Doe v Eli Lilly & Co*, 99 FRD 126, 128 (D DC, 1983) (emphasis added).]

With respect to ex parte interviews, we explained:

Although the rules are silent on informal methods of discovery, *prohibition of all ex parte interviews would be inconsistent with the purpose of providing equal access to relevant evidence and efficient, cost-effective litigation*. The omission of interviews from the court rules does not mean that they are prohibited, because the rules are not meant to be exhaustive. See MCR 2.302(F)(2) (permitting parties to modify the court rules to use other methods of discovery). *Their absence from the court rules does indicate that they are not mandated and that the physician cannot be forced to comply, but there is nothing in the court rules precluding an interview if the physician chooses to coöperate*. [*Domako*, 438 Mich at 361-362.]

After we decided *Domako*, the Legislature enacted MCL 600.2912f,[3] which provides that a defendant in a

[3] MCL 600.2912f, which became effective April 1, 1994, provides:

medical malpractice action or the defendant's attorney or representative "may communicate" with persons or entities with respect to whom the plaintiff has waived the physician-patient privilege "in order to obtain all information relevant to the subject matter of the claim or action and to prepare the person's or entity's defense to the claim or action." MCL 600.2912f(2). The statute also makes clear that a person who discloses such information "does not violate [MCL 600.2157] or any other similar duty or obligation created by law and owed to the claimant or plaintiff." MCL 600.2912f(3).

Under HIPAA, the general rule pertaining to the disclosure of protected health information is that a covered entity may not use or disclose protected health

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(1) A person who has given notice under [MCL 600.2912b] or who has commenced an action alleging medical malpractice waives for purposes of that claim or action the privilege created by [MCL 600.2157] and any other similar privilege created by law with respect to a person or entity who was involved in the acts, transactions, events, or occurrences that are the basis for the claim or action or who provided care or treatment to the claimant or plaintiff in the claim or action for that condition or a condition related to the claim or action either before or after those acts, transactions, events, or occurrences, whether or not the person is a party to the claim or action.

(2) Pursuant to subsection (1), a person or entity who has received notice under [MCL 600.2912b] or who has been named as a defendant in an action alleging medical malpractice or that person's or entity's attorney or authorized representative may communicate with a person specified in [MCL 600.5838a] in order to obtain all information relevant to the subject matter of the claim or action and to prepare the person's or entity's defense to the claim or action.

(3) A person who discloses information under subsection (2) to a person or entity who has received notice under [MCL 600.2912b] or to a person or entity who has been named as a defendant in an action alleging medical malpractice or to the person's or entity's attorney or authorized representative does not violate [MCL 600.2157] or any other similar duty or obligation created by law and owed to the claimant or plaintiff.

information without a written authorization from the individual as described in 45 CFR 164.508, or, alternatively, the opportunity for the individual to agree or object as described in 45 CFR 164.510. 45 CFR 164.512, however, enumerates several specific situations in which "[a] covered entity may use or disclose protected health information without the written authorization of the individual, as described in [45 CFR] 164.508, or the opportunity for the individual to agree or object as described in [45 CFR] 164.510 . . . ." 45 CFR 164.512.[4] This regulation provides alternative requirements for disclosures in specific situations. Relevant here is paragraph (e), "[d]isclosures for judicial and administrative proceedings," which permits a covered entity to disclose protected health information in response to "an order of

[4] The dissent concludes that the introductory paragraph of 45 CFR 164.512, and the second sentence in particular, "specifically limits when a covered entity may disclose protected health information *orally*[.]" We respectfully disagree. The paragraph provides, in full:

> A covered entity may use or disclose protected health information without the written authorization of the individual, as described in § 164.508, or the opportunity for the individual to agree or object as described in § 164.510, in the situations covered by this section, subject to the applicable requirements of this section. *When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally*. [Emphasis added.]

The purpose of the introductory paragraph is to explain that, for the uses and disclosures described in the lettered subsections of 45 CFR 164.512, the general requirements of a "written authorization of the individual as described in § 164.508" and "the opportunity for the individual to agree or object as described in § 164.510" need not be met. The second sentence explains how the covered entity may *inform* the individual of the use or disclosure when required to do so, and how the individual may *agree* to the use or disclosure. This introductory paragraph does not govern the form of a *use or disclosure* of *protected health information*.

a court or administrative tribunal," or "[i]n response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if":

> (A) [t]he covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
>
> (B) [t]he covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section. [45 CFR 164.512(e)(1)(i) and (ii).][5]

A "qualified protective order" is an order of a court or administrative tribunal or a stipulation by the parties that:

> (A) [p]rohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and
>
> (B) [r]equires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding. [45 CFR 164.512(e)(1)(v).]

Under HIPAA, "[a] standard, requirement, or implementation specification" of HIPAA "that is *contrary* to a

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[5] Alternatively, "a covered entity may disclose protected health information in response to lawful process described in [45 CFR 164.512(e)(1)(ii)] without receiving satisfactory assurance . . . if the *covered entity* makes reasonable efforts . . . to seek a qualified protective order sufficient to meet the requirements of [45 CFR 164.512(e)(1)(iv)]." 45 CFR 164.512(e)(1)(vi) (emphasis added).

provision of State law preempts the provision of State law" unless, among other exceptions, "[t]he provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under" HIPAA. 45 CFR 160.203 (emphasis added). "Contrary" means either that "[a] covered entity would find it impossible to comply with both the State and federal requirements" or that "[t]he provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" HIPAA. 45 CFR 160.202. "More stringent," in this context, means "provides greater privacy protection for the individual who is the subject of the individually identifiable health information." 45 CFR 160.202.

We hold that HIPAA does not preempt Michigan law permitting ex parte interviews because Michigan law is not "contrary" to HIPAA under either definition of that term. Michigan law is not "contrary" to HIPAA under the first definition because it is possible for a covered entity to comply with both Michigan law and HIPAA. As the parties acknowledge, HIPAA contains no express mention of ex parte interviews. Thus, the New York Court of Appeals has concluded that New York law permitting ex parte interviews and HIPAA could coexist because HIPAA "merely superimposed procedural requirements" onto state law:

> In addition, HHS has pointedly advised that where "there is a State provision and no comparable or analogous federal provision, or the converse is the case," there is no possibility of preemption because in the absence of anything to compare "there cannot be . . . a 'contrary' requirement" and so "the stand-alone requirement—be it State or federal—is effective" (64 Fed Reg 59918, 59995). As a result, there can be no conflict between New York law and

> HIPAA on the subject of ex parte interviews of treating physicians because HIPAA does not address this subject. *Accordingly, the Privacy Rule does not prevent this informal discovery from going forward, it merely superimposes procedural prerequisites*. As a practical matter, this means that the attorney who wishes to contact an adverse party's treating physician must first obtain a valid HIPAA authorization or a court or administrative order; or must issue a subpoena, discovery request or other lawful process with satisfactory assurances relating to either notification or a qualified protective order. [*Arons v Jutkowitz*, 9 NY3d 393, 415; 880 NE2d 831; 850 NYS2d 345 (2007) (emphasis added).]

We agree with the *Arons* court's analysis. Ex parte interviews are permitted under Michigan law, and nothing in HIPAA specifically precludes them. Because it is possible for defense counsel to insure that any disclosure of protected health information by the covered entity complies with 45 CFR 164.512(e) by making "reasonable efforts" to obtain a qualified protective order, HIPAA does not preempt Michigan law concerning ex parte interviews.

Plaintiff raises several arguments in support of her position that 45 CFR 164.512(e) does not permit ex parte interviews. First, she claims that HIPAA does not authorize informal discovery and that its provision for disclosure of protected health information pursuant to a qualified protective order applies only when a party seeks protected health information in the context of formal discovery. We disagree. Under 45 CFR 164.512(e)(1)(ii), a covered entity is permitted to "disclose protected health information in the course of any judicial or administrative proceeding":

> (ii) [i]n response to a *subpoena, discovery request, or other lawful process* that is not accompanied by an order of a court or administrative tribunal, if:

> (A) [t]he covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
>
> (B) [t]he covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section. [Emphasis added.]

As previously discussed, ex parte interviews are permitted under Michigan law as a means of informal discovery. Thus, even if "discovery request" contemplates formal discovery, a request for an ex parte interview is at least "other lawful process" within the meaning of 45 CFR 164.512(e)(1)(ii). Therefore, as long as "[t]he covered entity receives satisfactory assurance . . . that reasonable efforts have been made . . . to secure a qualified protective order" that meets the requirements of subsection (e)(1)(v), disclosure of protected health information by a covered entity during an ex parte interview is consistent with both Michigan law and HIPAA. The HIPAA regulations were "not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected health information." 65 Fed Reg 82462-01, 82530 (December 28, 2000), discussing 45 CFR 164.512(e).[6]

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[6] Other jurisdictions, which, like Michigan, permitted ex parte interviews before HIPAA, are in accord in determining that HIPAA did not disrupt state law practice and that this type of informal discovery request is permitted under HIPAA. See, e.g., *Arons*, *supra*; *Reutter v Weber*, 179

Plaintiff and the dissent also argue that an ex parte interview is not a proper subject of a qualified protective order because 45 CFR 164.512(e)(1)(v)(B) requires the "return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding." Plaintiff argues that this provision thus contemplates that only "documentary" evidence will be the subject of a qualified protective order.[7] We disagree. The distinction plaintiff makes between "documentary" information and other types of information is not one that exists in HIPAA. As previously discussed, "health information" explicitly includes "oral information," and all individually identifiable health information transmitted or maintained in any form or medium is "protected health information" under HIPAA. 45 CFR 160.103. We see no logical reason that "protected health information" maintained in a physician's records and conveyed verbally by a physician during an ex parte interview cannot be the subject of a qualified protective order under 45 CFR 164.512(e)(1)(v). The requirement in subsection (e)(1)(v)(B) to return or destroy "protected health information" applies to *all* protected health information, as the term is defined under HIPAA and its regulations.

Moreover, plaintiff's argument proceeds from the assumption that an ex parte interview never generates a physical record. This is simply incorrect. For instance, if the ex parte interview is conducted orally, a recording

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P3d 977 (Colo, 2007); *Holmes v Nightingale*, 2007 OK 15; 158 P3d 1039 (Okla, 2007); *Smith v American Home Prod Corp*, 372 NJ Super 105; 855 A2d 608 (NJ Super, 2003).

[7] The dissent apparently agrees. It observes that "[a] verbal ex parte interview cannot be returned or destroyed at the conclusion of the litigation."

of the conversation could be produced. Alternatively, defense counsel and a physician might choose to conduct an ex parte interview via e-mail. And written documents may be exchanged at an ex parte interview. All of these records could be "returned" or "destroyed," thus making the requirement of 45 CFR 164.512(e)(1)(v)(B) applicable, and defeating the argument that a qualified protective order cannot be fashioned for an ex parte interview under the plain meaning of the statute.

Plaintiff also argues that 45 CFR 164.512(e) does not allow ex parte interviews because defense counsel does not particularize the specific health information being sought in the interview, and that ex parte interviews lack adequate protections and limitations on the scope of disclosure. She argues that 45 CFR 164.512(e) "presumes that the parties are aware of the [protected health information] that has been requested **before** entry of a qualified protective order." (Plaintiff's Reply Brief, pp 1-2.) She relies on the following language from 45 CFR 164.512(e)(1)(v): " 'For purposes of paragraph (e)(1) of this section, a qualified protective order means, **with respect to protected health information requested under paragraph (e)(1)(ii) of this section**, an order of the court . . . .' " (Emphasis added by plaintiff.) 45 CFR 164.512(e)(1)(ii), however, makes no reference to a request for *specific* health information. It simply provides that a covered entity may disclose protected health information "[i]n response to a subpoena, discovery request, or other lawful process" if the other requirements of the section are met. This is in contrast to 45 CFR 164.512(e)(1)(i), which permits disclosure in response to a court order, "*provided that*

the covered entity discloses only the protected health information expressly authorized by such order[.]" (Emphasis added.)

Accordingly, we conclude that Michigan's approach to informal discovery, which permits defense counsel to seek an ex parte interview with a plaintiff's treating physician, is not "contrary" to HIPAA. An ex parte interview may be conducted and a covered entity may disclose protected health information during the interview in a manner that is consistent with HIPAA, as long as "[t]he covered entity receives satisfactory assurance . . . that reasonable efforts have been made . . . to secure a qualified protective order that meets the requirements of [45 CFR 164.512(e)(1)(v)]." 45 CFR 164.512(e)(1)(ii)(B).[8]

Nor does Michigan law concerning ex parte interviews "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of" HIPAA—the second definition of "contrary" under 45 CFR 160.202. Plaintiff claims that allowing ex parte interviews frustrates HIPAA's purpose of protecting the privacy of an individual's health information. While HIPAA is obviously concerned with protecting the privacy of individuals' health information, it does not enforce that goal to the exclusion of all other interests. Rather, it balances the protection of individual privacy with the need for disclosure in some situations. Thus, a covered entity may disclose pro-

[8] The "reasonable efforts" language comes directly from 45 CFR 164.512(e), which unquestionably governs disclosures of protected health information for judicial or administrative proceedings. We disagree with the dissent's unsupported assertion that 45 CFR 164.512(e) is "only applicable if there is a corresponding judicial or administrative procedure available under state law or court rule." The dissent would apparently hold that 45 CFR 164.512(e) is not "applicable" in Michigan under any circumstances.

tected health information: (1) to "[a] public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability," 45 CFR 164.512(b)(i); (2) to an employer, if "[t]he covered entity is a covered health care provider who is a member of the workforce of such employer or who provides health care to the individual at the request of the employer" in order "[t]o evaluate whether the individual has a work-related illness or injury," 45 CFR 164.512(b)(v)(A)(*2*); (3) "to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions," 45 CFR 164.512(d)(1); and (4) "to authorized federal officials for the conduct of lawful intelligence, counter-intelligence, and other national security activities authorized by the National Security Act," 45 CFR 164.512(k)(2). Given HIPAA's interest in balancing the need for disclosure in certain contexts with the importance of individual privacy, we cannot conclude that ex parte interviews are "contrary" to the objectives of HIPAA, as long as the interviews are sought according to the specific requirements of 45 CFR 164.512(e). Because we conclude that HIPAA does not preempt state law, we affirm the judgment of the Court of Appeals.

Finally, we emphasize that while we have been asked in this case to decide whether HIPAA permits defense counsel to seek an ex parte interview with a plaintiff's treating physician, 45 CFR 164.512(e)(1) is directed at covered entities, not parties or trial courts. HIPAA does not require a trial court to grant a motion for a protective order. Therefore, a trial court retains its discretion under

MCR 2.302(C)[9] to issue protective orders and to impose conditions on ex parte interviews.[10]

Similarly, 45 CFR 164.512(e)(1) addresses the circumstances under which a covered entity *may* disclose protected health information. Nothing in that provision, or in Michigan law, *requires* a covered entity to consent to an ex parte interview or to disclose protected health information during such an interview. See *Domako*, 438 Mich at 362 ("[T]here is nothing in the court rules precluding an interview if the physician chooses to coöperate."). As one commenter pointed out, "[t]he

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[9] MCR 2.302(C) provides in relevant part:

> On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:
>
> (1) that the discovery not be had;
>
> (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
>
> (5) that discovery be conducted with no one present except persons designated by the court[.]

[10] A trial court's decision on a motion for a protective order is reviewed for an abuse of discretion. *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 151; 715 NW2d 398 (2006). Because we have determined that ex parte interviews can be the subject of a qualified protective order under HIPAA, where, as here, a trial court bases its denial of such a motion on the erroneous conclusion that such interviews are not allowed under HIPAA, its decision constitutes an abuse of discretion because it falls outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

breadth of HIPAA and the substantial repercussions for HIPAA violations undoubtedly will cause healthcare providers to think twice before agreeing to ex parte interviews, even if defense counsel has a strong argument that HIPAA should not apply." Comment, *Don't ask, don't tell: HIPAA's effect on informal discovery in products liability and personal injury cases*, 2006 BYU L Rev 1075, 1098.

V. CONCLUSION

Under Michigan law, nothing precludes defense counsel from seeking an ex parte interview with a plaintiff's treating physician once the plaintiff has waived the physician-patient privilege. Michigan law is not "contrary" to HIPAA within the first definition of that term under 45 CFR 160.202 because, under HIPAA, a covered entity may disclose protected health information during an ex parte interview if "[t]he covered entity receives satisfactory assurance . . . that reasonable efforts have been made . . . to secure a qualified protective order that meets the requirements of [45 CFR 164.512(e)(1)(v)]." 45 CFR 164.512(e)(1)(ii)(B); see also 45 CFR 160.202. Nor does Michigan law concerning ex parte interviews "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of" HIPAA—the second meaning of "contrary" under 45 CFR 160.202—given the balance HIPAA strikes between the protection of individual privacy and the necessity of disclosure in some contexts. Thus, HIPAA does not preempt Michigan law concerning ex parte interviews. Nothing in either HIPAA or Michigan law, however, *requires* a covered entity to agree to an informal ex parte interview with defense counsel, or to disclose protected health information during such an interview.

Accordingly, the trial court abused its discretion by denying defendant's request for a qualified protective order on the grounds that HIPAA precludes ex parte interviews. The result reached by the Court of Appeals is affirmed, and this case is remanded to the trial court for further proceedings consistent with this opinion.

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

WEAVER, J. (*dissenting*). Although I understand the merits of the arguments presented by both the majority and Justice HATHAWAY's dissent, at this time and in this particular case, I am more persuaded by the reasoning and result of the dissent.

HATHAWAY, J. (*dissenting*). The majority holds that an ex parte interview can be conducted under MCR 2.302(C) in a manner that is consistent with the Health Insurance Portability and Accountability Act (HIPAA),[1] provided that reasonable efforts have been made to secure a qualified protective order that meets the requirements of 45 CFR 164.512(e)(1)(v) as set forth in 45 CFR 164.512(e)(1)(ii)(B). I must respectfully dissent from this decision.

First, ex parte interviews are generally conducted orally. The introductory portion of 45 CFR 164.512 specifically limits *oral* disclosures of a covered entity's information to instances "[w]hen the covered entity is *required by this section* to inform the individual of, *or when the individual may agree to*, a use or disclosure permitted by this section . . . ." (Emphasis added.) Because an ex parte interview is not required and cannot

[1] 42 USC 1320d *et seq*. References to "HIPAA" may include the regulations promulgated under that statute.

be compelled by this section or under Michigan law, nor is there a requirement within 45 CFR 164.512(e) that a patient be informed of an ex parte interview in a judicial proceeding, and plaintiff has not agreed to the ex parte interview in this instance, the provisions of 45 CFR 164.512(e) relied on by the majority cannot be construed as authorizing an ex parte interview that involves the oral disclosure of health information.

Second, I also disagree with the majority's conclusion that Michigan law authorizing ex parte interviews is valid and enforceable after the adoption of HIPAA. First, the physician-patient waiver provisions of both MCL 600.2157 and MCL 600.2912f are preempted by HIPAA, because they are contrary to and not more stringent than HIPAA. Second, the majority errs in its reliance on *Domako v Rowe*, 438 Mich 347; 475 NW2d 30 (1991), to support ex parte interviews. While *Domako* was a thoughtful and well reasoned opinion at the time, it relies on MCL 600.2157 and provisions of the Michigan Court Rules that embody that statute. That statute is now preempted by HIPAA. I conclude that ex parte interviews are not allowed in Michigan because HIPAA does not specifically authorize ex parte interviews, and the court rules and statutes relied on to authorize the interviews have been preempted.

Finally, even assuming that an ex parte interview was a permitted oral disclosure under 45 CFR 164.512(e), the majority opines that a party is *only* required to make *reasonable efforts* to obtain a qualified protective order rather than *actually* having to obtain a court order. In so holding, the majority fails to recognize that 45 CFR 164.512(e) applies to judicial and administrative proceedings, and that provisions of this subsection are only applicable if there is a corresponding judicial or administrative procedure available under

state law or court rule. This medical malpractice action is being pursued in a circuit court, rather than in an administrative proceeding, and as such is subject to our court rules. Under our court rules, there is no mechanism for a party to only make a *reasonable effort* to obtain a court order. Under the Michigan Court Rules, a party must make a request for an order by motion, and the request is either granted or denied. Under the majority's analysis, only a reasonable effort to secure the order is required, which can only mean that the request could be incompletely made or denied altogether and an ex parte interview could still take place. The majority's analysis and conclusion are completely at odds with our court rules and undermine the authority of trial courts to enforce the court rules and their own orders. Thus, the majority errs by relying on an inapplicable HIPAA provision to support its analysis, and I cannot agree with such an interpretation.

Accordingly, I would vacate the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

I. HIPAA

HIPAA was enacted in 1996 to provide a minimum national standard for the protection of private health information. HIPAA was intended to be a shield to protect private medical information from disclosure to third parties. HIPAA is a complex and comprehensive regulatory scheme. This overview is only intended to provide the necessary background to address those HIPAA regulations that deal with judicial proceedings and ex parte communications.

HIPAA provides an all-encompassing umbrella that protects the confidentiality of patient health information. HIPAA regulations specify that a *covered entity*

may not use or disclose protected health information, *except as permitted or required under the act*. 45 CFR 164.502(a). Under its broad definitions, a *covered entity* includes a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a covered transaction. 45 CFR 160.103. *Health Information* includes both oral information as well as information that is recorded in any form or medium that is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse. *Id*. *Individually identifiable health information* includes any information that relates to the past, present, or future physical or mental health or condition of an individual, or the past, present, or future provision of or payment for the provision of health care to an individual; and either identifies the individual, or provides a reasonable basis to believe the information can be used to identify the individual. *Id.* In sum, HIPAA's umbrella covers any health information, oral or recorded, that is individually identifiable and transmitted or maintained by a covered entity in any form or medium *unless a specific requirement or exception is found in the act* that provides for release of the protected information.

Finally, any HIPAA standard or requirement that is *contrary* to state law *preempts* state law, unless the state law is *more stringent* than HIPAA. 45 CFR 160.203. *Contrary* means either that a covered entity would find it impossible to comply with both the state and federal requirements or that the provision of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. 45 CFR 160.202. *More stringent* means that the state law provides greater privacy protection than HIPAA. 45 CFR 160.202.

II. HIPAA AND JUDICIAL PROCEEDINGS

HIPAA contains narrowly tailored exceptions for disclosures of protected health information during judicial or administrative proceedings. See 45 CFR 164.512(e). While HIPAA carves out certain areas of the law, such as worker's compensation, for individualized treatment,[2] HIPAA does not contain a separate section applicable only to medical malpractice claims. Nor does HIPAA impose more or less protection of health information for persons bringing medical malpractice claims, and thus medical malpractice claims are bound by the terms and conditions of 45 CFR 164.512(e) governing judicial proceedings. In judicial proceedings, absent a validly executed HIPAA compliant authorization as mandated by 45 CFR 164.508, a covered entity may only disclose health information according to the specific terms and conditions set forth in 45 CFR 164.512(e).

HIPAA does not address or mention ex parte interviews. The majority opines that because ex parte interviews are not mentioned in HIPAA, they are not contrary to HIPAA, and are thus authorized. I believe this analysis and conclusion are in error. HIPAA only allows for the release of information pursuant to a specifically enumerated requirement or exception. 45 CFR 164.502(a). If no requirement or exception exists, disclosure is not allowed. *Id.*

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[2] Compare and contrast HIPAA's treatment of workers' compensation claims, which provides for a more expansive method of disclosure than is allowed in the general category for judicial proceedings. No comparable section exists for medical malpractice claims. Section 164.512(l) provides:

> *Standard: Disclosures for workers' compensation*. A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.

The majority also suggests that HIPAA draws no distinction between when a covered entity's information needs to be disclosed in documentary form and when the disclosure can be made orally. To the contrary, 45 CFR 164.512 does make this distinction. While the majority relies on 45 CFR 164.512 to authorize *oral* ex parte interviews, they fail to address its introductory portion, which specifically limits when a covered entity may disclose protected health information *orally*:

> A covered entity may use or disclose protected health information without the written authorization of the individual, as described in § 164.508, or the opportunity for the individual to agree or object as described in § 164.510, in the situations covered by this section, subject to the applicable requirements of this section. *When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.* [45 CFR 164.512 (emphasis added).]

As this plain language indicates, oral disclosures are allowed, but are limited to "[w]hen the covered entity is *required by this section to inform* the individual of, or *when the individual may agree to*, a use or disclosure permitted by this section, *the covered entity's information* and the individual's agreement *may be given orally*." *Id*. (emphasis added). This introductory language contains *limited* circumstances wherein oral disclosures of information are permitted. If the circumstance is not provided for by that language, oral disclosure of information is not allowed. I respectfully suggest that the majority errs in its analysis, because neither of the specific circumstances applicable to use or disclosure of the covered entity's information is present in this instance. Ex parte interviews can not be required by this section or Michigan law, nor is there a

requirement within 45 CFR 164.512(e) that a patient be informed of an ex parte interview in a judicial proceeding. Additionally, the ex parte interview was not agreed to in this instance. Accordingly, the two subsections of 45 CFR 164.512(e) relied on by the majority cannot be construed as authorizing ex parte interviews, because the very terms of the introductory language of that section does not allow for oral disclosures.[3]

However, even if the introductory language limiting oral disclosures didn't exist, the majority's reliance on 45 CFR 164.512(e)(1)(ii)(B)[4] would be troubling. Subsection 164.512(e)(1)(ii)(B) permits disclosure "[i]n response to a subpoena, discovery request, or other lawful process, *that is not accompanied by an order of a court* or administrative tribunal, *if* ":

> The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section. [Emphasis added.]

This subsection, by its very terms, contemplates the use of state law procedures that occur *without the need for a court order*. Consistent with the mandates of this subsection the majority opines that a party is only required to make *reasonable efforts* to obtain a qualified protective order that meets the requirements of 45 CFR 164.512(e)(1)(v) rather than *actually* having to obtain a court order. In so holding, the majority fails to recognize

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[3] Compare and contrast an ex parte interview with a deposition, which can be conducted consistently with 45 CFR 164.512(e) because depositions are a recognized procedure under our court rules which are not only required but can be compelled. Moreover, depositions meet all of the notice provisions of the subsection.

[4] This subsection requires that reasonable efforts be made to secure a protective order that meets the requirements of 45 CFR 164.512(e)(1)(v).

that subsection 164.512(e) applies to judicial and administrative proceedings, and that its provisions are only applicable if there is a corresponding judicial or administrative procedure available under state law or court rule. This medical malpractice action is being pursued in a circuit court rather than in an administrative proceeding, and as such is subject to our Michigan Court Rules. Under our court rules, there is no mechanism for a party to *only* make a *reasonable effort* to obtain a court order. MCR 2.119(A)(1) requires a request for an order to be made by motion, and the motion is either granted or denied. Query, what does the majority contemplate when it proposes that only a reasonable effort need be made to obtain an order in a circuit court? The majority's "reasonable efforts" analysis can only mean that a request could be incompletely made, or denied by the trial court altogether, and an interview could still take place. Either of these results would be absurd. This analysis and conclusion are completely at odds with our court rules and completely undermine the authority of trial courts to enforce the court rules, or even their own orders.

I think it is clear that the majority errs by relying on an inapplicable HIPAA provision to support its analysis, and I cannot agree with such an interpretation. When interpreting § 164.512, it must be understood that this subsection of provision of HIPAA regulation applies not only to courts, but also to every federal agency, including those that administer Medicare, Medicaid, veterans' benefits, and Social Security, to name a few. Most of these federal agencies do not have ready access to circuit court judges who can issue or deny orders. Using a provision that is obviously designed for an administrative proceeding in a judicial proceeding leads to an absurd result. "[S]tatutes must be construed to prevent absurd results . . . ." *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999).

The majority's reliance on § 164.512(e)(1)(v) is equally troubling. Again, even if the prefatory section limiting oral disclosures did not exist, the majority's conclusion that § 164.512(e)(1)(v) may be used because it permits disclosure pursuant to a *qualified protective order* issued by a court or administrative tribunal or a stipulation by the parties is similarly erroneous. This provision "*[r]equires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding*." 45 CFR 164.512(e)(1)(v)(B) (emphasis added). A verbal ex parte interview cannot be returned or destroyed at the conclusion of the litigation. The fact that an interview *could be* recorded or memorialized, thus creating something that could be returned or destroyed, does not resolve the analytical problem as the majority suggests. HIPAA's return-or-destroy provision is *mandatory* and *not permissive*, and we are not free to rewrite HIPAA's mandates; we are required to follow them.

Further, to support its analysis, the majority borrows the phrase *oral information* from the broad definition of what is covered by HIPAA and uses it to expand this narrowly tailored exception to justify its interpretation. I must respectfully disagree with this premise and the methodology used to come to the conclusion. What is protected by HIPAA is not the same as what is excepted. What is protected by HIPAA is vast; the exceptions are specific and narrowly tailored. Disclosure is only allowed if *permitted or required under the act*, 45 CFR 164.502(a), and, again, we are not free to rewrite HIPAA's mandates; we are required to follow them.

III. MICHIGAN STATUTES

It is also necessary to review Michigan law to determine whether ex parte interviews are allowable under

any statute or court rule in a manner that is consistent with HIPAA's provisions which allow for *oral* disclosures.[5] This inquiry begins with a review of applicable Michigan medical malpractice statutes to determine if the statutes are enforceable or if they are preempted by HIPAA. State law is preempted by HIPAA if the state law is contrary to HIPAA, meaning that a covered entity would find it impossible to simultaneously comply with the federal and state law and the state law is not more stringent than HIPAA. 45 CFR 160.202.

Two statutory provisions, MCL 600.2157 and MCL 600.2912f, provide for the waiver of privilege in the context of medical malpractice actions. The relevant language of MCL 600.2157 is contained in its second sentence, which provides:

> *If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a witness* in the patient's own behalf who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, *the patient shall be considered to have waived the privilege provided in this section* as to another physician who has treated the patient for the injuries, disease, or condition. [Emphasis added.]

The unambiguous language of this provision clearly indicates that the physician-patient privilege is waived by virtue of two triggering events: (1) *filing* a lawsuit for personal injury or malpractice, and (2) *producing a physician as a witness* in the patient's own behalf. Once those two triggering events occur, nothing more is required by the statute and the privilege is waived. The statute does not require compliance with HIPAA to release or compel production of the health information.

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[5] This opinion addresses *oral* disclosures only, and does not opine on disclosure of health information in *written* documentary form.

Rather, by virtue of the two triggering events alone, waiver occurs and the information may be released or compelled.

Under HIPAA, all health care information is protected by its umbrella *unless* it is specifically exempted. Release of information in judicial proceedings under HIPAA is controlled by 45 CFR 164.512(e). However, the exceptions contained within this section are specific and narrowly tailored. Significantly, none of the specific and narrowly tailored exceptions within § 164.512(e) allows for release of information by virtue of the mere occurrence of the two triggering events named in MCL 600.2157, filing and production of a witness. Thus, the second sentence of MCL 600.2157 is *contrary* to HIPAA because *contrary* means that a covered entity would find it impossible to comply with both the Michigan and HIPAA requirements, or that the provision of Michigan law stands as an obstacle to the accomplishment and full purposes and objectives of HIPAA. A covered entity cannot simultaneously comply with the second sentence of § 2157 and HIPAA.

Moreover, the second sentence of § 2157 is clearly *not more stringent* in its requirements than HIPAA because *more stringent* means that the state law provides greater privacy protection for the individual who is the subject of the individually identifiable health information. 45 CFR 160.202. The second sentence of § 2157 simply does not provide a patient with greater privacy protection; to the contrary, it provides less. Accordingly, by the very terms and conditions set forth in HIPAA, the second sentence of § 2157, which provides for waiver, is preempted.

MCL 600.2912f must also be reviewed to determine whether any of its provisions are also preempted by HIPAA. I conclude that § 2912f is preempted *in its*

entirety because it too is contrary to and not more stringent than HIPAA. MCL 600.2912f provides in pertinent part:

> (1) *A person who has given notice under [MCL 600.2912b]* or who has commenced an action alleging medical malpractice *waives for purposes of that claim or action the privilege created by [MCL 600.2157] and any other similar privilege created by law* with respect to a person or entity who was involved in the acts, transactions, events, or occurrences that are the basis for the claim or action or who provided care or treatment to the claimant or plaintiff in the claim or action for that condition or a condition related to the claim or action either before or after those acts, transactions, events, or occurrences, whether or not the person is a party to the claim or action.
>
> (2) Pursuant to subsection (1), *a person or entity who has received notice under [MCL 600.2912b] or who has been named as a defendant* in an action alleging medical malpractice or that person's or entity's attorney or authorized representative *may communicate with a person specified in [MCL 600.5838a] in order to obtain all information relevant to the subject matter of the claim* or action and to prepare the person's or entity's defense to the claim or action. [Emphasis added.]

This statute provides that the physician-patient privilege is waived once a notice of intent (NOI) is provided pursuant to MCL 600.2912b. Section 2912f, once again, does not require that release of protected health care information be contingent upon compliance with HIPAA by such means as providing the covered entity with a HIPAA compliant authorization or a court order compelling production. Waiver is triggered in this instance by the mere act of sending or receiving an NOI. Nothing more is required. Subsection 164.512(e), which covers disclosure during judicial and administrative proceedings, does not have an exception for disclosure by virtue of an NOI being

provided to a defendant in and of itself.[6] HIPAA provides narrowly tailored methods of release, none of which are similarly required by § 2912f. As HIPAA contains no exception by virtue of providing an NOI, this entire statute is contrary to HIPAA because a covered entity would find it impossible to comply with both the Michigan and HIPAA requirements, and this statute would stand as an obstacle to the accomplishment and full purposes and objectives of HIPAA. A covered entity cannot comply with the second sentence of § 2912f and HIPAA, and § 2912f is clearly not more stringent in its requirements than HIPAA. Section 2912f does not provide greater privacy protection for the individual who is the subject of the individually identifiable health information; to the contrary, it provides less.

This interpretation of § 2157 and § 2912f recognizes that HIPAA protects *all* health care information in any form and that *if and only if* there is a specifically enumerated exception in HIPAA are its provisions waived. HIPAA contains no provision that permits waiver of privilege by the mere act of *filing* a medical malpractice action or sending an NOI, and we are not free to write such an exception into the federal act. If HIPAA did contain such an exception, all one would need to do is give a copy of the complaint or an NOI to a covered entity and ask that it release the requested information. Obviously, no one contemplates this as the procedure; however, that is precisely all these two statutes require. Accordingly, I conclude that the second sentence of § 2157 and all of § 2912f are preempted by HIPAA and are not enforceable.

IV. *DOMAKO* AND THE MICHIGAN COURT RULES

Finally, it is also necessary to review *Domako* and our

[6] The medical malpractice NOI waiting period is found in MCL 600.2912b.

court rules to determine whether ex parte interviews can be conducted consistently with HIPAA's provisions which allow for *oral* disclosures. In *Domako*, this Court reviewed both § 2157 and our court rules to determine whether ex parte interviews were permissible. *Domako* found equally compelling support for allowing ex parte interviews in both sources. The Court opined:

> The statute provides protection for information relayed by the patient to the physician, and it also provides for a waiver of the privilege when the plaintiff "produce[s] any physician as a witness in his own behalf" in a malpractice action. *Similarly, the Michigan Court Rules offer protection for medical information*:
>
> "When a mental or physical condition of a party is in controversy, medical information about the condition is subject to discovery under MCR 2.310 to the extent that . . . the party does not assert that the information is subject to a valid privilege." [MCR 2.314(A)(1)(b).]
>
> *Just as in the privilege statute, the court rules provide for the waiver of the physician-patient privilege.* MCR 2.314(B)(1) clarifies the procedure by which the patient waives the privilege: "The privilege must be asserted in the party's written response under MCR 2.310. A privilege not timely asserted is waived in that action . . . ." The Staff Comment declares that this section requires a party to decide at the discovery stage whether to assert the privilege. *Unlike other forms of litigation, a case involving medical malpractice cannot proceed without evidence of the physical or mental condition of the plaintiff. Therefore, requiring the plaintiff to decide whether to assert the privilege at the discovery stage, rather than at trial, promotes efficient use of judicial resources by fostering an early resolution of this issue.*[7] [Emphasis added.]

As previously indicated, § 2157 has been preempted by HIPAA, and that portion of the *Domako* analysis is no longer valid. Accordingly, the only remaining question is

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[7] *Domako*, 438 Mich at 353-354.

whether *Domako*'s court rule analysis has continuing validity, and I conclude that it does not, despite the fact that *Domako* was a thoughtful and well reasoned opinion.

Domako reasoned that ex parte interviews were permissible under our court rules because "*[j]ust as in the privilege statute, the court rules provide for the waiver of the physician-patient privilege . . . [a] privilege not timely asserted is waived in that action . . . .*" *Domako*, 438 Mich at 354 (emphasis added). This analysis is fundamentally premised on the concept that inaction waives the privilege. However, privileges cannot be waived by virtue of inaction under HIPAA; rather, there must be a requirement or an exception for disclosure of protected health information. As ex parte interviews are not required and cannot be compelled, and no exception allows for them, they cannot be used in Michigan, and the *Domako* analysis cannot be sustained under the current mandates of HIPAA.

Further, the majority's reliance on and analysis of MCR 2.302(C) is flawed. While *Domako* suggested that MCR 2.302(C) could be used to impose restrictions on ex parte interviews after the waiver of privilege, the majority here suggests that MCR 2.302(C) could be used to authorize the interviews. I respectfully disagree with the majority's conclusion that the rule authorizes ex parte interviews. MCR 2.302(C) contains no language authorizing ex parte interviews, and the majority fails to explain how this rule could be so interpreted given the content of the rule.[8]

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[8] MCR 2.302(C) provides in pertinent part:

> Protective Orders. On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:

Finally, my analysis should not be read to suggest or imply that a plaintiff may frustrate legitimate discovery, or engage in the gamesmanship that *Domako* wisely sought to curtail. However, these concerns are effectively addressed in MCR 2.314(B)(2), which provides:

> Unless the court orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition.

While requiring a defendant to conduct discovery by means of a deposition, rather than by an ex parte interview, could not be considered "preventing discov-

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(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a deposition shall be taken only for the purpose of discovery and shall not be admissible in evidence except for the purpose of impeachment;

(8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(9) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

ery of medical information," if a plaintiff does assert the privilege during a deposition and thus prevents discovery of medical information, he or she will be precluded from offering testimony at trial relating to his or her medical history or mental or physical condition.

V. CONCLUSION

I respectfully dissent from the holding of the majority that an ex parte interview can be conducted under MCR 2.302(C) in a manner that is consistent with HIPAA, provided that reasonable efforts have been made to secure a qualified protective order that meets the requirements of 45 CFR 164.512(e)(1)(v) as set forth in 45 CFR 164.512(e)(1)(ii)(B). Ex parte interviews involve *oral* disclosures of a covered entity's information. The introductory portion of 45 CFR 164.512 specifically limits *oral* disclosures of a covered entity's information to instances "[w]hen the covered entity is *required by this section* to inform the individual of, *or when the individual may agree to*, a use or disclosure permitted by this section . . ." (Emphasis added.) Because an ex parte interview is not required by either this section or Michigan law, nor is there a requirement within 45 CFR 164.512(e) that a patient be informed of an ex parte interview in a judicial proceeding, and plaintiff has not agreed to an ex parte interview in this instance, the subsections of 45 CFR 164.512(e) relied on by the majority cannot be construed as authorizing an ex parte interview that involves the oral disclosure of health information.

I also disagree with the majority's conclusion that Michigan law authorizing ex parte interviews is valid and enforceable after the adoption of HIPAA. First, the physician-patient waiver provisions of MCL 600.2157 and MCL 600.2912f are preempted by HIPAA, because

they are contrary to, and not more stringent than, HIPAA. Second, the majority errs in its reliance on *Domako* to support ex parte interviews, because *Domako* was based on Michigan law that has since been preempted by HIPAA. I conclude that ex parte interviews are not allowed in Michigan because HIPAA does not specifically authorize ex parte interviews, and Michigan law authorizing such interviews has been preempted.

Finally, by holding that a party is only required to make *reasonable efforts* to obtain a qualified protective order rather than *actually* having to obtain a court order, the majority fails to recognize that the Michigan Court Rules contain no mechanism for a party to only make a *reasonable effort* to obtain a court order. Requiring only a reasonable effort to secure the order can only mean that the request could be incompletely made, or denied altogether, and an ex parte interview could still take place. The majority's analysis and conclusion are completely at odds with our court rules and undermine the authority of trial courts to enforce the court rules and their own orders, and I cannot agree with such an interpretation.

Accordingly, I would vacate the decision of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

ADAIR v STATE OF MICHIGAN

Docket Nos. 137424 and 137453. Argued October 6, 2009 (Calendar No. 1). Decided July 14, 2010.

Daniel Adair, the Fitzgerald Public Schools, and others brought an original action in the Court of Appeals against the state of Michigan, the Department of Education, the Department of Management and Budget, and the State Treasurer. Plaintiffs consisted of 456 Michigan public school districts and a taxpayer from each. Plaintiffs alleged, among other claims, that defendants had violated the prohibition of unfunded mandates (POUM) in Const 1963, art 9, § 29, part of the so-called Headlee Amendment, by imposing numerous recordkeeping and reporting requirements on plaintiff school districts. The recordkeeping claim related to the requirements of Executive Order No. 2000-9 and MCL 388.1752 that school districts collect, maintain, and report various types of data to the Center for Educational Performance and Information (CEPI). The Court of Appeals, HOLBROOK, JR., P.J., and TALBOT, J. (SAAD, J., dissenting), granted defendants summary disposition on all claims. 250 Mich App 691 (2002). The Supreme Court granted plaintiffs leave to appeal, reversed in part the judgment of the Court of Appeals, concluding that plaintiffs' recordkeeping claim stated a claim on which relief could be granted, and remanded the case to the Court of Appeals for further proceedings on that claim. 470 Mich 105 (2004). On remand, the Court of Appeals, SAAD, P.J., and TALBOT and FORT HOOD, JJ., concluded that plaintiffs had not supported their claim that the CEPI requirements were an unfunded mandate and again granted summary disposition to defendants. 267 Mich App 583 (2005). In lieu of granting plaintiffs leave to appeal, the Supreme Court vacated the judgment of the Court of Appeals and remanded the case for it to reevaluate plaintiffs' claims under both prongs of the POUM provision in Const 1963, art 9, § 29: that involving the state's requiring a new activity or service and that involving a required increase in the level of an activity or service. 474 Mich 1073 (2006). On second remand, the Court of Appeals, in an unpublished order entered April 18, 2006 (Docket No. 230858), appointed former Wayne Circuit Court Judge Pamela R. Harwood as a special master to determine the issue. She concluded that the recordkeeping requirements did present an

increase in the level of activity required of plaintiff school districts beyond what was previously required and thus violated Const 1963, art 9, § 29. The Court of Appeals, SAAD, C.J., and TALBOT and FORT HOOD, JJ., adopted the special master's conclusions of law and findings of fact with some modifications and entered a declaratory judgment for plaintiffs. The Court of Appeals rejected plaintiffs' request for attorney fees under Const 1963, art 9, § 32, concluding that plaintiffs' "suit" had not been "sustained" as required by that constitutional provision. 279 Mich App 507 (2008). Plaintiffs and defendants filed separate applications for leave to appeal, and the Supreme Court granted both applications in part. 483 Mich 922 (2009).

In an opinion by Chief Justice KELLY, joined by Justices CAVANAGH, WEAVER, and HATHAWAY, the Supreme Court *held*:

To establish a violation of the prohibition of unfunded mandates, a plaintiff must show that the state required a new activity or service or an increase in the level of activities or services. If no state appropriation was made to cover the increased burden on local units of government, the plaintiff need not show the amount of increased costs. The state then has the burden to demonstrate that it need not provide funding because the requirement imposed did not actually increase costs for the local units of government or the increased costs were not necessary.

1. Const 1963, art 9, § 29 prohibits the state from placing two related but separate burdens on local units of government: (1) the state may not reduce the state-financed proportion of the necessary costs of any existing activity or service that the state requires of the local units of government and (2) no state agency may require a new activity or service or an increase in the level of any activity or service beyond that required by existing law unless the state appropriates and disburses funding to pay the local units of government for any necessary increased costs. The second prohibition is the POUM provision, which applies in this case.

2. Plaintiffs established a violation of the POUM provision. The CEPI recordkeeping requirements mandated more activities by plaintiff school districts than the law previously required. The testimony established that both the amount of information collected and the manner in which the information had to be reported to the CEPI were significantly greater and more intensive than before. The state did not fund the implementation of the reporting requirements through an appropriation or provide funding for those plaintiffs' ongoing duties, but expected them to use discretionary funds to cover their costs. Thus, plaintiffs met their initial burden.

3. The testimony established that plaintiff school districts incurred increased costs as a result of the recordkeeping requirements. The increased costs involved hiring additional personnel, reassigning staff, and purchasing software. Personnel were required to work overtime, and the diversion of manpower required constituted increased costs. Defendants offered no evidence in rebuttal.

4. Since plaintiffs met their burden, the state was required to show that it need not provide funds because the new or increased level of activity did not result in increased costs or those costs were not necessary. MCL 21.233(6) defines "necessary cost" as the net cost of an activity or service provided by a local unit of government. "Net cost" is defined as the actual cost to the state if the state were to provide the activity or service mandated as a state requirement. Therefore, the question is, would there be a cost to the state if it rather than the school districts paid for the increased activity? MCL 21.233(6)(a) excludes from the definition of "necessary cost" a cost that is *de minimis*, that is, a cost resulting from a state requirement that is less than $300 a claim. The school districts' additional costs were greater than this amount, and defendants offered no evidence that the state's actual costs would be lower than the districts' if the state were to provide the activity.

5. In the absence of a legislative appropriation, plaintiffs were not required to produce evidence of specific dollar-amount increases in the costs incurred. Because the Legislature is in a superior position to determine what the actual cost to the state would be if the state were to perform the increased recordkeeping and reporting duties, it was the Legislature's burden to demonstrate that plaintiff school districts' costs were not necessary under one or more of the exceptions to the definition of "necessary cost" in MCL 21.233(6)(a) to (d). The dispositive issue in the inquiry is the cost to the state if it were to provide the new or increased activity or service, not the costs incurred by the local units of government.

6. Const 1963, art 9, § 32 provides that if a "suit" to enforce the Headlee Amendment "is sustained," the plaintiff is entitled to the costs incurred in maintaining the suit. Those costs include attorney fees. Even though 20 of plaintiffs' 21 original claims were dismissed in this action, plaintiffs' recordkeeping claim, standing alone, constituted a suit under the constitutional provision, and the grant of the entirety of the relief plaintiffs sought—a declaratory judgment—clearly means that plaintiffs' suit has been sustained. The judgment of the Court of Appeals must be reversed on

this issue, and plaintiffs may recover attorney fees incurred during the litigation related to the recordkeeping claim only.

Declaratory judgment affirmed; judgment reversed in part and case remanded to the Court of Appeals for a determination of attorney fees and other costs.

Justice MARKMAN, joined by Justices CORRIGAN and YOUNG, dissenting, disagreed that plaintiffs are entitled to a declaratory judgment holding that the recordkeeping requirements violated the POUM provision. The majority's interpretation will transform the Headlee Amendment from a provision limiting public expenditures into a provision facilitating such expenditures by relieving future plaintiffs of the need to prove that the net increase in a local unit of government's costs was more than *de minimis* and by enabling them to prevail whenever the state cannot establish that the local unit of government's costs did not increase or that the increased costs were not necessary. The majority erroneously interpreted the burden of proof necessary to establish a POUM violation by holding that a plaintiff need only show that a new or increased level of activity was required for which there was no funding and that the state then must prove that the costs were not increased or that the increased costs were not necessary. The majority further erred by holding that the plaintiff need not submit proof of specific costs. However, the burden of proof remains on the plaintiff at all times and requires the plaintiff to prove with specificity an increase in necessary projected or actual costs. To show an increase in costs, and that the increase is not *de minimis*, there must be some determination of a baseline level of costs and a comparison of before-and-after numbers, whether real or projected. Under the majority's formulation, the state will have no notice of what it must do to comply with the Headlee Amendment and will need to guess at the size of the financial adjustment and the magnitude of the appropriation required to comply with an adverse declaratory judgment. The evidence in this case did not establish a Headlee violation. The judgment of the Court of Appeals should be reversed, and the case should be remanded for entry of summary disposition entered for defendants because plaintiffs failed to submit proof of specific necessary increased costs.

1. CONSTITUTIONAL LAW — PROHIBITION OF UNFUNDED MANDATES — HEADLEE AMENDMENT — BURDEN OF PROOF IN HEADLEE CLAIMS.

No state agency may require a new activity or service by a local unit of government or an increase in the level of any activity or service beyond that required by existing law unless the state appropriates

and disburses funding to pay the local unit of government for any necessary increased costs; to establish a violation of this prohibition of unfunded mandates, a plaintiff must show that the state required a new activity or service or an increase in the level of an activity or service; if the state made no appropriation to cover the increased burden on local units of government, the plaintiff need not show the amount of increased costs; once the plaintiff has satisfied its burden, the state has the burden to demonstrate that no state funding was required because the state-mandated requirement did not actually increase costs or the increased costs were not necessary (Const 1963, art 9, § 29; MCL 21.233[6]).

2. CONSTITUTIONAL LAW — HEADLEE AMENDMENT — COSTS — ATTORNEY FEES.

A taxpayer whose lawsuit to enforce the provisions of the Headlee Amendment is sustained is entitled to receive the costs incurred in maintaining the lawsuit, which include attorney fees (Const 1963, art 9 § 32).

Thrun Law Firm, P.C. (by *Dennis R. Pollard* and *Richard E. Kroopnick*), for plaintiffs.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Timothy J. Haynes*, *Raymond O. Howd*, *Joshua S. Smith* and *Joseph E. Potchen*, Assistant Attorneys General, for defendants.

KELLY, C.J. This case involves the Headlee Amendment[1] and is before this Court for the third time. Most of the legal issues have been resolved and appear in the discussion of facts and procedural history below. The issues remaining are (1) whether plaintiffs must introduce evidence of a specific, quantified increase in costs resulting from a violation of the Headlee Amendment provision prohibiting unfunded mandates to establish entitlement to a declaratory judgment and (2) whether plaintiffs' suit has been "sustained" under Const 1963, art 9, § 32, enabling plaintiffs to recover attorney fees. We answer the first question in the negative and the

[1] Const 1963, art 9, §§ 25 to 34.

second question in the affirmative. Therefore, we affirm in part and reverse in part the judgment of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

The Headlee Amendment is an initiative passed by Michigan voters in 1978. Among its provisions, Headlee added the following section to the Michigan Constitution:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18.[2]

Shortly after the Headlee Amendment was ratified, the Legislature enacted legislation designed to implement it.[3]

The state has required Michigan public school districts to report certain information, including pupil counts and financial data, for many years. However, in 2000, the Governor issued Executive Order No. 2000-9, which established the Center for Educational Performance and Information (CEPI). EO 2000-9 became effective September 28, 2000. Along with later legislation, it required plaintiff school districts to actively participate in collecting, maintaining, and reporting various types of data. The state began warehousing this data in several discrete databases, the single record

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[2] Const 1963, art 9, § 29.

[3] MCL 21.231 *et seq*.

student database (SRSD), the financial information database (FID), the registry of educational personnel (REP), and the school infrastructure database (SID). Under MCL 388.1752,[4] in order to receive yearly funding, school districts must furnish all data that the state considers necessary for the administration of the State School Aid Act.[5]

The information collected by the CEPI facilitates compliance with state reporting requirements and requirements imposed by the federal government.[6] In order to meet some of these requirements, the state must report data on a student-by-student, teacher-by-teacher, or building-by-building basis. This enables the state to receive federal funds under the No Child Left Behind Act.[7]

On November 15, 2000, plaintiffs filed the present suit in the Court of Appeals. Plaintiffs are 456 Michigan public school districts and a taxpayer from each district.[8] They alleged that the recordkeeping and report-

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[4] Currently, MCL 388.1752 provides, in part: "In order to receive funds under this act, each district and intermediate district shall also furnish to the center or the department, as applicable, the information the department considers necessary for the administration of this act . . . ."

[5] MCL 388.1601 *et seq*. Part of the "necessary" information is that needed for compliance with the CEPI recordkeeping and reporting requirements in MCL 388.1694a.

[6] See Center for Educational Performance and Information, <http://www.michigan.gov/cepi> (accessed July 6, 2010) ("Our initiatives in data collection and reporting facilitate school districts' compliance with the federal *No Child Left Behind Act of 2001* and the Michigan Department of Education's accreditation plan, *Education Yes!* CEPI is an office located within the Office of the State Budget.").

[7] PL 107-110, 115 Stat 1425. We note our holding in *Durant v Michigan*, 456 Mich 175, 199; 566 NW2d 272 (1997), that "there is no exception in [Const 1963,] art 9, § 29 for federal mandates, as long as the activity or service is mandated by state law."

[8] The parties stipulated that nine school districts would be "representative school districts" for purposes of discovery and trial. Those nine districts were the Ann Arbor Public Schools, the Birmingham Public

ing requirements in EO 2000-9 and MCL 388.1752 constituted an unfunded mandate and violated the provision of Const 1963, art 9, § 29 prohibiting unfunded mandates (the POUM provision). The parties stipulated midtrial that the database submissions listed in EO 2000-9 and the later legislation were not required until two years after the effective date of the executive order.

In its first adjudication of plaintiffs' claims, the Court of Appeals concluded that the claims raised or that could have been raised in earlier suits were barred by res judicata. It also held that plaintiffs' other claims were barred because of releases the parties had executed or because the activities complained of did not implicate the POUM provision. The Court granted summary disposition to defendants on all claims.[9]

We granted leave to appeal and reversed in part the judgment of the Court of Appeals.[10] A majority of this Court agreed with the Court of Appeals that most of plaintiffs' claims were barred by res judicata or release or did not implicate the Headlee Amendment's POUM provision. However, we concluded that plaintiffs had sufficiently stated a claim on which relief could be granted in their recordkeeping claim. We remanded the case to the Court of Appeals for further proceedings on that claim.

On remand, the Court of Appeals concluded that plaintiffs had not provided documentary support for their claim that the CEPI requirements were an unfunded mandate. Consequently, it again granted summary disposition to defendants.[11] Plaintiffs again ap-

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Schools, the East Grand Rapids Public Schools, the Farmington Public Schools, the Forest Hills Public Schools, the Monroe Public Schools, the Oakland Schools, the School District of the City of Pontiac, and the Traverse City Area Public Schools.

[9] *Adair v Michigan*, 250 Mich App 691; 651 NW2d 393 (2002) (*Adair I*).

[10] *Adair v Michigan*, 470 Mich 105; 680 NW2d 386 (2004) (*Adair II*).

[11] *Adair v Michigan (On Remand)*, 267 Mich App 583; 705 NW2d 541 (2005) (*Adair III*).

pealed, and we vacated the Court of Appeals' judgment and again remanded to that Court.[12] We directed the Court of Appeals to reevaluate plaintiffs' claim "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 . . . ."[13]

On second remand, the Court of Appeals appointed a special master to conduct fact-finding. The special master was instructed to determine

> whether the record-keeping obligations imposed on plaintiff school districts by MCL 388.1752 and Executive Order 2000-9 constitute either a new activity or service or an increase in the level of a state-mandated activity or service within the meaning of Mich Const of 1963, art 9, § 29's prohibition of unfunded mandates.[14]

The special master heard testimony in this case in 2007. On January 27, 2008, she filed an opinion, concluding that the recordkeeping requirements did present an increase in the level of activity required of plaintiff school districts beyond what was previously required. Therefore, she concluded that the requirements violated the POUM provision.

The Court of Appeals adopted the conclusions of law and factual findings of the special master with some modifications and entered a declaratory judgment in favor of plaintiffs.[15] The Court rejected plaintiffs' request for attorney fees under Const 1963, art 9, § 32, concluding that this suit "cannot be characterized as

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[12] *Adair v Michigan*, 474 Mich 1073 (2006) (*Adair IV*).

[13] *Id.*

[14] *Adair v Michigan (On Second Remand)*, unpublished order of the Court of Appeals, entered April 18, 2006 (Docket No. 230858).

[15] *Adair v Michigan (On Second Remand)*, 279 Mich App 507; 760 NW2d 544 (2008) (*Adair V*).

having been 'sustained' within the meaning of § 32."[16] Both plaintiffs and defendants appealed, and we granted both applications for leave to appeal in part.[17]

II. STANDARD OF REVIEW

Questions involving the proper interpretation of a constitutional provision receive review de novo.[18] The proper interpretation and application of a statute is also a question of law that we consider de novo.[19]

III. ANALYSIS

We have established that "[t]he primary and fundamental rule of constitutional or statutory construction is that the Court's duty is to ascertain the purpose and intent as expressed in the constitutional or legislative provision in question."[20] When interpreting constitutional provisions, we are mindful that the interpretation given the provision should be " 'the sense most obvious to the common understanding' " and one that " 'reasonable minds, the great mass of the people themselves, would give it.' "[21] "[T]he intent to be arrived at is

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[16] *Id.* at 525.

[17] *Adair v Michigan*, 483 Mich 922 (2009). We limited our grant of leave to appeal to the issues of (1) whether the prohibition of unfunded mandates in Const 1963, art 9, § 29 requires plaintiffs to prove specific costs, either through the reallocation of funds or out-of-pocket expenses, to establish their entitlement to a declaratory judgment and (2) whether plaintiffs are entitled to recover the "costs incurred in maintaining" this suit, pursuant to Const 1963, art 9, § 32.

[18] *People v Jackson*, 483 Mich 271, 277; 769 NW2d 630 (2009).

[19] *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

[20] *White v City of Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979).

[21] *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971), quoting Cooley, Constitutional Limitations (emphasis omitted).

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 . . . ."[22]

Article 9, § 29 of the Michigan Constitution prohibits the state from placing two related but independent burdens on local governmental entities. First, the state may not reduce the state-financed proportion of the necessary costs of any existing activity or service that state law requires of local units of government. Second, no state agency, including the Legislature, may require a new activity or service by a local unit of government. It may not require an increase in the level of an activity or service beyond that required by existing law. If it imposes such a requirement, the state must appropriate and disburse funding to pay the local unit of government for any necessary increased costs. This Court has described the first requirement as the "maintenance of support" (MOS) provision and the second requirement as the "prohibition on unfunded mandates" or POUM provision.[23] These two requirements address different situations and involve different harms.[24] Therefore, the analysis applicable to each differs.[25] Only the POUM provision is applicable in this case.

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[22] *Traverse City Sch Dist*, 384 Mich at 405, quoting Cooley, Constitutional Limitations (emphasis omitted).

[23] *Adair II*, 470 Mich at 111, citing *Judicial Attorneys Ass'n v Michigan*, 460 Mich 590, 595; 597 NW2d 113 (1999).

[24] *Durant v State Bd of Ed*, 424 Mich 364, 379; 381 NW2d 662 (1985) ("The first sentence [of Const 1963, art 9, § 29] is aimed at existing services or activities already required of local government. The second sentence addresses future services or activities.").

[25] The dissent is correct that we have previously concluded that the MOS and the POUM provisions are subject to similar requirements. *Post* at 500-501, quoting *Adair II*, 470 Mich at 120 n 13. However, in *Adair II*, a majority of this Court also specifically outlined the differences in the standards for claims arising under the two provisions:

A. HEADLEE VIOLATIONS

A majority of this Court has held that to establish a violation of the POUM provision, a plaintiff must show that "the state-mandated local activity was originated without sufficient state funding after the Headlee Amendment was adopted or, if properly funded initially, that the mandated local role was increased by the state without state funding for the necessary increased costs."[26] Also, as the dissent correctly notes, the state "need only fund mandates that will result in 'necessary increased costs.' "[27]

Const 1963, art 9, § 29 is a clear prohibition of state action: before the state imposes a new or increased activity or service on a local unit of government, it must appropriate funds to cover any necessary increased costs. Left unanswered is who bears the burden of showing that the new or increased activity or service resulted in necessary increased costs.[28]

> [T]o establish a Headlee violation under the MOS clause, the plaintiffs must show "(1) that there is a continuing state mandate, (2) that the state actually funded the mandated activity at a certain proportion of necessary costs in the base year of 1978-1979, and (3) that the state funding of necessary costs has dipped below that proportion in a succeeding year." *Oakland Co v Michigan*, 456 Mich 144, 151; 566 NW2d 616 (1997) (opinion by KELLY, J.). Under the POUM clause, they must show that the state-mandated local activity was originated without sufficient state funding after the Headlee Amendment was adopted or, if properly funded initially, that the mandated local role was increased by the state without state funding for the necessary increased costs. [*Adair II*, 470 Mich at 111.]

[26] *Id.* at 111.

[27] *Post* at 501.

[28] Our Headlee caselaw does not answer this question. The dissent asserts that it is a foregone conclusion that "it is the plaintiff's burden to show an increase in necessary costs." *Post* at 507 (emphasis omitted). The dissent cites nothing definitive in support of this proposition.

We conclude that to establish a violation of the POUM provision, a plaintiff must show that the state required a new activity or service or an increase in the level of activities or services. If no state appropriation was made to cover the increased burden on local government, the plaintiff need not show the amount of increased costs. It is then the state's burden to demonstrate that no state funding was required because the requirement did not actually increase costs or the increased costs were not necessary.[29]

In this case we agree with the Court of Appeals that plaintiffs established a violation of the POUM provision. The recordkeeping requirements of EO 2000-9 and the later legislation mandate more activities than the law required before, which Const 1963, art 9, § 29 forbids, and the state did not fund them,[30] as the POUM provision requires.[31] Moreover, defendants did not show

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[29] However, if the state did appropriate funds for the new or increased activity or service, the plaintiff would likely have a higher burden in order to show a POUM violation. Under those circumstances, the state would not have violated the POUM provision per se by failing to provide funding. Because those circumstances are not presented in the instant case, we need not address this issue.

[30] It is undisputed that the state did provide a one-time appropriation to plaintiff school districts in 2002 for implementation of changes to the SRSD. We did not give the parties an opportunity to brief the issue of the relevancy of this appropriation. However, it is also undisputed that the state made no explicit appropriation for the increased activity involved in complying with the requirements for the SID, FID, or REP. Therefore, the 2002 appropriation is irrelevant to our analysis.

[31] We reiterate that this conclusion is entirely consistent with a majority of this Court's requirement in *Adair II* that plaintiffs "must show that the state-mandated local activity was originated without sufficient state funding after the Headlee Amendment was adopted . . . ." *Adair II*, 470 Mich at 111. Plaintiffs established that a state-mandated local activity, namely new and increased levels of data collection, originated from EO 2000-9. Plaintiffs further demonstrated that no state funding was appropriated to cover the new activity involved in implementing the SID, which had no predecessor before the issuance of EO

that plaintiff school districts' costs were not increased or that such costs were not "necessary" under MCL 21.233(6). Therefore, we affirm the Court of Appeals' judgment granting plaintiffs a declaratory judgment.

1. INCREASE IN THE LEVEL OF ANY ACTIVITY OR SERVICE

The special master concluded that, beginning in 2002, the recordkeeping requirements imposed for the CEPI constituted an increase in the level of activity beyond that previously required. It is undisputed that the state required plaintiff school districts to report some student information and financial data before the CEPI was established. Therefore, the pertinent testimony on this issue involved the changes in the volume and specificity of information that the state required to be reported after implementation of the CEPI requirements.

Defendants assert that Const 1963, art 9, § 29 was not violated because the recordkeeping requirements did not constitute a state-mandated increase in the level of activities or services. However, the testimony adduced before the special master belies this argument. Ample testimony established that both the amount of information collected and the manner in which the information had to be reported after CEPI was significantly greater and more intensive than before.

For example, Deborah Piesz, the finance manager at the Birmingham Public Schools, testified that the reporting required for the FID was much more involved than it had been in the past. She stated further that the district was now required to "keep much more detailed information" than previously. Both Ms. Piesz and

2000-9. The state also failed to appropriate any funding for the increased activity required to provide data for the FID and REP.

Daniel Behm, the superintendent of the Forest Hills Public Schools, testified that the school district collected the additional information solely to comply with the heightened state requirements imposed by the CEPI. They also stated that the districts would not have collected the information for their own purposes. Testimony from other personnel employed in the nine representative districts was substantially similar to that of Mr. Behm and Ms. Piesz.

Collecting "a large amount of data" or "much more detailed information" than was previously required constitutes an increase in the level of an activity under Const 1963, art 9, § 29; namely, the state-mandated collection, maintenance, and reporting of data to the state. Defendants identify no evidence that rebuts this simple fact or undercuts the veracity of any of the testimony taken before the special master.

2. NO STATE APPROPRIATION

The evidence taken before the special master demonstrated that no state appropriation was made to fund plaintiff school districts' implementation of the reporting requirements of the REP, SID, or FID. Nor was any appropriation made to provide for the school districts' ongoing duty to comply with the reporting requirements for all four databases. Rather, the districts were expected to take monies from discretionary funds to cover the costs associated with their data-collection and reporting obligations. The evidence established that each school district did that.

Hence, plaintiffs met their initial burden of showing a POUM violation by demonstrating an increase in the level of recordkeeping required of the school districts. Moreover, they demonstrated that the state appropriated no funds to cover the implementation of these

increased requirements. Thus, plaintiffs are entitled to a declaratory judgment unless defendants demonstrate that plaintiff school districts' costs were not increased as a result of the requirements or that the costs incurred were not necessary.

3. INCREASED COSTS

The next question is whether the increase in the recordkeeping requirements resulted in increased costs to plaintiff school districts. Again, a vast amount of unchallenged testimony in the record establishes that plaintiff school districts incurred increased costs as a result of the CEPI requirements. These increased costs involved hiring additional personnel, reassigning existing staff to help meet the CEPI requirements, and purchasing computer software to enable compliance with them.

Testimony from administrative personnel working for the representative school districts established that personnel were required to work overtime to comply with the CEPI requirements. One of them, Sandy Kopelman, a secretary in the Birmingham Public Schools, stated that she worked overtime specifically to comply with the CEPI's additional reporting requirements. She stated that she had "never got overtime before."

Randall Monday, an assistant superintendent for the Monroe Public Schools, claimed that since the implementation of the CEPI requirements, he had to take more time to meet with the principal of each school within his district. He stated that the meetings required additional time because he and the principals had to sort out distinctions between the information required for the CEPI and the district's own reporting requirements. This diversion of manpower required so that the

school districts could comply with the CEPI requirements constituted increased costs to the districts.[32]

Mary Reynolds, the executive director of business services for the Farmington Public Schools, testified that her office lost staff after the CEPI requirements were implemented. Nevertheless, she testified that, because compliance with the CEPI requirements was state-mandated and needed for the district to receive other state funding, the district was forced to give

[32] By way of illustration, consider a staff member who before implementation of the CEPI requirements needed to spend 20 hours a week collecting, maintaining, and reporting data required by the state. Assume that after the establishment of the CEPI, that staff member needed to spend 30 hours a week for the district to comply with the new requirements (presuming no contemporaneous cost savings elsewhere). The district incurred an increased "net cost" of 10 hours a week of that employee's wages.

The Headlee Amendment does not require the district to show that its actual expenditures increased. MCL 21.233(6) defines "necessary cost" as the "actual cost to the state if the state were to provide the activity or service . . . ." In this example, plaintiffs could show that the state would incur the cost of paying a qualified person for 10 hours to collect, maintain, and report the new data. Even without such a showing, however, plaintiffs here demonstrated that the school districts' actual expenditures increased as a result of their efforts to comply with the CEPI requirements.

This hypothetical example is a simplified version of the stipulated testimony of administrative personnel from the various districts. For example, Francine Mershman, a secretary in the Birmingham Public Schools, testified that in June and August, she spent about 95 percent of her time on data entry for the CEPI. During the time for student count reports, she devoted 75 to 80 percent of her time to CEPI recordkeeping. Throughout the rest of the year, CEPI recordkeeping took approximately 30 to 40 percent of her time. When asked what percentage of her time would have been spent on data collection 10 years earlier, Ms. Mershman replied "probably 10%." She also stated that, although data collection previously increased at the end and beginning of the year, it still did not take "that much time." During most of the school year, therefore, Ms. Mershman spent 30 to 40 precent of her time on data collection post-CEPI, as compared to 10 percent pre-CEPI.

priority to that work. As a result, she testified, "there are many other things that don't get done, don't get accomplished."

Therefore, the evidentiary record shows that the state forced plaintiff school districts to allocate staff time in order to comply with the CEPI requirements. The fact that MCL 388.1752 requires school districts to comply with the CEPI requirements to receive other funding further supports our conclusion. Defendants offered no evidence to rebut this conclusion.[33]

4. "NECESSARY" COSTS AND "NET COST"

Defendants claim that, even if the CEPI requirements mandated an increase in activities or services that increased plaintiff school districts' costs, those costs are not necessary increased costs. Defendants assert that plaintiffs failed to demonstrate that any additional costs incurred to comply with the requirements met the definition of "necessary cost" under MCL 21.233(6) and were not *de minimis* under MCL 21.232(4).[34] Finally, defendants and the dissent argue

[33] Moreover, defendants concede that plaintiff school districts incurred at least some actual increased costs. They argue, however, that the increased costs were not necessary increased costs, asserting that "in those few instances where [plaintiffs] can actually point to an actual cost incurred, the costs were either *de minimis* or unnecessary."

[34] MCL 21.233 provides, in part:

> (6) "Necessary cost" means the net cost of an activity or service provided by a local unit of government. The net cost shall be the actual cost to the state if the state were to provide the activity or service mandated as a state requirement, unless otherwise determined by the legislature when making a state requirement. Necessary cost does not include the cost of a state requirement if the state requirement satisfies 1 or more of the following conditions:
>
> (a) The state requirement cost does not exceed a de minimus [sic] cost.

that plaintiffs cannot prevail because even if the school districts incurred necessary increased costs, they did not quantify the exact amount of those costs.

We reject defendants' argument because it would hold plaintiffs to an evidentiary burden that they need not meet. The language of Const 1963, art 9, § 29 provides a clear limitation on state action: an increase in the level of any activity or service beyond that required by existing law must not be required by the Legislature or any state agency. The only exception is if the state appropriates and disburses funds adequate to pay for necessary increased costs.

Neither Const 1963, art 9, § 29 nor MCL 21.233 suggests that plaintiffs bear the burden of proving precisely how much the school districts' costs increased

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(b) The state requirement will result in an offsetting savings to an extent that, if the duties of a local unit which existed before the effective date of the state requirement are considered, the requirement will not exceed a de minimus [sic] cost.

(c) The state requirement imposes additional duties on a local unit of government which can be performed by that local unit of government at a cost not to exceed a de minimus [sic] cost.

(d) The state requirement imposes a cost on a local unit of government that is recoverable from a federal or state categorical aid program, or other external financial aid. A necessary cost excluded by this subdivision shall be excluded only to the extent that it is recoverable.

(7) "New activity or service or increase in the level of an existing activity or service" does not include a state law, or administrative rule promulgated under existing law, which provides only clarifying nonsubstantive changes in an earlier, existing law or state law; or the recodification of an existing law or state law, or administrative rules promulgated under a recodification, which does not require a new activity or service or does not require an increase in the level of an activity or service above the level required before the existing law or state law was recodified.

MCL 21.232(4) defines "de minimus [sic] cost" as "a net cost to a local unit of government resulting from a state requirement which does not exceed $300.00 per claim."

as a result of the mandate. In fact, the language of MCL 21.233 implies the opposite. That section defines "necessary cost" as the "net cost of an activity or service provided by a local unit of government." The "net cost" is defined as "the actual cost to the state if the state were to provide the activity or service mandated as a state requirement . . . ."

Nothing in the POUM provision expressly requires a plaintiff to establish that the increase in activities or services resulted in increased costs. Rather, a plaintiff need only establish that the state imposed on it a new or increased level of activity without providing any funding to pay for it. The burden then shifts to the state to show (1) that it is not required to pay for it because the new or increased level of activity did not result in increased costs or (2) that those costs were not "necessary" under MCL 21.233(6).

In evaluating whether the additional costs stemming from the increased level of activity were necessary, the question is this: Would there be a cost to the state if it, rather than the school districts, paid for the increased activity? MCL 21.232(4) defines a *de minimis* cost as a "net cost" to a local governmental unit resulting from a state requirement that is less than $300 a claim.

Notably, this $300 requirement has no temporal limitation. The special master specifically found that "it is clear that the increase in the shear [sic] amount of data initially overwhelmed the resources . . . ." It is implicit in this conclusion and supported by copious testimony, such as that discussed previously, that the additional costs incurred by each school district to comply with the CEPI requirements exceeded $300.[35]

[35] Reference to our previous example again provides a good illustration of the point. See note 32 of this opinion. Suppose a district must pay a qualified person for an additional 10 hours of work each week collecting,

Defendants cannot demonstrate any basis for concluding otherwise, nor did they offer evidence that the state's actual costs, were it to provide the activity, would be lower than were the school districts'.

5. PROOF OF SPECIFIC INCREASED COSTS

Another necessary inquiry related to the preceding issue is whether plaintiffs must produce evidence of specific dollar-amount increases in the costs incurred in order to comply with the CEPI requirements. We conclude that, when no legislative appropriation was made, a plaintiff does not have the burden to make such a showing to establish entitlement to a declaratory judgment under the POUM provision. This conclusion is axiomatic from the language of Const 1963, art 9, § 29, previous caselaw involving the Headlee Amendment, and the underlying purpose for seeking a declaratory judgment.

The terms "net cost" and "actual cost" suggest a quantifiable dollar amount. However, nothing in MCL 21.233 suggests that it was intended to change the burden of proof in Const 1963, art 9, § 29. The specific costs that would be incurred are defined by reference to what costs the state would incur if it had to pay for the increased costs itself. Thus, it is the Legislature's burden to demonstrate that those costs were not "necessary" under one or more of the exceptions in MCL 21.233(6)(a) to (d). Otherwise, the Legislature must determine what dollar amount is necessary, then appropriate that amount to the school districts.

This is so because MCL 21.233(6) defines "net cost" as "the actual cost to the state" if the state were to

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maintaining, and reporting the data required for CEPI compliance. Assuming an hourly wage as low as $8, the "actual cost" to the state would exceed $300 within a month's time.

provide the activity or service required. Clearly, the Legislature is in a position far superior to plaintiffs' to determine what the actual cost to itself would be if it performed the increased recordkeeping and reporting duties. Proofs on this point are easily accessible to the state because it could ascertain the costs it would incur if it provided the new activity. The dispositive issue is the cost to the state if it were to provide the new or increased activity or service, not the cost incurred by the local governmental unit.[36]

To impose such a requirement on plaintiffs would be illogical and inconsistent with the purposes of the POUM provision of the Headlee Amendment. We have noted that the POUM provision is intended to address future services and activities.[37] Plaintiffs in this case filed suit fewer than two months after EO 2000-9 took effect. The parties stipulated at trial that plaintiff school districts were not required to begin complying with the order's recordkeeping requirements until two years later.

Therefore, had this case been resolved in a timely fashion, EO 2000-9 would not have required plaintiffs to demonstrate specific amounts of necessary costs incurred. Moreover, it would have been difficult for

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[36] Thus, the dissent is mistaken in asserting that we require the state to prove what a local unit of government's increased costs were, making its appropriation obligations under the Headlee Amendment unclear. This is a recurring theme throughout the dissenting opinion. See *post* at 502 n 9 ("[T]he state will be required to audit every POUM plaintiff's books and . . . extensive and intrusive discovery of local budgetary information may have to occur."); *post* at 504 ("[T]he state is afforded no notice of what it must do to comply with the Headlee Amendment and is left only to guess at the size of the financial adjustment, and of the magnitude of the appropriation required . . . ."); *post* at 511-512 ("[E]stimated levels of accompanying appropriations will entail nothing more than speculation.").

[37] *Durant*, 424 Mich at 379.

them to do so. Yet this Court specifically endorsed a prompt resolution of Headlee Amendment claims in *Durant*:

> As arduous as the proceedings in this case have been, we have succeeded in deciding many points of law that will guide future decisions. Thus, there is every reason to hope that future cases will be much more straightforward. *We anticipate that taxpayer cases filed in the Court of Appeals will proceed to rapid decision on the issue whether the state has an obligation under art 9, § 29 to fund an activity or service*.[38]

Finally, plaintiffs in this case seek a declaratory judgment, not monetary damages. An action for a declaratory judgment is typically equitable in nature and subject to different rules than other causes of action.[39] "The declaratory judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people."[40] We have also consistently held that "a court is not precluded from reaching issues before actual injuries or losses have occurred."[41]

Defendants claim that a finding of necessary increased costs cannot be established without a compari-

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[38] *Durant*, 456 Mich at 205-206 (emphasis added).

[39] MCR 2.605 contains specific provisions governing actions for a declaratory judgment. MCR 2.605(A) empowers a court to "declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(C) states that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in an appropriate case."

[40] *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978), citing 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), committee comment, p 683; see also *Revenue Comm'r v Grand Trunk W R Co*, 326 Mich 371, 375; 40 NW2d 188 (1949).

[41] *Shavers*, 402 Mich at 589; see also *Merkel v Long*, 368 Mich 1, 11-14; 117 NW2d 130 (1962).

son between the specific net costs before and after the required change in activities. For the reasons stated previously, we reject this argument. Had this action proceeded to a prompt resolution, plaintiffs could not have demonstrated such a side-by-side comparison of the "before and after" costs incurred to meet the recordkeeping requirements. It would be nonsensical to impose this additional evidentiary requirement on plaintiffs here when, in another case, it would be impossible for the plaintiffs to make such a showing.

That this litigation was delayed long enough for plaintiff school districts to incur ascertainable increased costs is insufficient justification for holding plaintiffs to an evidentiary requirement they otherwise need not bear. Requiring plaintiffs to demonstrate specific costs is contrary to the purposes of an action for declaratory judgment under the POUM provision in Const 1963, art 9, § 29 and the language authorizing it.[42] The parade of potentially negative "consequences" of our holding to which the dissent refers does not alter these simple facts.[43]

B. ATTORNEY FEES

In their cross-appeal, plaintiffs argue that they are entitled to attorney fees under Const 1963, art 9, § 32 because they have been granted a declaratory judgment on their claim concerning the recordkeeping requirements. The Court of Appeals rejected this argument:

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[42] Defendants also argued in the lower courts that (1) their one-time $3.4 million appropriation in 2002 sufficiently covered the increased costs plaintiff school districts incurred to comply with the CEPI requirements and (2) the mandate was fully funded by the state's $3.5 billion appropriation of discretionary funds. Our order granting leave to appeal did not include these issues. Thus, we decline to address them here.

[43] *Post* at 510-513.

> Although plaintiffs have sustained their claim with regard to the data-collection and reporting requirements, it must be noted that this claim is but one of many plaintiffs initially raised in this action. Plaintiffs' other claims were rejected by this Court. *Adair*, 250 Mich App 691. This Court's decision with regard to those claims was sustained by our Supreme Court. *Adair*, 470 Mich 105. Under these circumstances, plaintiffs' suit cannot be characterized has having been "sustained" within the meaning of [Const 1963, art 9,] § 32. Accordingly, we decline plaintiffs' request for attorney fees.[44]

Plaintiffs' entitlement to attorney fees is evaluated under Const 1963, art 9, § 32. That section states:

> Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.

We previously held that the word "costs" in Const 1963, art 9, § 32 includes attorney fees incurred in litigating claims alleging a violation of the Headlee Amendment.[45] Therefore, if their "suit" has been "sustained," plaintiffs are entitled to attorney fees in addition to other costs incurred in maintaining the suit.

The word "suit" and the word "sustained" are not defined in the applicable provisions of the Michigan Constitution or in the Headlee implementing legislation. Thus, we again apply the rule of common understanding to ascertain the purpose and intent of Const 1963, art 9, § 32.

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[44] *Adair V*, 279 Mich App at 525.

[45] *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 10; 564 NW2d 457 (1997).

Black's Law Dictionary defines "suit" as "[a]ny proceeding by a party or parties against another in a court of law[.]"[46] A lay dictionary defines "suit" as "4. *Law.* a. an act or instance of suing in a court of law; lawsuit. b. a petition or appeal."[47] "Sustain" is defined as "to uphold as valid, just, or correct"[48] and "4. ([o]f a court) to uphold or rule in favor of . . . . 5. To substantiate or corroborate . . . ."[49]

Applying the definitions to this case, we disagree with the Court of Appeals that plaintiffs' suit has not been sustained. "Any proceeding" and "a petition or appeal" is broad language that encompasses a cause of action such as this one, in which 20 of plaintiffs' 21 original claims were dismissed. Therefore, although most of plaintiffs' claims were dismissed, plaintiffs' recordkeeping claim, standing alone, constituted a "suit" under Const 1963, art 9, § 32. The recordkeeping claim has been the only claim litigated during the past six years.[50] It would defy the common understanding of the word "lawsuit" to conclude that such prolonged litigation does not constitute a "suit" within the meaning of Const 1963, art 9, § 32.

Moreover, plaintiffs' recordkeeping claim, itself a suit as noted previously, has clearly been sustained. The Court of Appeals granted plaintiffs the entirety of the relief sought on their claim—a declaratory judgment—which we affirm. Consequently, this Court has upheld,

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[46] Black's Law Dictionary (8th ed).

[47] *Random House Webster's College Dictionary* (2001).

[48] *Id*.

[49] Black's Law Dictionary (8th ed).

[50] In *Adair II*, a majority of this Court affirmed the Court of Appeals' dismissal of all of plaintiffs' claims except for the recordkeeping claim, ending litigation on those claims. *Adair II*, 470 Mich at 133.

ruled in favor of, validated, substantiated, or corroborated plaintiffs' suit. We therefore reverse the judgment of the Court of Appeals on this issue. Plaintiffs may recover attorney fees incurred during the litigation related to the recordkeeping claim only.

IV. CONCLUSION

We affirm in part and reverse in part the judgment of the Court of Appeals. The recordkeeping requirements of MCL 388.1752 and EO 2000-9 required an increase in the level of activities or services by plaintiff school districts over what was previously required. Moreover, the increase resulted in increased costs that are more than *de minimis*. In order to prevail, plaintiffs were not required to show a quantified dollar-amount increase in costs in excess of a *de minimis* amount. Therefore, the recordkeeping requirements violate the POUM provision of the Michigan Constitution of 1963, at article 9, § 29. The declaratory judgment in favor of plaintiffs is affirmed.

Finally, we conclude that plaintiffs' suit has been sustained within the meaning of Const 1963, art 9, § 32. Therefore, we reverse the Court of Appeals' judgment and hold that plaintiffs are entitled to the costs incurred in maintaining this action. Those costs include an award of reasonable attorney fees incurred in litigating the recordkeeping claim only. We remand this case to the Court of Appeals for a determination of costs and attorney fees to be awarded, and we do not retain jurisdiction.

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

MARKMAN, J. (*dissenting*). I respectfully dissent from the majority's conclusion that plaintiff school districts are entitled to a declaratory judgment holding that the recordkeeping requirements of MCL 388.1752 and Executive Order No. 2000-9 violate the prohibition of unfunded mandates (POUM) provision of Const 1963, art 9, § 29. I dissent because the majority has erroneously interpreted the burden of proof necessary to establish a violation of the POUM provision. The majority errs by holding that a POUM plaintiff need only show a new or increased level of activity for which there is no funding. It further errs by stating that if a plaintiff makes such a showing, the plaintiff is entitled to prevail *unless the state* proves that costs were not increased or that such increased costs were not "necessary." Finally, the majority errs by holding that a POUM plaintiff need not submit proof of specific costs. As explained hereafter, the burden of proof remains on a POUM plaintiff at all times and requires the plaintiff to prove with specificity an increase in necessary projected or actual costs.

I would reverse the judgment of the Court of Appeals and remand for entry of summary disposition for defendants on the ground that plaintiffs failed to establish a POUM violation because they failed to submit proof of specific "necessary increased costs" through the reallocation of funds or out-of-pocket expenses required by the new recordkeeping requirements.[1] There are significant practical consequences to the majority's interpretation that over time will trans-

[1] The majority also holds that plaintiffs are entitled to recover their costs, including attorney fees, as prevailing parties because one of their 21 claims was sustained. Because I find that plaintiffs should not prevail on the merits, I do not join this part of the majority's opinion either.

form the Headlee Amendment from a provision limiting public expenditures into a provision facilitating such expenditures.

I. FACTS AND HISTORY

Plaintiffs are 456 local Michigan school districts in their corporate capacity, together with one individual taxpayer from each district. This appeal is the culmination of plaintiffs' Headlee Amendment claim that the state has imposed new data collection and reporting requirements on local school districts without providing the necessary funding for the increased costs of those mandates.[2] Plaintiffs filed an original declaratory judgment action in the Court of Appeals on November 15, 2000, alleging 21 separate violations of the Headlee Amendment, specifically Const 1963, art 9, § 29, which, in its second sentence, contains a prohibition of unfunded mandates.[3] This Court eventually determined that only one of plaintiffs' claimed violations was potentially viable, and we remanded the case to the Court of Appeals, directing it to reevaluate plaintiffs' recordkeeping claim under Const 1963, art 9, § 29. *Adair v Michigan*, 470 Mich 105; 680 NW2d 386 (2004); *Adair v Michigan*, 474 Mich 1073 (2006).

The Court of Appeals subsequently appointed a special master who heard testimony in 2007, some five years after the recordkeeping requirements took

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[2] EO 2000-9 established the Center for Educational Performance and Information (CEPI) and required plaintiff school districts to actively participate in collecting, maintaining, and reporting various types of related data.

[3] The Headlee Amendment vests original jurisdiction in the Court of Appeals for claims arising under its provisions. Const 1963, art 9, § 32. Special pleading requirements for such actions are found in MCR 2.112(M).

effect. The special master determined that plaintiffs had proved their POUM claim—even though she also determined that plaintiffs had adduced "little evidence of local districts or [intermediate school districts] incurring actual additional costs or expenditures as a result" of these requirements. The Court of Appeals adopted most of the special master's factual findings and conclusions of law and entered a declaratory judgment in favor of plaintiffs. *Adair v Michigan (On Second Remand)*, 279 Mich App 507; 760 NW2d 544 (2008). In particular, the Court of Appeals held that to demonstrate a POUM violation, plaintiffs only needed to establish

> (1) an increase in the level of activity or services mandated by the state and (2) a complete failure on the part of the state to provide any funding to offset the necessary costs to be incurred by the districts in the provision of the increased level of services or activities. [*Id*. at 515.]

Defendants appealed in this Court, arguing that plaintiffs had not proved the specific dollar amount of any actual costs or expenses resulting from the recordkeeping requirements and that the Court of Appeals had erred by concluding that a plaintiff need not demonstrate particularized increased costs in order to sustain a POUM claim. We granted leave to appeal, asking the parties to brief "whether the prohibition of unfunded mandates in Const 1963, art 9, § 29, requires the plaintiffs to prove specific costs, either through the reallocation of funds or out-of-pocket expenses, in order to establish their entitlement to a declaratory judgment . . . ." *Adair v Michigan*, 483 Mich 922 (2009).

II. HEADLEE AMENDMENT

The Headlee Amendment is an initiative passed by Michigan voters in 1978. The first sentence of Const 1963, art 9, § 29 states:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law.

The second sentence of Const 1963, art 9, § 29 adds:

> A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.

The first sentence addresses existing services or activities required of local units of government, and the second sentence addresses future services or activities. Claims under the first sentence are known as "maintenance of support" or "MOS" claims. Claims under the second sentence are known as "prohibition of unfunded mandates" or "POUM" claims. This appeal involves only a POUM claim. Under the language of the second sentence, a POUM plaintiff must show "increased costs" that are "necessary" to fulfill a state mandate for a new or increased activity or service.[4] Thus, in the case at bar, one must assess (1) whether the recordkeeping requirements resulted in increased costs to plaintiff school districts and, if so, (2) whether the incurrence of these costs was necessary to comply with the recordkeeping requirements.

III. HEADLEE STATUTE

The Headlee implementing act, 1979 PA 101, MCL 21.231 *et seq*., defines "necessary cost" as "the net cost

[4] We did not grant defendants' application for leave to appeal the Court of Appeals' determination that the recordkeeping requirements amounted to both new and increased levels of activities and services. We also did not grant leave to appeal to consider defendants' argument that this case should not be viewed as a POUM case because of a 2002 appropriation.

of an activity or service provided" and "net cost" as "the actual cost to the state if the state were to provide the activity or service mandated as a state requirement . . . ." MCL 21.233(6).[5] The Headlee implementing act also provides that a necessary cost does not include a cost that does not exceed a *de minimis* amount, which is defined as a cost that does not exceed $300 a claim. MCL 21.233(6)(c); MCL 21.232(4).[6] Therefore, considering the Headlee implementing act in evaluating whether plaintiff school districts' additional costs were necessary, the relevant question is whether there would be an increase in the actual cost to the state if it were to provide the activity or service itself. Also, a cost incurred by a local unit of government because of a state mandate does not become a necessary cost if it is *de minimis*.

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[5] MCL 21.233(6) provides, in part:

> "Necessary cost" means the net cost of an activity or service provided by a local unit of government. The net cost shall be the actual cost to the state if the state were to provide the activity or service mandated as a state requirement, unless otherwise determined by the legislature when making a state requirement. Necessary cost does not include the cost of a state requirement if the state requirement satisfies 1 or more of the following conditions:
>
> (a) The state requirement cost does not exceed a de minimus [sic] cost.
>
> (b) The state requirement will result in an offsetting savings to an extent that, if the duties of a local unit which existed before the effective date of the state requirement are considered, the requirement will not exceed a de minimus [sic] cost.
>
> (c) The state requirement imposes additional duties on a local unit of government which can be performed by that local unit of government at a cost not to exceed a de minimus [sic] cost.

[6] MCL 21.232(4) provides:

> "De minimus [sic] cost" means a net cost to a local unit of government resulting from a state requirement which does not exceed $300.00 per claim.

IV. ANALYSIS

A. MOS VERSUS POUM CLAIMS

This Court held in *Durant v State Bd of Ed*, 424 Mich 364, 379; 381 NW2d 662 (1985), and *Oakland Co v Michigan*, 456 Mich 144; 566 NW2d 616 (1997), that a plaintiff bringing a claim under the MOS provision must demonstrate the actual costs of the mandated services. However, following the lead of the Court of Appeals, the majority holds here that POUM plaintiffs, in contrast with MOS plaintiffs, need not demonstrate either projected or actual costs. The majority's only explanation for why POUM plaintiffs should have a lower burden of proof comes in its assertion that the two sentences of Const 1963, art 9, § 29 address different situations and, therefore, that a different analysis applies to each.

I disagree. In *Durant*, 424 Mich at 379, we explained that the two sentences of Const 1963, art 9, § 29 must be read together "[b]ecause they were aimed at alleviation of two possible manifestations of the same voter concern . . . ." We specifically reiterated this point in *Schmidt v Dep't of Ed*, 441 Mich 236, 250-251; 490 NW2d 584 (1992), and *Judicial Attorneys Ass'n v Michigan*, 460 Mich 590, 598 n 2; 597 NW2d 113 (1999). Indeed, in the very case at bar, we have stated:

> Although *Oakland Co* dealt with MOS claims, as we noted in *Judicial Attorneys Ass'n, supra* at 598 n 2, that does not make it "inapplicable to an analysis of the second sentence of § 29." Thus, the requirements of POUM claims are, in this respect, similar to MOS claims. [*Adair*, 470 Mich at 120 n 13.]

While MOS claims are aimed at existing services or activities already required of a local unit of government and POUM claims address future services or activities,

both provisions require *a claimant* to quantify the necessary costs of state-mandated activities. The fact that this case is one for a declaratory judgment and not a claim for money damages[7] does not and cannot change the constitutional requirement that the state need only fund mandates that will result in "necessary increased costs."[8] If plaintiffs are not required to demonstrate that a state requirement will, in fact, result in the actual reallocation of funds or out-of-pocket expenses, then there has been no showing of any necessary increased costs that will be incurred.

B. THE MAJORITY'S ANALYSIS

The Court of Appeals held that plaintiffs only had to show a complete failure to provide funding for an increased or new level of services or activities in order to prevail as POUM plaintiffs. *Adair*, 279 Mich App at 514-515. The majority itself seems to agree, stating:

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[7] In this regard, I note that when this Court remanded this case to the Court of Appeals in 2006, Chief Justice KELLY included a separate statement indicating that she would remand so that the Court of Appeals "can rule on the merits and *find damages*, if any." *Adair*, 474 Mich at 1074 (KELLY, J., concurring) (emphasis added). Plaintiffs, however, are not seeking damages.

[8] Const 1963, art 9, § 29. Pursuant to MCR 2.605(A), a court may issue a declaratory judgment, and a court "is not precluded from reaching issues before actual injuries or losses have occurred." *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978). But this allowance cannot be used to reduce a plaintiff's burden of proof for the cause of action for which it is seeking a declaration. As we stated in *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Dir*, 472 Mich 117, 126; 693 NW2d 374 (2005), the "actual controversy" and the "interested party" requirements of MCR 2.605(A)(1) mean that a party seeking a declaratory judgment must have a concrete and particularized actual injury in fact. The "particularized" requirement surely reinforces the idea that Headlee plaintiffs are required to quantify their "necessary increased costs."

> [A] plaintiff need only establish that the state imposed on it a new or increased level of activity without providing any funding to pay for it. The burden then shifts to the state to show (1) that it is not required to pay for it because the new or increased level of activity did not result in increased costs or (2) that those costs were not "necessary" under MCL 21.233(6).

This formulation, however, is inconsistent with Const 1963, art 9, § 29. A POUM plaintiff must establish more than the state's failure to fund an increase or new level of service or activity. Under the majority's standard, the s*tate* will be required to prove that a POUM plaintiff's new or increased level of activity did not result in increased costs or that the increased costs were not necessary.[9] There is no basis for shifting this burden of proof onto the state.[10] The prohibitory language in Const 1963, art 9, § 29 in no way indicates that a plaintiff merely has to show an unfunded new or increased level of activity and the burden will then shift to the state to prove that no increase in costs occurred or that any increased costs were not necessary. Once

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[9] One has to wonder how the *state* will ever be able to "prove" what a *local* unit of government's costs were. It would appear that the state will be required to audit every POUM plaintiff's books and that extensive and intrusive discovery of local budgetary information may have to occur. The majority disputes the notion that its holding will require the state to prove what a local unit of government's increased costs are. This disavowal seems misplaced since the majority specifically states that once a POUM plaintiff meets its initial burden, it is entitled to a declaratory judgment "unless defendants demonstrate that *plaintiff school districts' costs were not increased* as a result of the requirements" and that one of the questions before us is "whether the increase in the recordkeeping requirements resulted in increased costs *to plaintiff school districts*." *Ante* at 483 (emphasis added).

[10] Indeed, HB 5800, which is pending in the Michigan House of Representatives, includes language that would shift the burden of proof onto the state to prove compliance with §§ 25 to 31 of article 9 of the state constitution. See proposed MCL 600.308e(2).

again, nothing in Const 1963, art 9, § 29 supports the majority's conclusion that the burden ever shifts away from the plaintiff onto the state. In addition, if plaintiffs are not required to establish a net increase in costs, this could result in litigation every time the state requires reporting, technology, or format changes. The majority's holding fails to recognize that *a POUM plaintiff must show* that its *necessary costs increased*. The majority's formulation never inquires whether a plaintiff has shown an increase in costs. Rather, it only inquires whether a POUM plaintiff has shown an unfunded new or increased level in an activity or service.[11] The majority's standard also fails to require a POUM plaintiff to prove that increased costs were necessary. It simply assumes the existence of necessary increased costs whenever there has been a mandated increase in an activity or service absent funding (unless the state can prove otherwise). In order to show an "increase" in costs, there must be some determination of a baseline level and a comparison of before-and-after numbers—whether real or projected.[12] This is the only way a POUM plaintiff can show whether an increase has actually occurred. Finally, the majority's standard also fails to take into account that some increased costs that are necessary may nonetheless be *de minimis* under

[11] To be clear, my point is that the majority's formulation fails to require a POUM plaintiff to show an increase in necessary costs. The fact that the majority believes there were, in fact, proofs of increased costs in this case does not change the fact that its legal formulation relieves future POUM plaintiffs of having to establish an increase in necessary costs. This Court is attempting to formulate the *law*, and not to merely resolve the instant case.

[12] Surely this is " 'the sense most obvious to the common understanding' " and one that " 'reasonable minds, the great mass of the people themselves, would give it.' " *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971), quoting Cooley, Constitutional Limitations (emphasis omitted).

MCL 21.232(4). This is directly contrary to *Oakland Co*, 456 Mich at 165 ("[T]he trial court must decide what costs are necessary . . . costs, including whether any fall within the de minimus [sic] exclusion.").

When this case was before us in 2004, we cited with approval the following language:

> "[F]uture plaintiffs must allege the type and extent of the harm so that the court may determine if a § 29 violation occurred for purposes of making a declaratory judgment. In that way, the state will be aware of the financial adjustment necessary to allow for future compliance." [*Adair*, 470 Mich at 119-120 (citation omitted).][13]

Notwithstanding our earlier statement that a POUM plaintiff must allege both the "type" and "extent" of harm, and under MCR 2.112(M) must do so with "particularity," the majority today inconsistently adopts a standard that relieves a POUM plaintiff of having to make any such showings. As we indicated in 2004, this deprives the state of threshold information on the basis of which to make necessary financial adjustments. Under the formulation the majority adopts today, the state is afforded no notice of what it must do to comply with the Headlee Amendment and is left only to guess at the size of the financial adjustment, and of the magnitude of the appropriation required, in order to comply with an adverse declaratory judgment.[14]

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[13] Indeed, in 2007 we placed this very language into MCR 2.112(M), which provides, in relevant part: "In an action involving Const 1963, art 9, § 29, the plaintiff must state with *particularity* the *type* and *extent of the harm* and whether there has been a violation of either the first or second sentence of that section." (Emphasis added.)

[14] Indeed, when we remanded this case to the Court of Appeals in 2006, we instructed it to "apply the provisions of MCL 21.231 *et seq*. and the definitions contained therein." *Adair*, 474 Mich at 1074. Notwithstanding, the Court of Appeals failed altogether to discuss the *de minimis* exception of MCL 21.232(4).

C. "INCREASED COSTS"

Notwithstanding the majority's holding that a POUM plaintiff need only prove an increase in an activity or service in conjunction with an absence of funding, the majority *does* acknowledge the paucity of evidence of increased costs to which the special master referred.[15] However, in the vacuum left by plaintiffs themselves in failing to offer evidence of increased costs, the majority has apparently scoured the voluminous record in this case and has uncovered the following examples of increased costs: (1) the need to hire additional personnel, (2) the need to reassign staff or pay them overtime to help meet the recordkeeping requirements, and (3) the need to purchase and update computer software.

When examined, this "evidence" falls short of establishing a net increase in necessary costs. First, plaintiffs did not submit actual evidence of the costs allegedly spent for additional staff. Indeed, there was no testimony whatsoever establishing a baseline against which one could compare the alleged increase in staff costs.[16] Second, while there was testimony about purchasing new software and updating software, nothing in the record established that plaintiff school districts were, in fact, required to purchase or update that software. As the special master said, "some local districts and [intermediate school districts] incurred actual costs for programming changes, *but most did not* . . . ." (Emphasis added.) Therefore, it is difficult to conclude that those schools that did incur such costs did so *necessarily*.

[15] Once again, the special master specifically stated that plaintiffs had adduced "little evidence" of local districts' "incurring actual additional costs or expenditures as a result" of the new recordkeeping requirements.

[16] There was no evidence comparing costs incurred to report data before the creation of the CEPI with costs incurred to report data afterward.

Finally, concerning evidence of increased overtime time costs, only a single witness testified about the receipt of less than $100 for such overtime, a clearly *de minimis* amount.

The majority asserts that the increase in costs on the part of plaintiff school districts exceeded the *de minimis* threshold of $300. While there was indeed testimony to that effect, the majority's formulation improperly relieves *future* plaintiffs of having to prove that their net increase in costs was more than *de minimis*, notwithstanding the Headlee implementing act's provision that a "necessary cost" does not include a cost that does not exceed $300 a claim. MCL 21.232(4); MCL 21.233(6).

D. "NET COSTS"

The majority correctly observes that MCL 21.233(6) provides that the "net cost" shall be the "actual cost to the state if the state were to provide the activity or service . . . ."[17] Yet it fails to note that plaintiffs made no effort to show what the costs to the state would have been if the state itself had provided the increased

[17] A question was asked at oral argument regarding whether the definition of "net cost" in MCL 21.233(6) is consistent with Const 1963, art 9, § 29, which contemplates an increase in cost to a *local unit* of government as opposed to the cost the *state* would incur. Plaintiffs' counsel responded by stating that this issue had not even been indirectly raised in this case. He also declined the opportunity to argue that the statutory definition of "net cost" is compatible with the constitution. Under these circumstances, I will not further address the issue other than to observe that it might well be argued that the statute defines "net cost" by reference to hypothetical costs to the state only as a *proxy* for determining whether the required new or increased activity or service will impose actual necessary increased costs on the local unit of government. In any event, subdivisions (a) to (c) of MCL 21.233(6) require us to look at the "actual" costs to the local unit of government to determine whether they are *de minimis* or are offset by other savings. See note 5 of this opinion.

recordkeeping.[18] Thus, plaintiffs' claim should also be denied for failure to present any evidence establishing a net increase in costs.

The majority concedes that the statutory terms "net cost" and "actual cost" "suggest a quantifiable dollar amount." Yet, inexplicably, it proceeds to dispense with this concession and holds that a POUM plaintiff need not quantify the plaintiff's actual necessary increased costs. The majority even goes so far as to state that "it is the Legislature's burden to demonstrate that those costs were not 'necessary' under one or more of the exceptions in MCL 21.233(6)(a) to (d)." But under Const 1963, art 9, § 29, it is the *plaintiff's* burden to show an increase in necessary costs. For the majority to relieve a POUM plaintiff of the obligation to show increased costs, and that such increased costs were necessary, is contrary to Const 1963, art 9, § 29. The majority has no authority to reduce plaintiffs' burden of proof or to place the burden on the state to prove that costs did not increase or that any increased costs were unnecessary. By its reallocation of these burdens, the majority effectively eliminates the requirement that a POUM plaintiff prove that the increased costs were necessary. This is in direct contravention of the language of our constitution, which only requires reimbursement of "any necessary increased costs." Const 1963, article 9, § 29. That provision makes clear that the ratifiers of the Headlee Amendment did not intend that the state be required to enact an appropriation when a local unit of government has not proved specific

[18] The transcript from oral argument indicates the following exchange:

> [*Question to plaintiffs' counsel*]: [D]id you put in proofs of what it would cost the state to do the CEPI reporting?
>
> [*Answer*]: No, we did not your honor.

necessary increased costs associated with a new or increased level of activity or service.

E. QUANTIFYING COSTS

Despite 10 days of testimony from at least 17 witnesses, plaintiffs made no effort to quantify the school districts' necessary increased costs. This is not surprising in view of the fact that plaintiffs believed, incorrectly in my judgment, that they were under no obligation to make such a showing. The majority overlooks this failure of proofs and holds that a POUM plaintiff is not required to quantify its necessary increased costs because a POUM claim for declaratory judgment is designed only to challenge a mandate before it takes effect. The majority further suggests that if this case had proceeded to a prompt resolution, plaintiffs could not have provided costs incurred before and after implementation of the recordkeeping requirements. That is, plaintiffs should not be required to show the school districts' before-and-after costs when it would have been impossible at a sufficiently early juncture to do so, even though plaintiffs could have shown before-and-after costs following the several-year delay that occurred before presenting evidence to the special master.

The majority's suggestion that it might be "impossible" for a litigant in a declaratory judgment action to show an anticipated increase in necessary costs is mistaken.[19] Civil plaintiffs routinely prove entitlement to future economic damages,[20] and schools routinely

[19] See, e.g., *Durant v Dep't of Ed (On Third Remand)*, 203 Mich App 507, 514; 513 NW2d 195 (1994), in which the Court of Appeals said that "actual costs would be satisfactory as a prima facie indicator of 'necessary costs,' " "whether based on realized costs or theoretical costs . . . ."

[20] See, e.g., M Civ JI 50.06 (future damages); M Civ JI 53.03 (future damages—non-personal-injury action); Patek, McLain, Granzotto &

adopt budgets that project future costs and expenses. The Uniform Budgeting and Accounting Act, MCL 141.421 *et seq*., mandates a budgeting system for various local governmental units in Michigan, which include public schools. MCL 141.422d(4); MCL 141.434. MCL 141.435(1) provides:

> The recommended budget shall include at least the following:
>
> (a) Expenditure data for the most recently completed fiscal year and estimated expenditures for the current fiscal year.
>
> (b) An estimate of the expenditure amounts required to conduct, in the ensuing fiscal year, the government of the local unit, including its budgetary centers.

MCL 141.422a(4) further provides: " 'Budget' means a plan of financial operation for a given period of time, including an estimate of all proposed expenditures from the funds of a local unit and the proposed means of financing the expenditures." Thus, in the case of a mandated *increased* activity or services, a POUM plaintiff that has its claim heard before actual increased expenses have been incurred need simply present evidence explaining how much it is currently spending to perform the service or activity and how much extra, i.e., the projected amount of "increase," it anticipates it will have to spend carrying out the increased level of service or activity. And in the case of mandated *new* activities or services, a plaintiff need only present evidence that it currently spends *no* money on the service or activity, but anticipates incurring specific necessary costs that are not *de minimis* once the mandate becomes effective. Given that estimates of increased expenses are ordi-

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Stockmeyer, 1 Michigan Law of Damages and Other Remedies (ICLE), § 4.10, pp 4-7 to 4-10 (discussing of future-earning-capacity claims); *id.*, § 10.10, p 10-9 (discussing future damages).

narily quantified in budgets, it is reasonable to conclude that a witness can summarize and provide a reasonable estimate of an anticipated increase in necessary costs.[21] Ideally, a POUM claim will be decided before the projected necessary cost increases become actual increases. But in situations such as the case at bar, where plaintiff school districts had been complying with the mandates for several years before trial, actual necessary increased costs, if they exist, should not be difficult, much less insurmountable, to establish. In any event, proof of specific necessary increased costs, projected or actual, is essential in order to verify the legitimacy of a POUM claim.[22]

V. CONSEQUENCES

Apart from the fact that the majority's interpretation is contrary to the law and the Michigan Constitution, there are significant practical consequences to their interpretation that will transform the Headlee Amendment over time from a provision limiting public expenditures into a provision facilitating such expenditures. As we stated in *Durant*, 424 Mich at 378, the Headlee Amendment "was proposed as part of a nationwide

[21] Although plaintiffs were not required to show the exact dollar amount of underfunding for school districts statewide, they were required to show a quantified projected increase in necessary costs beyond those that were *de minimis*, i.e., the particularized extent of the harm suffered, and they did not.

[22] To be sure, plaintiffs may have established that the new requirements are burdensome and require additional staff time. However, this is not the equivalent of the considerably more specific, and rigorous, requirements of our constitution. The majority is mistaken when it asserts that Const 1963, art 9, § 29 does not suggest that POUM plaintiffs must prove how much their costs increased. To reiterate, the word "increase" clearly implies the necessity of before-and-after numbers. By providing such numbers, a POUM plaintiff can satisfy the constitutional requirement that it show how much its necessary costs have increased.

'taxpayer revolt' in which taxpayers were attempting to limit" state spending. The "voters . . . were striving to gain more control over their own level of taxing and over the expenditures of the state." *Id.* at 383. "Headlee is fundamentally a taxpayers' amendment, enacted for the primary purpose of relieving the electorate from overwhelming and overreaching taxation." *Durant v Michigan*, 456 Mich 175, 214; 566 NW2d 272 (1997).

First, under the majority's reduced burden of proof, a POUM plaintiff will be entitled to prevail in a declaratory judgment action whenever the state has mandated an unfunded increase in the level of an activity or service and the state cannot establish that costs did not increase or that any increase was not necessary. Yet under the actual language of Const 1963, art 9, § 29, a POUM plaintiff is entitled to prevail only if it can show that some increase in the level of an activity or service was necessary and that it was not *de minimis*. As a result, the Legislature will effectively be required to enact an accompanying appropriation to every statute that mandates an increase in the level of an activity or service—even if there are no necessarily increased costs, and even if any such increased costs are merely *de minimis*—unless it is willing to undertake the risk that the state will eventually be able to sustain in court its burden of proof that a POUM plaintiff's costs did not increase or that any such increased costs were not necessary.

Second, under the majority's new standards, the Legislature in future Headlee Amendment situations will be likely to *overestimate* the necessary levels of accompanying appropriations when it has mandated an increased level of activity or service. This is because, in the absence of proofs by a local unit of government that it has incurred quantifiable costs, estimated levels of

accompanying appropriations will entail nothing more than speculation. The cost of an underestimated appropriation by the state will be to invite litigation and to risk paying a POUM plaintiff's attorney fees if that litigation is lost. Better, then, to overestimate and thereby avoid litigation and attorney fees. That is, the guesswork introduced into the Headlee Amendment process by the majority, and the attendant budgetary uncertainties on the state's part, can only have an adverse fiscal impact on the very persons that the amendment was designed to protect—the taxpayers.

Third, local units of government, which in the past may have simply absorbed reasonable expenses stemming from mandates by either working harder or more efficiently, are now incentivized to maintain the status quo and file lawsuits in response to all new mandates on the grounds that each such mandate has imposed additional obligations or costs. The majority's standards create an incentive for local units of government to litigate Headlee Amendment claims on the theory that every new mandate has unconstitutionally burdened that local unit, rather than incentivizing the local unit to make do with existing resources by working in a harder or more efficient manner to absorb such burdens.

Finally, litigation expenses will only increase as a consequence of the majority's Headlee Amendment process. The dismantlement of the quantification requirement, the erosion of the "necessary" and "*de minimis*" conditions for a Headlee claim, the distortion of burden-of-proof obligations, and the general sense of uncertainty caused by the elimination of traditional obligations of POUM plaintiffs to prove their claims will all lead inevitably to increased litigation between the state and local units of government. I need not dwell at

great length on the obvious fact that in such litigation, public entities are involved on both sides, and the taxpayers are responsible for the costs of litigation and attorney fees on both sides.

VI. CONCLUSION

Consistently with article 9, § 29 of the Michigan Constitution and the Headlee implementing act, I would hold that POUM plaintiffs must prove specific necessary increased costs, projected or actual, that are more than *de minimis* in order to establish their entitlement to declaratory judgment under the POUM provision. For all the reasons set forth above, I would reverse the judgment of the Court of Appeals and remand for entry of summary disposition for defendants on the ground that plaintiffs failed to establish a POUM violation because they failed to submit proof of specific necessary increased costs through the reallocation of funds or out-of-pocket expenses required by the state's new recordkeeping requirements.

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

KYSER v KASSON TWP

Docket No. 136680. Argued November 3, 2009 (Calendar No. 1). Decided July 15, 2010.

Edith Kyser brought an action in the Leelanau Circuit Court against Kasson Township, alleging that defendant's refusal to rezone her property from agricultural use and to include it in defendant's district that permits gravel-mining operations should be held invalid and unconstitutional. Following a bench trial, the court, Thomas G. Power, J., entered an order allowing the plaintiff to mine gravel on her property and enjoining defendant from interfering with plaintiff's gravel-mining operation. Defendant appealed that order, and plaintiff appealed the order that denied plaintiff's requests for awards of costs and sanctions against defendant. The appeals were consolidated. The Court of Appeals, WHITBECK, P.J., and JANSEN, J. (DAVIS, J., concurring in part and dissenting in part) affirmed both orders. With respect to the gravel-mining operation, the majority applied the holding in *Silva v Ada Twp*, 416 Mich 153 (1982), to conclude that plaintiff was entitled to mine gravel on her property despite the zoning ordinance because the gravel was a valuable natural resource and mining it would not result in very serious consequences. Judge DAVIS concurred with respect to costs and sanctions but dissented from the decision to affirm the order allowing gravel mining because defendant's establishment of a gravel-mining district was presumptively valid and plaintiff had failed to show that the consequences that would result from her gravel-mining operation were not very serious. 278 Mich App 743 (2008). This Court granted defendant's application for leave to appeal. 483 Mich 982 (2009).

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

The judicially created rule that a zoning ordinance is unreasonable if it prohibits the extraction of natural resources where no very serious consequences would result is not constitutionally required, violates the constitutional separation of powers, and was superseded by the exclusionary zoning provision of the zoning enabling act.

1. The "no very serious consequences" rule is not constitutionally required. The Legislature gave local governments the broad, but not

absolute, authority to regulate land development by adopting zoning ordinances. When a local government exercises this authority in a way that affects individual constitutional rights, its citizens are entitled to due process of law. Generally, to establish that a zoning ordinance violates the constitutional right to due process, the person challenging it must prove that it advances no reasonable governmental interest. In *Silva*, this Court created an exception to this "reasonableness" test for challenges to zoning ordinances that prevent the extraction of natural resources. Under *Silva*, such ordinances are considered unreasonable if the person challenging the ordinance can show that there are natural resources on the property in question and that no very serious consequences would result from the proposed extraction. *Silva* elevated what had been but one factor to be considered in determining whether a zoning ordinance involving natural resources was reasonable into a presumption that such ordinances are invalid unless "very serious consequences" will result from the proposed extraction. But the constitution compels no such presumption, and the consideration of competing public interests is best left to the Legislature and local communities, rather than the judiciary.

2. The "no very serious consequences" rule violates the constitutional separation of powers. Our state constitution directs the Legislature, not the judiciary, to provide for the protection and management of the state's natural resources, and the Legislature has empowered local legislative bodies to plan for and regulate land use in their communities. By creating a judicial preference for the extraction of natural resources over competing public policies, the "no very serious consequences" rule usurps the responsibilities of both the Legislature and self-governing local communities and effectively requires trial courts to arrogate the responsibilities of a super-zoning commission.

3. The "no very serious consequences" rule was superseded by the exclusionary zoning provision of the zoning enabling act, which establishes a comprehensive framework for local governments to create zoning plans to promote the public health, safety, and welfare of their communities. The comprehensive nature of this statutory scheme indicates a legislative intent that localities would be responsible for regulating the extraction of natural resources within their boundaries. Further, although the statute contains provisions that specifically limit localities' power to regulate certain specified natural resources, it contains none that applies to the extraction of gravel.

Reversed and remanded to the trial court for further proceedings not inconsistent with this opinion.

Chief Justice KELLY, joined by Justice CAVANAGH, dissenting, would affirm the judgment of the Court of Appeals and hold that the very serious consequences test derives from due process considerations, does not violate the constitutional separation of powers, and has not been superseded by the exclusionary zoning statute.

Justice WEAVER did not participate in this case because she has a past and current business relationship with Kasson Township Supervisor Fred Lanham and his family.

1. ZONING — NATURAL RESOURCES EXTRACTION — CONSTITUTIONAL LAW — DUE PROCESS.

A zoning ordinance that regulates the extraction of natural resources need only be reasonable to meet constitutional due process requirements (Const 1963, art 1, § 17).

2. CONSTITUTIONAL LAW — SEPARATION OF POWERS — ZONING — NATURAL RESOURCES EXTRACTION.

Courts may not impose requirements beyond reasonableness on zoning ordinances that regulate the extraction of natural resources without violating the constitutional separation of powers (Const 1963, art 3, § 2).

3. ZONING — NATURAL RESOURCES EXTRACTION.

A zoning ordinance that regulates the extraction of natural resources is presumed to be reasonable, and the burden is on the party challenging it to overcome this presumption by demonstrating that it advances no reasonable governmental interest.

Olson, Bzdok & Howard, P.C. (by *Christopher M. Bzdok* and *Michael C. Grant*), for plaintiff.

Gerald A. Fisher and *Running, Wise & Ford, P.L.C.* (by *Richard W. Ford* and *Thomas A. Grier*), for defendant.

Amici Curiae:

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, PC (by *John H. Bauckham*), for the Michigan Townships Association.

Johnson, Rosati, LaBarge, Aseltyne & Field, P.C. (by *Carol A. Rosati*), for the Public Corporation Law Section.

Richard K. Norton for the American Planning Association and the Michigan Association of Planning.

Warner Norcross & Judd LLP (by *Kenneth W. Vermeulen*, *John J. Bursch*, and *Gaëtan Gerville-Réache*) for the Michigan Aggregates Association.

Berry Reynolds & Rogowski, PC (by *Susan K. Friedlaender*), for the Michigan Paving & Materials Company and the Edward C. Levy Company.

Plunkett Cooney (by *Mary Massaron Ross*) for the Michigan Municipal League and the Michigan Municipal League Liability & Property Pool.

MARKMAN, J. At issue here is: (1) whether the rule articulated in *Silva v Ada Twp*, 416 Mich 153; 330 NW2d 663 (1982), which held that a zoning ordinance is unreasonable if the person challenging the ordinance can show that there are natural resources on the property and that "no very serious consequences" would result from extracting such resources, is constitutionally required; (2) whether the "no very serious consequences" rule violates the constitutional separation of powers; and (3) whether the "no very serious consequences" rule was superseded by the enactment of the exclusionary zoning provision, MCL 125.297a, of the Township Zoning Act (TZA).

We hold that the rule of *Silva* is not a constitutional requirement and, in fact, violates the constitutional separation of powers. Further, we conclude that the rule is superseded by the exclusionary zoning provision, MCL 125.297a of the TZA, now MCL 125.3207 of the Zoning Enabling Act (ZEA). Accordingly, we reverse the Court of Appeals and remand to the trial court for further proceedings.

I. FACTS AND HISTORY

Defendant, Kasson Township, is heavily underlain with gravel and sand, with over 50 percent of the township being either mostly or moderately suited for gravel mining. In 1988, there were seven gravel mines operating in the township, and over the following six years, there were seven rezoning applications submitted to the township board to allow for additional gravel mining, resulting in both litigation and the establishment of new mining operations. In response, the township took several steps to address its overall mining policy, culminating in the establishment of a gravel mining district in accordance with the ZEA, encompassing 6 of the township's 37 square miles.

Plaintiff, Edith Kyser, owns a 236-acre parcel adjacent to the township's gravel mining district. As with the gravel deposits within the mining district, 115.6 acres of plaintiff's property contain a large deposit of outwash gravel, which is the most commercially valuable type. Plaintiff filed an application to rezone her property to allow for gravel mining, but defendant denied the application, asserting that to do otherwise would undermine Kasson Township's comprehensive zoning plan and prompt additional rezoning applications from similarly situated property owners. Plaintiff then filed this action, claiming that her "due process" rights had been violated by this decision because gravel mining would cause "no very serious consequences" in accordance with *Silva*.

The trial court determined that large quantities of gravel were available from other sources within the township, and because the testimony showed that this existing supply would last well into the "latter part of the 21st century," the trial court "conclude[d] that the public interest in [plaintiff's] gravel is not high." Nevertheless, applying the "no very serious consequences" rule, the trial

court examined the consequences alleged by defendant pertaining to traffic safety, traffic noise, impact on surrounding property values, impact on residential development, and the influence on additional rezoning applications. The court concluded that a mining operation on plaintiff's property would result in no "very serious consequences" and enjoined enforcement of the zoning ordinance.

On appeal, the Court of Appeals affirmed, concluding that plaintiff had established that no " 'very serious consequences' " would result from her proposed mining. 278 Mich App 743, 760; 755 NW2d 190 (2008). The Court of Appeals dissent reasoned that applying the rule without considering the effect on the township's zoning plan essentially nullified the plan because the "only effective limitations on transforming the entirety of Kasson Township into a gravel mine would be the existence of gravel on a given parcel of property and the property owner's own interest in mining." *Id*. at 773 (opinion by DAVIS, J.). Additionally, it observed that the gravel district had been formed as a "result of intensive planning efforts . . . to prevent . . . uncontrolled intrusion of mining into any part of the township that would support it, irrespective of the consequences to the community." *Id*. Thus, the destruction of defendant's plan and the disruption to the community "constitutes a 'very serious consequence.' " *Id*. at 774. We then granted defendant's application for leave to appeal. 483 Mich 982 (2009).

II. STANDARD OF REVIEW

This case presents issues of constitutional and statutory interpretation, which we review de novo. *Dep't of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008).

III. ANALYSIS

A. JUDICIAL REVIEW OF ZONING

Zoning constitutes a legislative function. *Schwartz v City of Flint*, 426 Mich 295, 309; 395 NW2d 678 (1986). The Legislature has empowered local governments to zone for the broad purposes identified in MCL 125.3201(1).[1] This Court has recognized zoning as a reasonable exercise of the police power that not only protects the integrity of a community's current structure, but also plans and controls a community's future development. *Austin v Older*, 283 Mich 667, 674-675; 278 NW 727 (1938). Because local governments have been invested with a broad grant of power to zone, "it should not be artificially limited." *Delta Charter Twp v Dinolfo*, 419 Mich 253, 260 n 2; 351 NW2d 831 (1984). Recognizing that zoning is a legislative function, this Court has repeatedly stated that it " 'does not sit as a superzoning commission.' " *Macenas v Village of Michiana*, 433 Mich 380, 392; 446 NW2d 102 (1989) (citation and emphasis omitted); *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425, 430-431; 86 NW2d 166 (1957). Instead, "[t]he people of the community, through their appropriate legislative body, and not the

[1] MCL 125.3201(1) provides:

> A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare.

courts, govern its growth and its life." *Brae Burn*, 350 Mich at 431. We reaffirm these propositions.

However, the local power to zone is not absolute. When the government exercises its police power in a way that affects individual constitutional rights, a citizen is entitled to due process of law. *Id*. at 437. The Due Process Clause is included in Const 1963, art 1, § 17 of the Michigan Constitution and provides in pertinent part: "No person shall . . . be deprived of life, liberty or property, without due process of law. . . ." "The test to determine whether legislation enacted pursuant to the police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective." *Shavers v Attorney General*, 402 Mich 554, 612; 267 NW2d 72 (1978). The level of the governmental interest that is sufficient depends on the nature of the affected private interest. See *id.* at 613 n 37. When the individual interest concerns restrictions on the use of property through a zoning ordinance, the question is " ' "whether the power, as exercised, involves an undue invasion of private constitutional rights without a reasonable justification in relation to the public welfare." ' " *Schwartz*, 426 Mich at 309, quoting *Norwood Builders v City of Des Plaines*, 128 Ill App 3d 908, 917; 471 NE 2d 634 (1984), quoting *Exch Nat'l Bank v Cook Co*, 25 Ill 2d 434, 440; 185 NW2d 250 (1962). A zoning ordinance is presumed to be reasonable. *Brae Burn*, 350 Mich at 432. Starting with such a presumption, the burden is upon the person challenging such an ordinance to overcome this presumption by proving that there is no reasonable governmental interest being advanced by the zoning ordinance. *Id*. Stated another way, the challenger must demonstrate "that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property." *Id*. Under this standard, a zoning ordinance will be struck down only if it constitutes "an arbitrary fiat, a whimsical

ipse dixit, and . . . there is no room for a legitimate difference of opinion concerning its [un]reasonableness." *Id*.[2]

B. "NO VERY SERIOUS CONSEQUENCES" RULE

The "no very serious consequences" rule constitutes an exception to the "reasonableness" test for assessing the constitutionality of zoning regulations and provides that "regulations which prevent the extraction of natural resources are invalid unless 'very serious consequences' will result from the proposed extraction." *Silva*, 416 Mich at 156. This rule appears to have originated in *City of North Muskegon v Miller*, 249 Mich 52, 54; 227 NW 743 (1929), which addressed whether a zoning ordinance could prohibit a landowner from drilling for oil on his property. This Court observed:

> The courts have particularly stressed the importance of not destroying or withholding the right to secure oil,

[2] Although the standard of review for zoning regulations and decisions is characterized as a "reasonableness" test, it bears analogy to the "rational basis" standard of review that is used to test the constitutionality of legislation where there are no "suspect" factors or "fundamental rights" involved or where "heightened scrutiny" is otherwise inapposite. *Phillips v Mirac, Inc*, 470 Mich 415, 432-433; 685 NW2d 174 (2004). In *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 557-558; 629 NW2d 402 (2001), this Court defined "rational basis" review as follows:

> "Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice." *Crego v Coleman*, 463 Mich 248, 260; 615 NW2d 218 (2000). Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose. The legislation will pass "constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Id.* at 259-260. To prevail under this standard, a party challenging a statute must overcome the presumption that the statute is constitutional. *Thoman v Lansing*, 315 Mich 566, 576; 24 NW2d 213 (1946).

> gravel, or mineral from one's property, through zoning ordinances, unless some very serious consequences will follow therefrom. *Village of Terrace Park v. Errett* [12 F2d 240 (CA 6, 1926)]. [*Id*. at 57.][3]

In defining the applicable test, *Miller* stated that "a zoning ordinance [must] be reasonable, and the reasonableness becomes the test of its legality." *Id*. This Court further explained that a zoning ordinance must be " 'reasonably necessary for the preservation of public health, morals, or safety . . . where such necessity appears either from existing conditions or reasonable anticipation of future growth and development.' " *Id*. at 58, quoting *Errett*, 12 F2d at 241.

Viewed in context, the "no very serious consequences" rule of *Miller* was not a rule, but a definition of one factor to consider when assessing whether a zoning ordinance was reasonable. Rather than applying

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[3] *Errett* involved a zoning ordinance that prohibited gravel mining in a suburb of Cleveland, Ohio. The United States Court of Appeals for the Sixth Circuit asserted:

> There is . . . a substantial difference between an ordinance prohibiting manufacturing or commercial business in a residential district that may be conducted in another locality with equal profit and advantage, and an ordinance that wholly deprives the owner of land of its valuable mineral content. [*Id*. at 243.]

The Sixth Circuit neither discussed nor applied what emerged in *Miller* as the "no very serious consequences" rule. Instead, it considered the diminishment of property value if gravel mining was prohibited as a relevant factor in determining whether the zoning ordinance constituted a reasonable exercise of the police power. *Id*. at 242. The court concluded that the ordinance was not such an exercise. It is worth noting that *Errett* was decided seven months before the landmark decision of *Village of Euclid v Ambler Realty Co*, 272 US 365; 47 S Ct 114; 71 L Ed 303 (1926), in which the United States Supreme Court established the standard of review for adjudicating due process claims against zoning ordinances—the reasonableness standard. Before *Euclid*, the states had been divided as to whether zoning constituted a constitutional exercise of the police power. *Euclid* held that it was. 1 Salkin, American Law of Zoning (5th ed), § 2:21.

this rule to the zoning ordinance in that case, this Court held that the zoning ordinance was unreasonable because the restriction on the property's use rendered the property practically worthless. *Id*. at 57. Accordingly, we determined that the zoning ordinance, as applied, was "unreasonable and confiscatory, and therefore illegal." *Id*. at 59.[4]

For almost three decades, *Miller* was viewed as standing for two propositions, neither of which embodied a "no very serious consequences" rule. First, if "the property involved was unfit for the use to which it was restricted, [then] the ordinance was unreasonable and confiscatory and, therefore, illegal." *Pleasant Ridge v Cooper*, 267 Mich 603, 606; 255 NW 371 (1934); *Hammond v Bloomfield Hills Bldg Inspector*, 331 Mich 551, 557; 50 NW2d 155 (1951); *Ervin Acceptance Co v City of Ann Arbor*, 322 Mich 404, 408; 34 NW2d 11 (1948); *Oschin v Redford Twp*, 315 Mich 359, 363; 24 NW2d 152 (1946). Second, a zoning ordinance must be "reasonable in its operation," and an "arbitrary action or the unreasonable exercise of authority may not be justified." *Hitchman v Oakland Twp*, 329 Mich 331, 335; 45 NW2d 306 (1951); *Redford Moving & Storage Co v Detroit*, 336 Mich 702, 707; 58 NW2d 812 (1953); *Grand Trunk R Co v Detroit*, 326 Mich 387, 398; 40 NW2d 195 (1949).

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[4] Once this Court concluded that the zoning ordinance was unreasonable as applied, it turned its attention to a companion drilling ordinance, holding that it was reasonable because the proposed drilling could potentially contaminate the city's water supply. *Id*. at 62-63. Although there was evidence that the landowner could avoid this danger, we held that "it is not within our province to regulate the action of the city officials when they act within their legal rights." *Id*. at 63. It is unclear whether we also applied the "no very serious consequences" rule to the drilling ordinance. Admittedly, potentially contaminating the city's water supply constitutes a "very serious consequence." However, potential contamination of the water supply would also be independently sufficient to conclude that the drilling ordinance was reasonable.

The "no very serious consequences" rule resurfaced in the late 1950s in two opinions, *Bloomfield Twp v Beardslee*, 349 Mich 296; 84 NW2d 537 (1957), and *Certain-teed Prod Corp v Paris Twp*, 351 Mich 434; 88 NW2d 705 (1958). In both cases, Justice BLACK, citing *Miller*, applied the rule without articulating any due process considerations with regard to whether the zoning ordinance was reasonable.[5] Also in both cases, the rationale for the rule seemed predicated on the ideas that natural resources can only be extracted from where they are found and that a local government cannot zone beneath the surface.[6] Additionally, in both cases the threshold question was viewed as whether the proposed mining operations would create an enjoinable nuisance.[7]

In *Beardslee*, 349 Mich at 301, the defendant landowner was enjoined from surface mining gravel on a

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[5] In *Beardslee*, Justice BLACK issued a "concurring" opinion, although it was actually the majority opinion because three justices joined this opinion; only two justices joined Justice SMITH's asserted "lead" opinion. Later, in *Certain-teed*, Justice BLACK's opinion is presented as a "concurring in part and dissenting in part" opinion. However, again, three justices joined Justice BLACK's opinion and only one joined Justice EDWARDS's asserted "lead" opinion while another concurred in the result of the lead opinion.

[6] Other than *Miller* and *Errett*, Justice BLACK does not cite authority for the proposition that a local government cannot zone beneath the surface; neither *Miller* nor *Errett* appears to stand for this proposition. Rather, a local government is empowered to establish zoning ordinances to regulate land development and to "regulate the use of land and structures to meet the needs of the state's citizens for . . . natural resources . . . ." MCL 125.3201(1). There are no apparent distinctions in the law between regulating surface and subsurface lands. Nevertheless, even assuming that a local government cannot zone beneath the surface, it can still regulate the surface, including any land use and structures on the surface that may be created in support of subsurface mining.

[7] Although nuisance is obviously one harm that zoning regulations seek to prevent, since at least *Euclid*, zoning laws have never been confined to *only* preventing nuisances. *Euclid*, 272 US at 387-388.

parcel of land that was not zoned for that use. While the "lead" opinion upheld the zoning ordinance because it was "reasonable,"[8] Justice BLACK in his majority opinion rejected this theory and upheld the trial court's ruling on the theory that the gravel mining operation would create a public nuisance. *Id.* at 310-311. He explained that he could not uphold the ordinance on the alternate constitutional ground supported by the "lead" opinion because of "concern over the implications of zoning the depths distinguished from zoning the surface," and cited the "no very serious consequences" rule in *Miller* and *Errett*. *Id*. at 310-311.

In *Certain-teed*, 351 Mich at 439, the plaintiff was denied a permit to mine and manufacture gypsum in a 500-foot area zoned for various industrial uses, including gypsum mining, and was denied a permit to extend the industrial zone by 750 feet. The first issue was whether the defendant township erred by rejecting the plaintiff's proposed construction of a manufacturing facility within the industrial zone and its requested extension of 750 feet for the same purpose. *Id*. at 445-446. The second issue was

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[8] In response to the argument in *Beardslee* that a landowner has a " 'legal right to exploit natural resources where they may be found,' " Justice SMITH stated:

> Attractive though the argument may seem upon its first reading, it must be obvious that a logical application of its principle would be destructive of all zoning. For in each case the particular parcel has, it is always asserted, some peculiar utility: it is an ideal spot for a motel, or a factory, or a junk yard, or what not. It has that contiguity to traffic, that peculiar topographical structure, that supply of water or shade, which makes it unique. Yet, just as the surface user desired by the owner must give way, at times, to the public good, as must the subsurface exploitation. In each case the question is whether, on the peculiar facts before us, the ordinance is a reasonable regulation in the interests of the public good, or whether it is an arbitrary and whimsical prohibition of a property owner's enjoyment of all of the benefits of his title. [*Id*. at 303.]

whether the zoning ordinance could prohibit subsurface mining if there was minimal surface interference within areas zoned for agricultural use. *Id*. In his majority opinion, Justice BLACK agreed with the "lead" opinion that the ordinance did not prohibit the plaintiff's proposed mining operation. However, concerned about a zoning ordinance that attempted to regulate subsurface mining, he stated:

> As an ordinance enacted pursuant to our township rural zoning act projects its regulatory tentacles toward nether regions, the proponent side of the "debatable question" is progressively weakened and the contestant voice is correspondingly strengthened. This I think was made clear by the warning rule of *City of North Muskegon v. Miller*, 249 Mich 52. To sustain the ordinance in such case there must be some dire need which, if denied the ordained protection, will result in "very serious consequences." So, and if the ordinance in its proposed application to mining fails to meet the test . . . , the result must be a judicial determination of constitutional unreasonableness. [*Id*. at 466-467.]

This represents the first occasion in which the "no very serious consequences" rule was offered as a constitutional test of reasonableness, and as a *sufficient* test of reasonableness. While Justice BLACK concluded that the zoning ordinance did not prohibit mining, he was not convinced that the mining operation would not create an enjoinable nuisance, even though the landowner presented evidence that it could avoid this. *Id*. at 468. However, unlike in *Miller*, in *Certain-teed*, this Court allowed the landowner to proceed with its mining operation provided that it would not create an enjoinable nuisance. *Id*. at 470-473.[9] Therefore, in contrast to

[9] We then remanded to the trial court for ongoing judicial supervision of the plaintiff's mining operation, *id*. at 472-473, and indicated that an injunction might be necessary if the mining operation became a future nuisance. *Id*. at 470-471.

Miller, the rule as applied in *Certain-teed* made it considerably more difficult for a local government to regulate the extraction of natural resources.

After *Certain-teed*, the "no very serious consequences" rule was not applied again until *Silva*, over 20 years later. In *Silva*, we asserted that we were reaffirming the rule originally articulated in *Miller* and *Certain-teed*. Under this rule, "[t]he party challenging the zoning has the burden of showing that there are valuable natural resources and that no 'very serious consequences' would result from the extraction of those resources." *Silva*, 416 Mich at 162. We explained that the basis for the "no very serious consequences" rule, or the "more rigorous standard of reasonableness," was the "important public interest in extracting and using natural resources" and that "[n]atural resources can only be extracted from the place where they are located and found." *Id*. at 158-159. Additionally, we expressed concern with an " 'ordinance that wholly deprives the owner of land of its valuable mineral content.' " *Id*. at 160, quoting *Errett*, 12 F2d at 243. Thus, the *Silva* rule made it even more difficult than *Certain-teed* for a local government to limit the extraction of natural resources through zoning ordinances.[10]

In sum, the "no very serious consequences" rule originated in *Miller* as but a single factor in determining whether a zoning ordinance that regulates the extraction of natural resources is reasonable. The "rule" was not mentioned again for 30 years until *Beardslee* and *Certain-teed*, in which it was transformed

[10] Justice RYAN, concurring in part and dissenting in part, observed that the Court's decision was unlike the decision in *Certain-teed* because the plaintiffs in the earlier case "were not given *carte blanche* to develop natural resources, and the Court's opinion explicitly contemplated that in the future an injunction shutting down the mining operation might be proper." *Id*. at 165.

from one factor in the test of reasonableness into a *sufficient* test of reasonableness. Furthermore, in *Beardslee* and *Certain-teed*, the "very serious consequences" were confined to enjoinable nuisances, although a landowner could nevertheless proceed under judicial supervision if the nuisance could be avoided. Then, after another 20 years, the rule reemerged in *Silva*, and was transformed to signify that "zoning regulations which prevent the extraction of natural resources are invalid unless 'very serious consequences' will result from the proposed extraction," and without consideration being given to judicial supervision. *Silva*, 416 Mich at 156. As the rule evolved, it has become progressively more difficult for a local government to regulate the extraction of natural resources by zoning ordinances.

C. CONSTITUTIONAL REQUIREMENTS

The first question we must address is whether the "no very serious consequences" rule is a constitutional requirement where a zoning ordinance purports to limit or prevent the extraction of natural resources. As already discussed, a zoning ordinance or decision is considered valid, i.e., does not violate the Due Process Clause, if it meets the test of "reasonableness." That is, a zoning ordinance is presumed to be reasonable, and a person challenging such an ordinance carries the burden of overcoming this presumption by proving that there is no reasonable governmental interest being advanced by the ordinance. *Brae Burn*, 350 Mich at 432. While the "no very serious consequences" rule may have originated with *Miller* as a factor to consider in determining the reasonableness of a zoning ordinance, its later applications were not based on traditional due process considerations. From a review of these cases, the central theme that gave rise to the "no very serious consequences" rule is that natural

resources can only be extracted from where they are located. *Errett*, 12 F2d at 243. Two premises emerged: that prohibiting a landowner from extracting natural resources " 'wholly deprives the owner of land of its valuable mineral content,' " *Silva*, 416 Mich at 159-160, quoting *Errett*, 12 F2d at 243, and that "[p]reventing the extraction of natural resources harms the interests of the public . . . ." *Silva*, 416 Mich at 160.

The first of these premises implies that extracting natural resources is somehow a "preferred" land use that defines a more valuable or profitable use of the property than other types of land use.[11] However, a zoning ordinance is not unreasonable just because a prohibited land use is more profitable than the land uses allowed by the zoning ordinance. See *Brae Burn*, 350 Mich at 432-433.[12] With regard to the value or profitability of

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[11] In effect, the "no very serious consequences" rule transformed natural resource extraction into a preferred land use, a doctrine that this Court expressly rejected in *Kropf v Sterling Hts*, 391 Mich 139; 215 NW2d 179 (1974). In *Silva*, Justice RYAN, in dissent, opined that the majority had effectively overruled *Kropf*. In response, Justice LEVIN observed that *Kropf* involved the "validity of zoning ordinances in general," and did not specifically address the no "very serious consequences" rule. *Silva*, 416 Mich at 161. Ironically, to support its conclusion that the "no very serious consequences" rule—a rule that creates a preferred land use—sets forth a constitutional test, the dissent relies on the due process concerns raised in *Kropf*. *Post* at 546. While the dissent quotes *Kropf* in this regard, it neglects to include the last three sentences of the paragraph:

> When First Amendment rights are being restricted we require the state to justify its legislation by a "compelling" state interest. With regard to zoning ordinances, we only ask that they be "reasonable". And, as we have stated, they are presumed to be so until the plaintiff shows differently. [*Kropf*, 391 Mich at 158.]

Thus, while this Court explained various due process concerns of zoning regulations, the test used in *Kropf* was nevertheless based on reasonableness, as is our holding in the instant case.

[12] Where a zoning ordinance goes too far, it may be deemed to be a "taking" of private property that requires just compensation under the

land, there is no obvious difference in kind between being prevented from extracting resources and being prevented from using the land in any other way. A wide array of land uses that are viewed as reasonable in general, including uses that are well-suited to a particular property, can be excluded on the basis of a zoning ordinance, provided that the ordinance is reasonable. When compared with any other unique, and potentially valuable, attributes of a particular property—its location, its view, its size or configuration, its terrain, its lakes and ponds and wildlife—minerals on a property do not render it any more unique or valuable in a way that would justify elevating mineral extraction to a specially protected land use by judicial decree. There is simply no basis in the zoning laws of our state, or in our constitution, for judicially adopting such a distinction.

The second premise—that the public is harmed by preventing the extraction of mineral resources—presumes that the natural resources are in demand by the public. The flaw of the "no very serious consequences" rule is that it is built on the premise that such resources are *always* in demand by the public, and, therefore, unless there are "very serious consequences," local governments must always defer to the property owner where a zoning regulation affects natural resource extraction. Indeed, in the instant case, the trial court specifically determined that large quantities of gravel were available from other sources within the township and that this supply would last well into the "latter part of the 21st century." Accordingly, the trial

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United States and Michigan constitutions, US Const, Am V; Const 1963, art 10, § 2. *Bevan v Brandon Twp*, 438 Mich 385, 389-390; 475 NW2d 37 (1991). In Michigan, to establish a taking, "[t]he owner must show that the property is either unsuitable for use as zoned or unmarketable as zoned." *Id*. at 403, citing *Kirk v Tyrone Twp*, 398 Mich 429, 444; 247 NW2d 848 (1976). There are no "taking" claims in this case.

court "conclude[d] that the public interest in [plaintiff's] gravel is not high." Despite this, the trial court was compelled under the "no very serious consequences" rule to enjoin defendant from enforcing what the court otherwise would have viewed as a reasonable zoning ordinance.

Further, on the basis of a presumed public demand for resources, the "no very serious consequences" test essentially elevates one particular aspect of the "public interest" above all competing aspects, enabling a single consideration to trump all other considerations unless there are "very serious consequences." Through this means, the "no very serious consequences" rule redefines what constitutes the "public interest" and compels communities to allow land uses that may be viewed as contrary to the "public interest." However, all that the constitution's Due Process Clause compels is that a zoning ordinance be reasonably designed and administered to protect the public health, safety, and welfare of the community, and that fair procedures be accorded to participants in the process. *Brae Burn*, 350 Mich at 431-432. We are unable to discern in the constitution any obligation that such a rule be specifically interposed in the zoning process. While the "public interest" in mineral extraction is undeniably one aspect of the overall "public interest," we are not persuaded that the constitution compels either that it be accorded specific weight, or that a particular balancing invariably be undertaken, in the public's calculations of what is "reasonable" and what is in the "public interest." The proper consideration of these many "public interests" is best left to the Legislature and local communities rather than the judiciary.[13]

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[13] As additional justification for the rule, the dissent relies on language in *Silva*, in which this Court reasoned that "[p]reventing the extraction

Plaintiff asserts that the "no very serious consequences" rule is simply a "species" of the reasonableness standard. However, we believe that the rule represents a very significant departure from that standard. Under the rule, a zoning ordinance will be struck down unless "very serious consequences" will result from the extraction of natural resources, without regard to whether the ordinance constitutes a *reasonable* means of addressing the harm that a mining operation might impose on the community. *Silva*, 416 Mich at 156. Thus, rather than presuming that a zoning ordinance is valid, the rule requires just the opposite presumption: that a zoning ordinance pertaining to the regulation of natural resource extraction is invalid and to be upheld if the ordinance is the only means to avoid the "very serious consequences" that would otherwise result. Moreover, even though the rule as set forth in *Silva* specifies that the party challenging the ordinance carries the burden of proof, in practice, he or she must merely demonstrate that no "very serious consequences" will result from the extraction of resources. *Id.* at 162. The party need not show that the ordinance is unreasonable, which is the only showing pertinent to the constitution. Once the challenger has made a preliminary showing that "no very serious consequences" will obtain, the burden shifts to the community to prove otherwise, i.e., to demonstrate that the proposed mining will, in fact, cause "very serious harm" to the community. Otherwise, the ordinance is rendered null and void, and the proposed mining can proceed. It is simply not enough that the community demonstrate that its

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of natural resources harms the interests of the public as well as those of the property owner by making natural resources more expensive." *Silva*, 416 Mich at 160. However, neither *Silva* nor the dissent cites any legal authority for the proposition that a constitutional standard that is less deferential to the zoning authority is required whenever a regulation makes a natural resource, or any other product, more or less expensive.

zoning ordinance is "reasonable."[14] For these reasons, we do not believe that the "no very serious consequences" rule is simply a variation upon the "reasonableness" test, and therefore hold that the rule is not a constitutional requirement.[15]

D. SEPARATION OF POWERS

The second question we must consider is whether the "no very serious consequences" rule violates the constitutional separation of powers. The fundamental prin-

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[14] The dissent claims that we conclude "without analysis" that the cases holding that the "no very serious consequences" rule was constitutionally mandated were erroneously decided, and that we are "ignor[ing]" the constitutional underpinnings of the rule. Considering that this opinion fully examines the rule's evolution, as well as its various rationales, we do not view this criticism as well-founded. Indeed, it is the dissent that fails almost completely to explain why the "no very serious consequences" rule is one of "constitutional dimensions." While the dissent argues that the rule is grounded in due process, it ignores the fact that the rule as applied in *Silva* constitutes a significant departure from the traditional reasonableness test—a test that *is* clearly grounded in the "constitutional dimensions" of due process.

[15] For the reasons set forth above, we believe that the cases that have held that the "no very serious consequences" rule is constitutionally mandated were wrongly decided. Although application of the doctrine of stare decisis is generally the preferred course of action by this Court, for it " 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process,' " it is not an inexorable command. *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998). "Indeed, these same values are also furthered by judicial decisions that are neutrally grounded in the language of the law, by a legal regime in which the public may read the plain words of its law and have confidence that such words mean what they say and are not the exclusive province of lawyers." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 756; 641 NW2d 567 (2002). This is especially true with regard to judicial decisions interpreting constitutional provisions. Indeed, the policy of stare decisis "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v Felton*, 521 US 203, 235; 117 S Ct 1997; 138 L Ed 2d 391 (1997). In fact, it is " 'our duty to re-examine a

ciples of separation of powers are embodied in Michigan's Constitution. Const 1963, art 3, § 2 of the Michigan Constitution provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

In *Massachusetts v Mellon*, 262 US 447, 488; 43 S Ct 597; 67 L Ed 1078 (1923), the United States Supreme Court explained the concept of separation of powers:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other.

As stated, zoning involves the exercise of a legislative function. *Schwartz*, 426 Mich at 309. While it may be appropriate for this Court to review statutes and ordinances to discern whether there is a rational basis for such laws, this Court does "not substitute our judgment for that of the legislative body charged with the duty and responsibility in the premises." *Brae Burn*, 350 Mich at 431.

In *Silva*, this Court established the "no very serious consequences" rule "[b]ecause of the important public interest in extracting and using natural resources."

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precedent where its reasoning or understanding of the Constitution is fairly called into question.' " *Robinson*, 462 Mich at 464 (citations omitted). We further believe that overruling these cases will not result in "practical, real-world dislocations." *Id.* at 466. For these reasons, we overrule those cases that have held that the "no very serious consequences" rule is constitutionally mandated.

Silva, 416 Mich at 158. In effect, this judicially created rule established a statewide public policy that prefers natural resource extraction to alternative public policies. However, Const 1963, art 4, § 52 of the Michigan Constitution provides:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The *legislature* shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction. [Emphasis added.]

Michigan's constitution directs the Legislature, not the judiciary, to provide for the protection and management of the state's natural resources.[16] As observed in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 589; 702 NW2d 539 (2005), policy-making is at the core of the legislative function.[17] By preferring the extraction of natural resources to competing public policies, the "no very serious consequences" rule usurps the responsibilities belonging to both the Legislature and to self-governing local communities.

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[16] While the dissent relies on the first sentence of Const 1963, art 4, § 52, to support its view that the 'no very serious consequences' rule of *Silva* is constitutionally mandated, it dismisses the second sentence that directs the *Legislature* to protect the state's natural resources. Furthermore, the dissent does not explain how a rule that *always favors* the recovery of natural resources, even when such resources are not in high demand, is in accord with Const 1963, art 4, § 52, which declares that *both* conservation and development are paramount public concerns. Const 1963, art 4, § 52 is an obviously hortatory provision of the Constitution, and its exhortations implicate multiple objectives that may often be in conflict.

[17] This Court has the authority to establish and modify the common law. Const 1963, art 3, § 7; see also *Placek v Sterling Hts*, 405 Mich 638, 656-657; 275 NW2d 511 (1979). However, at least outside the realm of the common law, policy decisions are a legislative function. *Devillers*, 473 Mich at 589.

Additionally, the "no very serious consequences" rule requires courts to engage in an expansive and detailed analysis of land-use considerations as to which they have no particular expertise. To assess the myriad factors that are relevant to land-use planning in hundreds of communities across this state requires a decision-making process for which the judicial branch is the least well-equipped among the branches of government. Such decision-making entails the solicitation of a broad range of disparate views and interests within a community, premised upon widely different visions of that community's future and widely varying attitudes toward "quality of life" considerations, and then a balancing of these views and interests in ways that are not easily susceptible to judicial standards. Indeed, in the instant case, a substantial portion of the trial court's decision consisted of its review of potential "very serious consequences" raised by defendants and an assessment that none of those consequences, in its judgment, were serious enough to prohibit mining on the property. The court also reviewed potential configurations of the township's gravel mining district and alternative boundaries, opining that it "is not at all clear that [the] district is necessarily the ideal district," and that adding to the district "from time to time is not necessarily a bad idea." However, the trial court also questioned how it could prevent a large portion of the township from "becoming a gravel pit," and asserted that "some thought about 'where does this end' probably would be a good idea." In essence, although the trial court undertook conscientiously to do what this Court has directed it to do, the court's deliberations illustrate the kind of balancing of factors, line-drawing, policy judgments, and exercise of discretion that belong to legislative bodies exercising the constitution's "legislative power." See *Brae Burn*, 86 Mich at 431. As this

case demonstrates, the "no very serious consequences" rule unavoidably requires a trial court to arrogate unto itself responsibilities akin to that of a super-zoning commission. *Id*. at 430-431.

Ironically, the "no very serious consequences" rule itself potentially creates "very serious consequences" because the rule effectively compels that mineral extraction zoning decisions be made on a case-by-case basis, without methodical consideration being given to other long-term concerns inherent in land-use planning. See *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373, 389; 733 NW2d 734 (2007) ("A decision whether to rezone property does not involve consideration of only a particular or specific user or only a particular or specific project; rather, it involves the enactment of a new rule of general applicability, a new rule that governs all persons and all projects."). This ad hoc and piecemeal approach to rezoning undermines the efforts of local governments to provide stable land-use development. In *Schwartz*, 426 Mich at 313, this Court observed in this regard:

> Even if the practice [of judicial rezoning] did not offend the separation of powers, the judiciary's zoning track record is not good. See, generally, Babcock, *The Zoning Game Revisited* (1985). Zoning, by its nature, is most uniquely suited to the exercise of the police power because of the value judgments that must be made regarding aesthetics, economics, transportation, health, safety, and a community's aspirations and values in general. By the same token, zoning, which requires linedrawing that oftentimes "by its nature [is] arbitrary," . . . is uniquely unsuited to the judicial arena.

In the case at bar, the township planned its gravel district with the community's active participation, and balanced the economic considerations that gravel mining brought to the community with the impact of such mining on the

local "quality of life." However, the "no very serious consequences" rule may well dictate rezoning large portions of the township that have been placed outside the mining zone, thereby defeating the township's own exercises in deliberation, planning, and balancing.

It is the role of the Legislature to establish natural resources policy, and the role of local legislative bodies to plan for and regulate land use in their communities in accordance with the directions of the Legislature. Because the "no very serious consequences" rule compels the judiciary to interject itself inappropriately by second-guessing these legislative decisions, we believe that this rule is incompatible with the constitutional separation of powers.

E. ZONING ENABLING ACT

Moreover, the Legislature itself superseded the rule of *Silva* by enacting the exclusionary zoning provision, MCL 125.297a.[18] Determining whether a statute preempts the common law is a matter of legislative intent. *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987). Where legislation is comprehensive, providing " 'in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions,' " then there is a legislative intention that a statute preempt common law. *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006), quoting *Millross*, 429 Mich at 183.

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[18] The trial in *Silva* was concluded in March 1979. *Silva v Ada Twp*, 99 Mich App 601, 604; 298 NW2d 838 (1980). That same month, the Legislature amended the TZA to include the exclusionary zoning provision, MCL 125.297a. See 1978 PA 637. Consequently, in *Silva*, this Court did not consider the amended zoning enabling statute because the case was tried under the earlier statute.

MCL 125.297a is now recodified in nearly identical form as MCL 125.3207 under the ZEA,[19] which provides:

> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within the local unit of government does not exist where the use may be appropriately located or the use is unlawful.

MCL 125.3207 prohibits municipalities from enacting any zoning ordinance "totally prohibiting" a given land use if a "demonstrated need" exists for that use, unless there is no location where the use may be "appropriately located," the use is "unlawful."

Fundamental to determining whether the exclusionary zoning provision supersedes the "no very serious consequences" rule is assessing the provision in the context of the whole ZEA. The ZEA establishes the framework for a local government to create a comprehensive zoning plan to promote the public health, safety, and welfare of the community. MCL 125.3201(1) empowers local legislative bodies to zone for a broad range of purposes and addresses the establishment of land-use districts. In particular, MCL 125.3203(1) pertains to the development of a land-use plan and provides:

> The zoning ordinance shall be based upon a plan designed to promote the public health, safety, and general welfare, to encourage the use of lands in accordance with

[19] Until 2006, there were three separate zoning enabling acts in Michigan: one for city and village zoning, one for township zoning, and one for county zoning. In 2006, the Legislature enacted the ZEA, 2006 PA 110, effective July 1, 2006, which consolidated the zoning enabling authority for all local governments. MCL 125.3101 *et seq*.

> their character and adaptability, to limit the improper use of land, to conserve natural resources and energy, to meet the needs of the state's residents for food, fiber, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to insure that uses of the land shall be situated in appropriate locations and relationships, to avoid the overcrowding of population, to provide adequate light and air, to lessen congestion on the public roads and streets, to reduce hazards to life and property, to facilitate adequate provision for a system of transportation, sewage disposal, safe and adequate water supply, education, recreation, and other public requirements, and to conserve the expenditure of funds for public improvements and services to conform with the most advantageous uses of land, resources, and properties. The zoning ordinance shall be made with reasonable consideration to the character of each district, its peculiar suitability for particular uses, the conservation of property values and natural resources, and the general and appropriate trend and character of land, building, and population development.

These provisions reveal the comprehensive nature of the ZEA. It defines the fundamental structure of a zoning ordinance by requiring a zoning plan to take into account the interests of the entire community and to ensure that a broad range of land uses is permitted within that community. These provisions empower localities to plan for, and regulate, a broad array of land uses, taking into consideration the full range of planning concerns that affect the public health, safety, and welfare of the community. *Burt Twp v Dep't of Natural Resources*, 459 Mich 659, 665-666; 593 NW2d 534 (1999).[20] Perhaps most significantly, these provisions

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[20] In *Bevan v Brandon Twp*, 438 Mich 385, 398; 475 NW2d 37 (1991), this Court recognized that there is a broad array of land uses that a local government may regulate:

> While all of the legitimate state interests that may justify zoning have not been identified, the United States Supreme Court has

enable localities to regulate land use to meet the state's needs for natural resources. In our judgment, it follows that the Legislature intended that localities would be responsible for regulating the extraction of natural resources within their boundaries.

Additionally, the ZEA specifically limits localities' powers. For instance, the exclusionary zoning provision, MCL 125.297a, now MCL 125.3207, applies to all land uses within the community and precludes the zoning power from completely prohibiting a lawful land use where there is a demonstrated need for that land use within a jurisdiction. The ZEA also imposes other limitations. For example, there is a provision that limits the regulation of adult foster care facilities and family or group child-care homes. MCL 125.3206. Another provision sets forth a detailed approach to protect and preserve open spaces. MCL 125.3506. There is also a provision that protects agricultural land by allowing for the creation of a development rights ordinance. MCL 125.3507 *et seq*. Notably, the ZEA specifically excludes areas that the Legislature intended to regulate through other means. MCL 125.3205(1), for example, explicitly makes local zoning subject to the Electric Transmission Line Certification Act, MCL 460.561 *et seq*. That same provision specifically limits a county or township from regulating or controlling "the drilling, completion, or operation of oil or gas wells or other wells drilled for oil or gas exploration purposes," and also limits them from exercising jurisdiction over "the issuance of permits for the location, drilling, completion, operation, or abandonment of such wells." MCL 125.3205(2). Notably, there are no similar provisions that limit or exempt the exercise of local zoning power over other natural resources, such as gravel.

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indicated "that a broad range of governmental purposes and regulations satisfies these requirements." *Nollan v California Coastal Comm* [483 US 825, 834-835; 107 S Ct 3141; 97 L Ed 2d 677 (1987)].

Thus, the ZEA is a comprehensive law that empowers localities to zone, sets forth in detail the development of zoning plans within a community, and specifically limits the zoning power in particular circumstances. The Legislature clearly intended for localities to regulate land uses, including the extraction of natural resources other than oil and gas. Under the ZEA, a locality may not totally prohibit a lawful land use within its jurisdiction, providing that there is a demonstrated need for that land use and there is an appropriate location. By contrast, the "no very serious consequences" rule allows natural resources extraction without consideration of these same factors. Under the ZEA, the Legislature requires localities to establish comprehensive land-use plans. The "no very serious consequences" rule, however, dilutes this achievement by overlaying on the law a judicially created case-by-case rule that is incompatible with the idea of a sustained and comprehensive long-term plan. And unlike the ZEA, the "no very serious consequences" rule dictates that a single consideration, the extraction of natural resources, will always carry the highest priority in the land-use process, no matter how this is viewed by the community in which the use occurs, and no matter how thorough and how nuanced the local land-use plan is in reconciling the full range of relevant factors and interests. The *Silva* rule creates a "one-size fits all" policy in a realm in which it is especially important that the unique circumstances of each locality be carefully assessed. In at least these ways, the "no very serious consequences" rule is, in our judgment, incompatible with the ZEA, and accordingly it is superseded by the ZEA.

IV. CONCLUSION

The "no very serious consequences" rule is not a "species" of the reasonableness test and thus is not a

requirement of the constitution's Due Process Clause; its adoption violates the constitution's separation of powers; and, by the enactment of the exclusionary zoning provision of the ZEA, the Legislature has superseded the rule. The constitution only requires that a zoning ordinance be reasonable, regardless of whether the ordinance does or does not regulate the extraction of natural resources. Moreover, an ordinance is presumed to be reasonable, and the burden is upon the party challenging the ordinance to overcome this presumption by demonstrating that there is no reasonable governmental interest being advanced.

In this case, both the trial court and the Court of Appeals analyzed the zoning ordinance through the prism of the "no very serious consequences" rule, rather than the "reasonableness" test. We therefore reverse the judgments of the Court of Appeals and the trial court and remand to the trial court for further proceedings not inconsistent with this opinion.

CORRIGAN, YOUNG, and HATHAWAY, JJ., concurred with MARKMAN, J.

KELLY, C.J. (*dissenting*). The "very serious consequences" test derives from constitutional due process considerations. I believe that it does not violate the constitutional separation of powers principle and has not been superseded by the exclusionary zoning statute.[1] Accordingly, I would affirm the judgment of the Court of Appeals.

THE VERY SERIOUS CONSEQUENCES TEST DERIVES FROM CONSTITUTIONAL DUE PROCESS CONCERNS

The very serious consequences test originated over

[1] MCL 125.297a.

80 years ago in *City of North Muskegon v Miller*.[2] This Court observed that "courts have particularly stressed the importance of not destroying or withholding the right to secure oil, gravel, or mineral from one's property, through zoning ordinances, unless some very serious consequences will follow therefrom."[3] Recognizing that restrictions on mineral extraction differ from other land-use restrictions, this Court went on to state that " '[l]egislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.' "[4]

Nearly 30 years later, this Court made clear that the very serious consequences test is a constitutional test for reasonableness that must be applied when the extraction of minerals is involved. In *Certain-teed Prod Corp v Paris Twp*, we stated that if an ordinance is applied to mining and fails to meet the very serious consequences test, "the result must be a judicial determination of *constitutional unreasonableness*."[5] *Certain-teed* solidified the test as a test of constitutional dimensions in Michigan.

In *Silva v Ada Twp*, this Court reaffirmed that *Miller* and *Certain-teed* state the appropriate constitutional standard for determining the reasonableness of zoning that prevents the extraction of valuable minerals.[6] *Silva* recognized that the very serious consequences test is important because the prevention of mineral extraction has a uniquely confiscatory character. Also, the public

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[2] 249 Mich 52; 227 NW 743 (1929).

[3] *Id.* at 57.

[4] *Id.* at 58 (citation omitted).

[5] *Certain-teed Prod Corp v Paris Twp*, 351 Mich 434, 467; 88 NW2d 705 (1958) (emphasis added).

[6] *Silva v Ada Twp*, 416 Mich 153, 159; 330 NW2d 663 (1982).

has a particular interest in having valuable minerals. The Court observed that "[n]atural resources can only be extracted from the place where they are located and found."[7] In addition to the necessity of protecting individual property rights, this Court pointed to the public interest in natural resource development as a justification for the higher standard: "Preventing the extraction of natural resources harms the interests of the public as well as those of the property owner by making natural resources more expensive."[8]

This Court further explained the substantive due process concerns for zoning regulations in *Kropf v Sterling Hts*:

> A plaintiff-citizen may be denied substantive due process by the city or municipality by the enactment of legislation, in this case a zoning ordinance, which has, in the final analysis, no reasonable basis for its very existence. The power of the city to enact ordinances is not absolute. It has been given power by the State of Michigan to zone and regulate land use within its boundaries so that the inherent police powers of the state may be more effectively implemented on the local level. But the state cannot confer upon the local unit of government that which it does not have. For the state itself to legislate in a manner that affects the individual right of its citizens, the state must show that it has a sufficient interest in protecting or implementing the common good, via its police powers, that such private interests must give way to this higher interest. *Different degrees of state interest are required by the courts, depending upon the type of private interest which is being curtailed.*[9]

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[7] *Id.* at 159.

[8] *Id.* at 160.

[9] *Kropf v Sterling Hts*, 391 Mich 139, 157-158; 215 NW2d 179 (1974) (emphasis added). Although the test used in *Kropf* was based on reasonableness, it was framed in terms of substantive due process. *Kropf* did not consider the very serious consequences test. *Silva*, 416 Mich at 161.

It is significant that in 1963, before this Court's decision in *Silva*, Michigan's citizens adopted a new constitution that affirmed the importance of the development of natural resources: "The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people."[10]

The majority opinion dismisses over 80 years of precedent holding that minerals on property implicate unique due process concerns. It reverses course, observing that there is simply "no basis in the zoning laws of our state, or in our constitution, for judicially adopting such a distinction."

To the contrary, the power of courts to interpret and enforce constitutional rights and policies by placing limits on the government's exercise of its police power is well established.[11] The majority opinion fails to adequately explain on what grounds it overrules the line of cases since *Miller* that held that the very serious consequence test derives from the Due Process Clause of the constitution.[12] It fails to follow established prece-

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[10] Const 1963, art 4, § 52. This section goes on to direct the Legislature to protect the state's natural resources. This command does not diminish the declaration that the conservation and development of natural resources is of paramount importance to the people of the state of Michigan. The special status that the constitution gives natural resources only strengthens *Silva*'s conclusion that a higher standard applies to mineral extraction because natural resources are different from other types of private interests.

[11] *Delta Charter Twp v Dinolfo*, 419 Mich 253, 273; 351 NW2d 831 (1984) (stating that "line drawing is a legislative function, but certainly there can be no argument against the well-understood rule of law that the task of deciding whether the line itself is reasonably related to the object of the line drawing is a judicial function").

[12] Const 1963, art 1, § 17 ("No person shall be . . . deprived of life, liberty or property, without due process of law.").

dent, concluding instead that the test is not a constitutional requirement. In so doing, it ignores the constitutional underpinnings of the test set forth in *Silva* and the fact that the Due Process Clause is the bedrock upon which the test was built.

Notably, the majority opinion does not adequately consider whether the doctrine of stare decisis warrants overruling the constitutional underpinnings of the *Silva* opinion. Such consideration is essential. If the very serious consequences test is derived from the Due Process Clause, as this Court has continuously held, then the Legislature does not have the power to displace the test.[13]

This Court should not disregard stare decisis by gutting the long line of constitutional jurisprudence behind the very serious consequences test and leave only the bare shell of *Silva* intact. This would eviscerate the whole concept behind stare decisis by selectively overruling parts of the case, leaving the rest and declaring no harm done.[14] This is also contrary to the require-

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[13] See *People v Salsbury*, 134 Mich 537, 546; 96 NW 936 (1903) (explaining that the Legislature cannot instruct a court on how to interpret the constitution because the judicial power, which includes the power to interpet the constitution, is held exclusively by the courts); See also *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614; 684 NW2d 800 (2004) (stating that the judicial branch is the final authority to "accord meaning to the language of the constitution . . . ."); *Dickerson v United States*, 530 US 428, 437; 120 S Ct 2326; 147 L Ed 2d 405 (2000) (holding that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution . . . .").

[14] See *People v Gardner*, 482 Mich 41, 85; 753 NW2d 78 (2008) (KELLY, J., dissenting) (explaining that the purpose behind stare decisis is to promote predictability "by making it more difficult to apply the doctrine selectively."); *Paige v Sterling Hts*, 476 Mich 495, 533; 720 NW2d 219 (2006) (opinion by CAVANAGH, J.) (stating that " 'absent the rarest circumstances, [the Court] should remain faithful to established precedent' ") (emphasis omitted); *Gardner*, 482 Mich at 85 (KELLY, J., dissenting) (holding that there must be "some special justification" for overrul-

ments of *Robinson v Detroit* and the most fundamental principles of stare decisis.[15] Even if I would have reached a different conclusion had I helped decide *Silva* and considered the test for the first time, I am now bound to follow and apply it.[16]

The majority neglects to show how *Silva* defies practical workability. It fails to consider whether overturning it will work an undue hardship on those who have relied on it. Rather, without explanation, it states that overruling it will not cause " 'practical, real-world dislocations.' " (Citation omitted.) I would not so casually discard over 80 years of jurisprudence. If the majority is intent on sending *Miller* and its progeny to the grave, it should give them a proper burial. Having been provided no substantial justification for overruling this precedent, I would affirm this Court's previous decisions holding that the very serious consequences test derives from constitutional due process concerns.

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ing earlier precedent, and this requires more than a conviction that the challenged precedent was wrongly decided).

[15] *Robinson v Detroit*, 462 Mich 439, 464-465; 613 NW2d 307 (2000). *Robinson* requires this Court to examine a number of things before overruling precedent. First, it must determine that an earlier decision was wrongly decided. Next, it must consider (1) whether the decisions defies practical workability, (2) whether reliance interests would work an undue hardship if the decision were overturned, and (3) whether changes in the law or facts no longer justify the decision.

See also *Petersen v Magna Corp*, 484 Mich 300; 773 NW2d 564 (2009) (opinion by KELLY, J.) (extensively discussing the doctrine of stare decisis and advocating for a test giving greater deference to past precedent). I remain committed to the stare decisis factors I pronounced in *Petersen*, and I believe that those factors should be adopted by this Court. Nevertheless, the stare decisis test enunciated in *Robinson* is currently recognized by a majority of the Court.

[16] See *Hubbard v United States*, 514 US 695, 716; 115 S Ct 1754; 131 L Ed 2d 779 (1995) (Scalia, J., concurring) (explaining that a past decision should not be overruled without more grounds than that it was wrongly decided).

THE VERY SERIOUS CONSEQUENCES TEST DOES NOT VIOLATE THE SEPARATION OF POWERS PRINCIPLE

I disagree with the majority that the very serious consequences test violates the principle of separation of powers. Essential to this analysis is whether the test is derived from constitutional due process, which I discussed in the previous section. Because this Court held previously that it does, and because I believe this holding should not be disturbed, it follows that the principle of separation of powers is not violated.

Legislative power is not absolute and is limited by the constitution.[17] The Michigan Constitution cautions that "No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."[18]

I agree with the majority that zoning involves the exercise of a legislative function. Zoning is an exercise of the state's police power, and the government has the authority to restrict private conduct to promote public health, safety, morals, or the general welfare.[19] However, the Legislature may not pass a zoning ordinance that does not comport with the requirements of substantive due process.[20]

If the constitution and a legislative act conflict, the constitution must govern. It is within the inherent power of the judiciary to determine whether there is such a conflict. As explained in *Marbury v Madison*:

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[17] *Marbury v Madison*, 5 US 137, 176; 2 L Ed 60 (1803) ("[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

[18] Const 1963, art 3, § 2.

[19] 1 Rathkopf, The Law of Zoning and Planning (4th ed), § 1.101[2], p 1-6; *Village of Euclid v Ambler Realty Co*, 272 US 365, 387; 47 S Ct 114; 71 L Ed 303 (1926) (holding that zoning laws "must find their justification in some aspect of the police power, asserted for the public welfare").

[20] *Silva*, 416 Mich at 157-158.

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.[21]

These principles have been embraced in Michigan since the beginning of its system of government. It is this Court's duty to uphold the constitution above any legislative acts.[22] Although the Legislative branch can exercise the police power, it cannot also define the limits of that power. As Justice COOLEY explained:

> It has long been a maxim in this country that the Legislature cannot dictate to the courts what their judgments shall be, or set aside or alter such judgments after they have been rendered. If it could, constitutional liberty would cease to exist . . . .[23]

Only the courts can define the contours of constitutional rights. Because this Court has consistently found the very serious consequences test to be grounded in

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[21] *Marbury*, 5 US at 177-178.

[22] *People ex rel Sutherland v Governor*, 29 Mich 320, 324-325 (1874) (explaining that the courts must determine whether a legislative act conflicts with the constitution, and if it does, the constitution prevails).

[23] *Id.* at 325-326.

the Due Process Clause of the constitution, the test does not violate the separation of powers principle.

THE EXCLUSIONARY ZONING STATUTE HAS NOT SUPERSEDED THE VERY SERIOUS CONSEQUENCES TEST

Even assuming that the very serious consequences test were not constitutional in nature and that the Legislature had the authority to displace it, I do not believe that it has done so. I disagree with the majority that the test was superseded by the exclusionary zoning statute. That statute was part of the Township Zoning Act (TZA).[24] It is now recodified in nearly identical form as MCL 125.3207 under the Zoning Enabling Act (ZEA).[25]

Three things compel me to conclude that the ZEA does not displace the very serious consequences test. First, both the TZA and the ZEA are silent regarding the test, and there is every reason to believe that the Legislature was aware of the test when it passed the statutes. Whether a statute "preempts, changes, or amends the common law is a question of legislative intent," and the Legislature "is presumed to know of the existence of the common law when it acts."[26] We have repeatedly stated that " 'statutes in derogation of the common law must be strictly construed, and will not be extended by implication to abrogate established rules of common law.' "[27]

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[24] MCL 125.271 *et seq*.

[25] MCL 125.3207 prohibits municipalities from enacting any zoning ordinance "totally prohibiting" a given land use if a "demonstrated need" exists for that use, unless either: (1) there is no location where the use may be "appropriately located"; or (2) the use is "unlawful."

[26] *Wold Architects & Engineers v Strat*, 474 Mich 223, 233-234; 713 NW2d 750 (2006).

[27] *Energetics, Ltd v Whitmill*, 442 Mich 38, 51 n 20; 497 NW2d 497 (1993), quoting *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 508; 309 NW2d 163 (1981) (citations omitted).

By the time the Legislature passed the exclusionary zoning statute in 1979, the very serious consequences test had already been set forth in *Miller* and affirmed in *Certain-teed*. Yet, the TZA makes no mention of the test, nor does it state a different standard for gravel extraction; rather, it is completely silent on the issue.

Likewise, when the ZEA was enacted in 2006, it made no mention of the very serious consequences test. If the Legislature wanted either statute to replace the test, why did it not indicate that, given that it was presumed to know the common law? The courts must construe statutes that are in derogation of the common law narrowly. Hence, we should conclude that the Legislature's failure to specifically address the very serious consequences test or enact another standard for gravel extraction indicates its intention not to displace the rule.

Second, the Legislature's acquiescence implies that it has accepted the test. In the 27 years between the passage of the TZA and ZEA, courts across Michigan have repeatedly applied the test in relative harmony with the statutes.[28] Despite this ongoing application and use of the test, the Legislature has not acted to invalidate it. If the Legislature had wanted to alter it, there was ample opportunity, especially in 2006 with the enactment of the ZEA.

The test has worked in this state for a long time now. I find it difficult to conclude that the Legislature intended to displace it merely by implication when it enacted the TZA or the ZEA. Because the Legislature

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[28] See, e.g., *Compton Sand & Gravel Co v Dryden Twp*, 125 Mich App 383; 336 NW2d 810 (1983); *American Aggregates Corp v Highland Twp*, 151 Mich App 37; 390 NW2d 192 (1986); *Velting v Cascade Charter Twp*, unpublished opinion per curiam of the Court of Appeals, issued May 5, 2005 (Docket No. 250946); *France Stone Co, Inc v Monroe Charter Twp*, 790 F Supp 707 (ED Mich, 1992).

did not indicate in either statute that it was displacing the test, it appears to have acquiesced in it.[29]

Third, the very serious consequences test and the exclusionary zoning statute cover different matters. The very serious consequences test applies to cases in which the alleged harm affects a specific parcel. In the present case, the test is applicable to plaintiff's parcel of land. In contrast, the harm alleged in a claim under the exclusionary zoning statute affects an entire geographic area.

Notably, it does not appear from the act's language that a plaintiff who prevails under the exclusionary zoning statute is necessarily entitled to rezoning of a specific parcel. This is because the harm is to a geographic area. Because the statute and the rule address different types of challenges to zoning ordinances and can be applied in harmony, there is no basis for concluding that one supersedes the other.

CONCLUSION

The very serious consequences test is an ingrained part of Michigan jurisprudence. It was born over 80 years ago from due process principles. While there are certainly valid policy considerations for and against retaining it, this Court should not discard it without better cause than has been shown in this proceeding.

Moreover, I believe that the Legislature is not empowered to invalidate the test, and nothing clearly indicates that the Legislature has tried to do so. Accordingly, I would affirm the judgment of the Court of Appeals.

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[29] See *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 53; 732 NW2d 56 (2007) (KELLY, J., dissenting) (listing a long line of cases where this Court has used legislative acquiescence and explaining that "legislative acquiescence is one of the many judicial tools a court properly uses when attempting to effectuate the intent of the Legislature").

CAVANAGH, J., concurred with KELLY, C.J.

WEAVER, J., did not participate in this case because she has a past and current relationship with Kasson Township Supervisor Fred Lanham and his family.

HENDEE v PUTNAM TOWNSHIP

Docket Nos. 137446 and 137447. Argued November 3, 2009 (Calendar No. 2). Decided July 15, 2010.

Jeffrey Hendee, Michael Hendee, and Louann Demorest Hendee sought to rezone a tract of land in Putnam Township from agricultural use to single-family residential use and approval of a planned unit development (PUD). The township board denied the application for the rezoning and the PUD. The Hendees then sought a use variance, which the township zoning board of appeals denied. At some point during the proceedings, the Hendees decided to seek rezoning to permit the development of a manufactured housing community (MHC), but did not pursue an application. The Hendees, joined by Village Pointe Development LLC, which had proposed to buy the property, filed a complaint in the Livingston Circuit Court against Putnam Township, alleging that the township's refusal to rezone the land for use for an MHC deprived plaintiffs of substantive due process and equal protection and constituted an unconstitutional taking. Plaintiffs also alleged exclusionary zoning because the township's zoning ordinance excluded zoning for MHCs. Plaintiffs sought to enjoin the township from interfering with their development of an MHC. The court, David J. Reader, J., granted the injunction and subsequently awarded plaintiffs costs and expert witness fees, but denied them attorney fees. The township appealed the judgment. Plaintiffs appealed the court's denial of attorney fees, and the township cross-appealed the award of costs and expert witness fees. The Court of Appeals, SAWYER and MURPHY, JJ. (DONOFRIO, P.J., concurring in part and dissenting in part), affirmed in part with respect to the injunction in an unpublished opinion per curiam, issued August 26, 2008 (Docket Nos. 270594 and 275469). The Court of Appeals reversed in part with respect to plaintiffs' challenges to the constitutionality of the ordinance as applied. While concluding that those claims were subject to the rule of finality (which requires that a plaintiff have obtained a final decision from the initial decision-maker before seeking judicial review) but should not have been dismissed on that ground under the futility exception to the rule, the Court of Appeals also concluded that the

claims failed on the merits. With respect to plaintiffs' exclusionary zoning claim, the Court of Appeals found it unnecessary to decide whether it was a facial challenge to the ordinance and whether it was not subject to the rule of finality because, assuming that the rule did apply, the Court concluded it would have been futile for plaintiffs to have sought rezoning for the MHC development when the township had already denied their application for a less intensive use of the property (the PUD). Since the futility exception to the rule of finality applied, the exclusionary zoning claim was thus ripe for review, and the Court of Appeals affirmed with respect to that claim. The Supreme Court granted the township leave to appeal. 483 Mich 983 (2009).

In separate opinions, the Supreme Court *held*:

Plaintiffs' claim was not ripe for judicial review.

Justice WEAVER, joined by Justice HATHAWAY, would hold that the Court of Appeals erred by reaching the question whether the zoning ordinance was unconstitutional. Because plaintiffs never submitted an application for rezoning or a variance to construct an MHC, plaintiffs' claim was not ripe for judicial review. For the claim to be ripe, the township must have reached a final decision and plaintiffs must have exhausted every administrative appeal. Otherwise, plaintiffs could not demonstrate that the zoning ordinance or decision specifically injured them. Plaintiffs' failure to seek rezoning for MHC development denied the township the opportunity to assess plaintiffs' MHC proposal and arrive at a definitive decision from which the trial court could determine whether plaintiffs had sustained an actual or concrete injury. Plaintiffs' claim was not only not ripe for review, it was nonexistent. A zoning ordinance is not facially invalid merely because it does not not authorize every conceivable lawful use, nor does a zoning authority's denial of a rezoning application for a lower-density use automatically establish that it would be futile for the property owner to seek approval for a higher-density use. Because plaintiffs had not made at least one unsuccessful meaningful application to rezone their property for MHC use, they did not establish that the futility exception to the rule of finality applied. The requirements of finality and ripeness apply to facial exclusionary zoning challenges. Because plaintiffs' claim was not ripe for judicial review, the trial court had no basis to enjoin the township from enforcing its ordinance and should not have awarded plaintiffs their costs and expert witness fees. The judgment of the Court of Appeal should be reversed and the case remanded for entry of a dismissal order.

Justice CAVANAGH, joined by Chief Justice KELLY, concurred in the result only and agreed that on the facts of this case, plaintiffs' claims were not ripe for review. He wrote separately, however, to

note that the lead opinion's reasoning would exacerbate the errors in the broad finality rule adopted by the Supreme Court in *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57 (1989), and *Paragon Props Co v City of Novi*, 452 Mich 568 (1996), for all as-applied constitutional challenges to zoning ordinances by further extending that rule to all as-applied exclusionary zoning claims and to statutory exclusionary zoning claims. Requiring the same type of final decision for all such challenges regardless of whether the decision actually serves the purposes of the ripeness doctrine is an extremely imprecise measure of ripeness.

Justice CORRIGAN, joined by Justices YOUNG and MARKMAN, concurred in the result, agreeing that plaintiffs' exclusionary zoning claim was not ripe for judicial review, but disagreed with the reasoning of the lead opinion. The lead opinion failed to define whether plaintiffs' exclusionary zoning claim was a facial or an as-applied challenge to the township's ordinance, thus blurring the established distinctions between those types of challenges and sidestepping any substantive discussion about the differing ripeness and finality analyses applicable to each. While plaintiffs alleged both facial and as-applied challenges in their complaint, their exclusionary zoning claim did not amount to a facial challenge. Rather, it was a challenge to the ordinance as applied, and, consequently, both the ripeness doctrine and the rule of finality applied. The issue was not ripe for review because plaintiffs had not yet suffered an actual injury since the township had not yet refused to allow them to use their property for an MHC. The futility exception to the rule of finality did not apply because plaintiffs had not requested rezoning for MHC use and it was not clear how the township would react to that request, regardless of its denial of plaintiffs' rezoning request for a PUD.

Myers & Myers, PLLC (by *Roger L. Myers*), for plaintiffs.

Foster, Swift, Collins & Smith, P.C. (by *Thomas R. Meagher*), for defendant.

Amici Curiae:

McClelland & Anderson, LLP (by *David E. Pierson*), *Honigman Miller Schwartz & Cohn LLP* (by *Norman Hyman*), and *Berry Reynolds & Rogowski PC* (by

Ronald E. Reynolds) for the Real Property Law Section of the State Bar of Michigan.

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *John K. Lohrstorfer*), for the Michigan Townships Association.

Johnson, Rosati, LaBarge, Aseltyne & Field, P.C. (by *Carol A. Rosati*), for the Michigan Municipal League, the Michigan Municipal Risk Management Authority, and the Michigan Municipal League Liability and Property Pool.

WEAVER, J. In this zoning case, Putnam Township (1) denied plaintiffs' request to rezone a 144-acre parcel from agricultural-open space (A-O) use to single-family, rural residential (R-1-B) use, (2) denied a request for a planned unit development (PUD) that would have permitted R-1-B development of the parcel and, (3) denied a use variance that would have permitted residential development of up to 95 lots. In light of these circumstances, we consider whether the trial court had jurisdiction to entertain a claim of exclusionary zoning and grant relief that would allow plaintiffs to use the property for a 498-unit manufactured housing community (MHC).

Plaintiffs' exclusionary zoning claim was premised on the notion that because the township's zoning map classified no appropriate land for MHC use and the township's master plan designated only unsuitable property for that use, the township's ordinance was facially invalid. The trial court agreed with plaintiffs and granted relief on the basis of a finding that the township had engaged in exclusionary zoning and that MHC development was an appropriate use of plaintiffs' property.

On appeal, the Court of Appeals majority affirmed in part. Concluding that plaintiffs had presented an ap-

parently "facial" challenge to the constitutionality of the ordinance[1] because it did not include MHC development,[2] the majority also determined that plaintiffs had presented an "as applied" challenge to the constitutionality of the ordinance. The majority found it unnecessary to determine whether the exclusionary zoning claim presented a facial challenge and whether it was subject to the rule of finality, however, "holding that further township proceedings would have been futile assuming application of the rule."[3] The as-applied challenge was not subject to finality and ripeness requirements because, in light of the township's denial of plaintiffs' applications to rezone the property for a lower-density residential use, it would have been futile for plaintiffs to apply for approval of a 498-unit MHC.

We conclude that the trial court and the Court of Appeals majority (1) erred to the extent that they held that the township zoning ordinance was facially invalid because it unconstitutionally excluded a lawful use (MHC) and (2) erred by holding that the futility exception excused compliance with the finality rule and that the appropriate remedy was to enjoin the township from interfering with plaintiffs' development of a 498-unit MHC. An ordinance is not facially invalid merely because it does not authorize every conceivable lawful use, nor does a zoning authority's denial of an applica-

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[1] The majority described it as a "facial challenge with 'as applied' attributes or features, considering that execution of the ordinance scheme with respect to a recognized yet unapplied MHC district can go the issue of whether the township engaged in exclusionary zoning." *Hendee v Putnam Twp*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2008 (Docket Nos. 270594 and 275469), p 6 n 6.

[2] The partial dissent would have held that plaintiffs' claim was not ripe for judicial review. *Id*., unpub op at 1 (DONOFRIO, P.J., concurring in part and dissenting in part).

[3] *Id*., unpub op at 5-6 (majority opinion).

tion for residential rezoning at a proposed lower-density level automatically establish that it would be futile for the property owner to apply for a higher-density use, such as MHC rezoning or a variance allowing MHC use. Because plaintiffs never submitted an application to the township for MHC rezoning or for a use variance that permitted construction of an MHC, plaintiffs' claim was not ripe for judicial review.[4]

I. FACTS AND PROCEDURAL BACKGROUND

Plaintiffs Jeffrey Hendee, Michael Hendee, and Louann Demorest Hendee own a 144-acre tract of land, formerly used as a dairy farm, in defendant Putnam Township. The land is essentially undeveloped, consisting of flat lands, hills, wetlands, and woods. The land was and is currently zoned A-O, which permits development as a farm or 10-acre single-family homes. The parties stipulated that the surrounding property to the east and south is zoned for agricultural use, that the property to the west is zoned for agricultural and medium-acreage residential estate use, and that the property is bordered on the west by a paved road and on the south by a gravel road. The township has no public water or sanitary-sewer service.

Some years before the proceedings in this case, the Hendees had stopped using the land as a dairy farm because it was unprofitable. In 2002, they attempted to sell the land, intending to use the proceeds to fund their retirements, but they concluded that they could not get an acceptable price for the land because the A-O zoning classification limited its development potential. Plaintiff Village Pointe Development LLC agreed to purchase

[4] *Paragon Props Co v City of Novi*, 452 Mich 568, 576; 550 NW2d 772 (1996).

and develop the land, contingent on the property being rezoned from A-O to R-1-B.

On August 29, 2002, the Hendees filed an application with the Putnam Township Planning Commission to rezone their land from A-O to R-1-B. The township planning commission recommended denial of the rezoning application, but the Livingston County Planning Commission recommended approval with conditions, specifically, that cluster or PUD development be considered to protect the parcel's wetlands.

On April 23, 2003, the Hendees filed an application with the township for approval of a 95-unit PUD and rezoning to R-1-B. The township planning commission recommended denial of the application, and in May 2003 the county planning commission also recommended denial.

Following these denial recommendations, the Putnam Township Board remanded the application to the township planning commission for specific findings of fact. The planning commission held a hearing and presented its findings supporting denial, supplemented by letters from the township's community planner and consulting engineers, to the township board in December 2003. On December 17, 2003, the township board denied both the rezoning request and the application for the 95-unit PUD/R-1-B on the basis of the planning commission's findings.

The Hendees next applied to the township zoning board of appeals (ZBA) for a use variance to permit development of up to 95 one-acre residential lots on their land. Following hearings in February and March 2004, the ZBA denied the Hendees' variance request on March 22, 2004.

Although it is unclear when it occurred, at some point during the application process concerning the

95-unit PUD/R-1-B, the Hendees filed a new application to rezone the property to permit MHC development. The Hendees withdrew that application, however, after the township informed them that it would not process a new application for an MHC while the 95-unit PUD application was still pending.

On April 12, 2004, the Hendees, together with the proposed buyer/developer, Village Pointe, filed a complaint against the township, alleging that the refusal to rezone the property from A-O zoning to allow MHC development deprived plaintiffs of equal protection and substantive due process and constituted an unconstitutional taking and further alleging that the township's zoning was exclusionary, in violation of former MCL 125.297a,[5] because it excluded MHC zoning.

Importantly, plaintiffs abandoned the 95-unit PUD as "economically unfeasible." Instead, they based their claim for injunctive relief prohibiting enforcement of the A-O zoning of their property on their earlier (withdrawn) request to rezone the property for an MHC,[6] asking that the court enjoin the township from interfering with plaintiffs' development of a 498-unit MHC. On May 5, 2006, after a nine-day bench trial during January and March 2006, the trial court found in plaintiffs' favor on all claims and granted an injunction prohibiting the township from interfering with devel-

[5] MCL 125.297a was part of the former Township Zoning Act. 2006 PA 110 repealed that act and other zoning statutes and replaced them with the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*., effective July 1, 2006. MCL 125.3702(1). The Township Zoning Act, however, applies to this case. MCL 125.3702(2).

[6] Again, we note that plaintiffs never re-presented their application for a 498-unit MHC to the township for review after the township informed plaintiffs that it could not consider a new application while their 95-unit PUD application was still pending.

opment of the MHC. The trial court also awarded costs and expert witness fees to plaintiffs.

The township appealed and, in an unpublished, split decision, the Court of Appeals affirmed the trial court's judgment enjoining the township from enforcing its A-O zoning and from interfering with plaintiffs' MHC development.[7] The majority reversed in part with respect to the as-applied constitutional claims (equal protection, substantive due process, and taking). Although the majority ruled that the claims were subject to the rule of finality but should not have been dismissed on that ground under the futility exception to that rule, it also concluded that those claims failed on the merits because the township "was advancing a legitimate governmental interest in maintaining the A-O classification," it was "not acting arbitrarily or capriciously," and "all avenues of use, and thus economic feasibility, were not explored and negated."[8] The majority affirmed the trial court's ruling on plaintiffs' exclusionary zoning claim, however. The majority found it unnecessary to decide whether it was a facial claim that was not subject to the rule of finality. Instead, "assuming the contrary, the futility exception applied; the claim was ripe for suit."[9] The majority implied that plaintiffs were free to pursue their exclusionary zoning claim because the ordinance unconstitutionally excluded a lawful use (MHC). The majority reasoned that, in light of the township's denial of plaintiffs' request for far less intensive residential rezoning (the PUD) and use variance applications, it would have been fruitless for plaintiffs to seek MHC rezoning or a variance permitting MHC use of the property at the much higher density they proposed.

[7] *Hendee*, unpub op at 23-24.

[8] *Id.* at 23.

[9] *Id.*

Relying on *Schwartz v City of Flint*, 426 Mich 295, 329; 395 NW2d 678 (1986), the majority concluded that the use plaintiffs proposed was reasonable and affirmed the trial court's order enjoining the township from interfering with it.[10] The majority also affirmed the award of costs and expert witness fees to plaintiffs.

Judge DONOFRIO concurred in part and dissented in part. He agreed that plaintiffs' as-applied claims were not ripe, but also thought that the trial court's ruling on the exclusionary zoning claim should be reversed because it was not ripe for judicial review and because plaintiffs had not established, pursuant to former MCL 125.297a, that a demonstrated need for MHCs existed in the township, a question that the majority had found unnecessary to decide because it believed the futility doctrine rendered such analysis unnecessary.

Defendant applied for leave to appeal, and we granted leave and requested that the parties brief the following issues:

> (1) whether a rule of finality or ripeness applies to the plaintiffs' exclusionary zoning claim, see *Paragon Props Co v City of Novi*, 452 Mich 568, 576 (1996); *Warth v Seldin*, 422 US 490, 508 n 18 [95 S Ct 2197; 45 L Ed 2d 343] (1975) ("[U]sually the focus should be on a particular project."); (2) if so, whether the Court of Appeals majority properly held that the defendant township's previous denials of the plaintiffs' applications to rezone their property for less intensive uses excused the finality requirement under the futility doctrine; (3) whether the trial court erred in granting injunctive relief prohibiting the defendant township from interfering with the plaintiffs' proposed use of their property for a manufactured housing community when the plaintiffs had never proposed that use to the township, see *Schwartz v City of Flint*, 426 Mich 295, 327-328 (1986); (4) whether a claim that a zoning ordi-

[10] *Id.* at 18-20, 23-24.

nance unconstitutionally excludes a lawful use is properly analyzed without regard to whether a demonstrated need for the use exists, as suggested by the Court of Appeals' reliance on *Kropf v Sterling Hts*, 391 Mich 139, 155-156 [215 NW2d 179] (1974), or whether the enactment of 1978 PA 637, MCL 125.297a (now recodified in nearly identical language as MCL 125.3207) superseded the analysis of *Kropf* on which the majority relied; and (5) whether the trial court abused its discretion in awarding the plaintiffs their costs and expert witness fees.[11]

II. STANDARDS OF REVIEW

This Court reviews de novo issues of law.[12] We review a trial court's findings of for clear error.[13]

III. ANALYSIS

A. LEGISLATIVE ZONING POWER

The zoning of land is an exercise of a government's police power.[14] For more than 80 years, courts have adhered to the analysis in *Village of Euclid v Ambler Realty Co*.[15] There, the United States Supreme Court recognized that the pressures of competing land uses require the segregation of incompatible uses, consistent with the public interest in protecting and preserving property values. In accordance with *Euclid*, various zoning acts, including the former Township Zoning Act, MCL 125.271 *et seq*., were adopted to establish procedures for Michigan governmental bodies to enact and enforce zoning ordinances.

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[11] *Hendee v Putnam Twp*, 483 Mich 983 (2009).

[12] See *Odom v Wayne Co*, 482 Mich 459, 467; 760 NW2d 217 (2008).

[13] *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

[14] See *Paragon*, 452 Mich at 577.

[15] *Village of Euclid v Ambler Realty Co*, 272 US 365; 47 S Ct 114; 71 L Ed 303 (1926).

Pursuant to that statute, Putnam Township enacted a zoning ordinance and adopted a zoning map.[16] Legislative bodies such as the Putnam Township Board also have the authority to amend zoning maps by granting rezoning requests and special use permits. In addition, a landowner may seek a use variance to permit a use in a zoning district that otherwise would not be permitted.

B. PLAINTIFFS' REZONING REQUEST

Plaintiffs' land was zoned for agricultural use, which limited the development of single-family homes on plaintiffs' property to 10-acre parcels. Accordingly, plaintiffs initially filed a request to rezone their property from A-O to R-1-B. Upon the recommendation of the Livingston County Planning Commission, plaintiffs reformulated their request, seeking to proceed with a 95-unit PUD.

After the township denied plaintiffs' request for a 95-unit PUD, plaintiffs properly sought administrative relief by requesting a use variance from the ZBA to permit the 95-unit PUD. The ZBA denied plaintiffs' variance request. At that point, plaintiffs had exhausted their administrative review obligations and could have sought judicial relief under the ripeness rule of *Paragon Props Co v City of Novi*, 452 Mich 568; 550 NW2d 772 (1996), as no other means of administrative appeal or review was available to plaintiffs to permit development of a 95-unit PUD.

However, after the township reached its final decision denying the 95-unit PUD, plaintiffs did not seek judicial review of the ZBA's denial of their request for a variance to develop a 95-unit PUD. Instead, they filed a

[16] Former MCL 125.281; see *Paragon*, 452 Mich at 574; cf. MCL 125.3401.

complaint in the circuit court alleging that the township had wrongfully engaged in exclusionary zoning by enacting an ordinance that did not, on its face, permit *development of a 498-unit MHC* on plaintiffs' property.[17] Thus, the township was never afforded an opportunity to review a rezoning request for a 498-unit MHC because the only applications before the township were the requests to rezone the property for residential development or *development of a 95-unit PUD* or for a use variance that would allow residential development.

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[17] A facial challenge is one in which the complainant alleges that the very existence of a zoning ordinance or decision adversely affects and infringes upon the property values of the rights of all landowners within the governed community. *Paragon*, 452 Mich at 576. Specifically, plaintiffs alleged that because there was no provision for MHC zoning in the township's zoning ordinance, the ordinance wrongfully precluded all landowners from using their land for MHCs. Consequently, in making a facial challenge, plaintiffs must establish that there is no set of circumstances in which the ordinance would be valid. *Warshak v United States*, 532 F3d 521, 529 (CA 6, 2008). In this regard, plaintiffs sought to frame their complaint as a facial claim challenging the constitutionality of the township's ordinance on the basis that the ordinance wrongfully denies all property owners the right to develop their land for MHC use and is therefore exclusionary.

An as-applied challenge is one in which the complainant alleges that the individual landowner suffers from a specific and identifiable injury as a result of the township's zoning ordinance or decision. *Paragon*, 452 Mich 576. An as-applied challenge is always subject to the rule of finality—the requirement that the governing body has made a definitive decision such that an identifiable injury can be shown. An as-applied challenge is not ripe for judicial review until the complainant can establish that a final decision injures a complainant. *Id.* at 576-577. By contrast, the rule of finality does not apply to true facial challenges because such challenges attack the very existence of the ordinance or decision. *Id.* at 577. We agree with the Court of Appeals majority that this case "reflects a facial challenge with 'as applied' attributes or features, considering that execution of the ordinance scheme with respect to a recognized yet unapplied MHC district can go to the issue of whether the township engaged in exclusionary zoning." *Hendee*, unpub op at 6 n 6. We disagree, however, with its conclusion that, under these circumstances, plaintiffs were excused from complying with the finality requirement.

The township responded that it had reached a final decision only with respect to the rezoning request before it: the request for the 95-unit PUD. The township had no rezoning request pertaining to development if a 498-unit MHC upon which to make any decision, much less a final decision appealable in the circuit court. Accordingly, the trial court had no authority to review plaintiffs' complaint alleging that the township's ordinance was a facially invalid exercise in exclusionary zoning because the ordinance did not permit plaintiffs to develop an MHC.

We conclude that the trial court erred by deciding plaintiffs' exclusionary zoning claim because plaintiffs did not first submit a request to rezone their property for MHC use. The township could not even consider, much less render a final decision with regard to, the proposed 498-unit MHC use because it had no such application before it.

C. *PARAGON PROPS CO v CITY OF NOVI*

Under *Paragon*, a plaintiff's complaint is not ripe for judicial review until the zoning authority has reached a final decision and the plaintiff has exhausted every administrative appeal. Without a final decision from the zoning authority, a plaintiff cannot demonstrate that the zoning ordinance or decision specifically injured the plaintiff.

In *Paragon*, this Court addressed whether the Novi City Council's denial of plaintiff Paragon Properties Company's request to rezone its property was a final decision appealable in the circuit court. Paragon owned a 75-acre vacant tract of land that was zoned for large-lot, single-family residential use. The property in Novi, Michigan, abutted an active gravel pit operation to the west, and the land north of the property was

zoned for industrial use. To the east of the Paragon tract, the undeveloped property was zoned for residential use, and to the west, the property was developed for mobile-home use.

Paragon applied to the planning board of the city of Novi to rezone the property from single-family residential to mobile-home use. Both the planning board and the Novi City Council denied Paragon's request. Paragon then filed a complaint in the Oakland Circuit Court, alleging that the property had no economic value as zoned for residential use because of adjacent industrial uses and poor drainage conditions. Paragon argued that the highest and best use of the property would be for mobile-home use and thus the city's denial of its rezoning request unconstitutionally deprived Paragon of its property, in violation of the Due Process Clause.

The city moved for summary disposition, arguing that because Paragon had failed to first seek a use variance, Paragon had not obtained a final decision regarding the permissible uses of the property under the Novi ordinance. The trial court denied the motion, concluding that Paragon had exhausted all its administrative remedies because the case concerned a request for rezoning, not a request for a use variance. Thereafter, the trial court held that the zoning ordinance as applied to Paragon's property was an unconstitutional taking and entered a judgment against the city.[18]

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[18] As noted earlier, we stated in *Paragon* that as-applied challenges are distinct from facial challenges:

> Although the police power allows the government to regulate land use, the Fifth Amendment requires that compensation be paid if a government regulation unreasonably shifts social costs to an individual or individuals. *Village of Euclid*, [272 US] at 387. A claim for compensation may allege that an ordinance is confiscatory "as applied" or "on its face." A facial challenge alleges that the mere existence and threatened enforcement of the ordinance

On appeal, the Court of Appeals reversed the trial court, holding that Paragon's claim was not ripe for judicial review because Paragon had neither sought a variance nor brought an inverse condemnation action.[19]

Citing the United States Supreme Court's opinion in *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*,[20] as well as this Court's express adoption of *Williamson* in *Electro-Tech, Inc v H F Campbell Co*,[21] we observed in *Paragon* the importance of requiring finality in land-use-regulation disputes.[22] In *Williamson*, a property owner received temporary approval from the planning commission to develop a residential subdivision. When the commission subsequently amended its ordinance, thereby denying the

> materially and adversely affects values and curtails opportunities of all property regulated in the market. *Id* at 395. An "as applied" challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution. *Id*.
>
> A challenge to the validity of a zoning ordinance "as applied," whether analyzed under 42 USC 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality. [*Paragon*, 452 Mich at 576, citing *Lake Angelo Assoc v White Lake Twp*, 198 Mich App 65, 70; 498 NW2d 1 (1993), citing *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 186; 105 S Ct 3108; 87 L Ed 2d 126 (1985).]

As discussed, however, it does not follow that every ostensibly "facial" challenge is exempt from the rule of finality. Rather the court must look to the substance of the claim and the factual matrix in which it is presented to determine whether the claim is one that is exempt from *Paragon*'s rule of finality.

[19] *Paragon Props Co v City of Novi*, 206 Mich App 74, 76; 520 NW2d 344 (1994).

[20] *Williamson*, n 18 *supra*.

[21] *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 81-91; 445 NW2d 61 (1989).

[22] *Paragon*, 452 Mich at 577-578.

property owner his preferred use, the owner sued in federal district court, alleging that the ordinance amounted to an unconstitutional taking of his property. The United States Supreme Court disagreed, holding that because the landowner had failed to first seek alternative relief by requesting a land use variance, the landowner's claim was not ripe for judicial review.[23]

Consistently with *Williamson*, we held in *Paragon* that judicial review in zoning cases is not available until the zoning authority has rendered a final decision.[24] Thus, because Paragon had not first sought a use variance, it had not established that its claim was ripe for judicial review:

> The City of Novi's denial of Paragon's rezoning request is not a final decision because, absent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted, nor, therefore, is there information regarding the extent of the injury Paragon may have suffered as a result of the ordinance. While the city council's denial of rezoning is certainly a decision, it is not a final decision under *Electro-Tech* because had Paragon petitioned for a land use variance, Paragon might have been eligible for alternative relief from the provisions of the ordinance. [*Paragon*, 452 Mich at 580.]

D. APPLICATION OF *PARAGON*

As there was no decision regarding plaintiffs' proposed use of the property for a 498-unit MHC, plaintiffs' complaint did not allege that any final decision by the township precluded plaintiffs from making MHC use of their property. MHC use was contemplated by the township's master plan, though not yet specifically

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[23] *Williamson*, 473 US at 193-194.

[24] *Paragon*, 452 Mich at 576-577.

zoned for in the township. Plaintiffs' failure to seek rezoning of their property for MHC development denied the township any opportunity to assess plaintiffs' MHC proposal and arrive at a definitive decision from which the court could determine whether plaintiffs had sustained any actual or concrete injury. Consequently, plaintiffs have not exhausted their administrative remedies, the township has rendered no final decision, and plaintiffs' exclusionary zoning claim is not ripe for judicial review. As this case can be resolved on this narrower ground, we need not and do not address the substance of plaintiffs' exclusionary zoning claim.

Whereas the *Paragon* Court held that Paragon's failure to obtain a final decision from the Novi Zoning Board of Appeals precluded Paragon from seeking judicial review, in the case now before us, plaintiffs' claim for relief is not only not ripe for review, it is nonexistent. Simply put, plaintiffs' failure to submit an application to rezone its property to permit an MHC effectively denied the township any opportunity to consider whether that alternative use of the land would be acceptable. As Judge DONOFRIO observed, it also deprived the township of any opportunity to consider whether its ordinance failed to accommodate a lawful use for which a demonstrated need existed within either the township or the surrounding area.[25] In the absence

[25] *Hendee*, unpub op at 8 (DONOFRIO, P.J., concurring in part and dissenting in part). See former MCL 125.297a, which provided:

> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful.

A comparable provision, MCL 125.3207, appears in the Michigan Zoning Enabling Act.

of an express prohibition of a lawful land use within the ordinance itself,[26] the issue of the ordinance's exclusionary effect, or the absence of it, will not be ripe for consideration by the courts until the township has been afforded the opportunity to make that determination.

In response, plaintiffs argue that it would have been futile to seek permission to develop a 498-unit MHC because the township had already denied its rezoning request for a less intensive use—the 95-unit PUD. The Court of Appeals majority agreed, noting that under the futility doctrine, a court will not require parties to exhaust all administrative remedies.[27] If a plaintiff can show that it would be futile to first exhaust all administrative appeals, because it can be established that the zoning authority's decision would remain the same on appeal, courts have held that the futility doctrine excuses the requirement of ripeness.

As the United States Court of Appeals for the Sixth Circuit explained in *Bannum, Inc v City of Louisville*, 958 F2d 1354, 1362-1363 (CA 6, 1992):

> We do not want to encourage litigation that is likely to be solved by further administrative action and we do not

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[26] As previously noted, the township's master plan contemplates MHC use. The master plan currently projects that MHCs will be located on land adjacent to the village of Pinckney, which has the only available public water and sewer. Plaintiffs alleged that the land designated was unsuitable for MHC use, but, by failing to apply for MHC rezoning, they denied the township any opportunity to consider that claim.

[27] The majority observed:

> [T]his Court has stated that it will not require parties to undertake vain and useless acts, and where it is clear that further administrative proceedings would be an exercise in futility and nothing more than a formal step on the way to the courthouse, resort to the administrative body is not mandated. *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 358; 733 NW 2d 107 (2007); *Turner v Lansing Twp*, 108 Mich App 103, 108; 310 NW2d 287 (1981). [*Hendee*, unpub op at 6-7 n 7.]

> want to put barriers to litigation in front of litigants when it is obvious that the process down the administrative road would be a waste of time and money. . . .
>
> . . . [However,] [f]or the exception to be available to an aggrieved landowner, the landowner must have submitted at least one "meaningful application" for a variance from the challenged zoning regulations. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454-55 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043, 108 S.Ct.775, 98 L.Ed.2d 861(1988).

Because plaintiffs have not even made at least one unsuccessful meaningful application for a rezoning request to change the zoning from AO to MHC, so as to permit their proposed 498-unit MHC, plaintiffs have not established that the futility doctrine applies.

Relying on the discussion of the requirement of finality in the context of a taking claim in *Paragon*, 452 Mich at 578-579, plaintiffs, the trial court, and the Court of Appeals majority appear to have proceeded on the assumption that *Paragon*'s ripeness and finality rules can never apply to an ostensibly "facial" attack on a zoning ordinance, i.e., one premised on an exclusionary zoning theory. They are mistaken, as even a cursory examination of the statute on which the trial court relied reveals. Precisely because the statute prevents a "zoning *ordinance* or *zoning decision*" from "hav[ing] the effect of totally prohibiting the establishment of a land use within a township *in the presence of a demonstrated need for that land use within either the township or surrounding area within the state*," former MCL 125.297a (emphasis added), the zoning authority must first be afforded the opportunities (1) to determine the effect of its ordinance in light of evidence demonstrating a need for the proposed land use and (2) to render a zoning decision based on that evidence before a facial exclusionary zoning claim can become ripe for judicial review.

As the United States Supreme Court observed in *Warth v Seldin*, 422 US 490, 508; 95 S Ct 2197; 45 L Ed 2d 343 (1975):

> We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention. Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of "a real need to exercise the power of judicial review" or that relief can be framed "no broader than required by the precise facts to which the courts ruling would be applied." *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. [208], at 221-222 [94 S Ct 2925; 41 L Ed 2d 706 (1974)].

In *Warth*, the plaintiffs were individuals and organizations residing in Rochester, New York. They brought a class action against the town of Penfield, New York, and its officials, alleging that the town's zoning ordinance unconstitutionally excluded low- and moderate-income persons from living in Penfield. The federal district court dismissed the plaintiffs' suit, and the United States Court of Appeals for the Second Circuit affirmed. On appeal, the United States Supreme Court again affirmed the decision after a majority of the justices concluded that the plaintiffs lacked standing to sue because none of the individual plaintiffs could allege a particular injury to themselves. Nor did the plaintiffs demonstrate that judicial intervention could benefit them in a tangible way. In this respect, the *Warth* Court held that the plaintiffs' facial claim alleging exclusionary zoning was not ripe for judicial review.

As Judge DONOFRIO observed in dissent in this case, every use is not appropriate to every community, and Mackinac Island's zoning (for example) is not necessarily unconstitutionally (or, under a statute like former

MCL 125.297a, unlawfully) exclusionary because it does not include industrial use classifications or zone particular property for such uses.[28]

The township denied the only applications that plaintiffs submitted, requests to rezone the property from A-O to R-1-B to permit residential development (or, alternatively, to permit a 95-unit PUD) or for a use variance. Plaintiffs' decision not to pursue an application for rezoning from A-O to MHC effectively barred plaintiffs from seeking judicial review of that question. Without such an application, and a final decision by the township, it is impossible to say whether (1) the township would permit such a use of plaintiffs' property and (2) whether a denial of such a request would be reasonable in light of the township's efforts to channel future MHC development to its border with the village of Pinckney, which has the only public water and sewer systems in the area.[29] We agree with the partial dissent of Judge DONOFRIO:

> After reviewing the record, I conclude that plaintiffs cannot show that they sought alternative uses of the

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[28] *Hendee*, unpub op at 9 n 3 (DONOFRIO, P.J., concurring in part and dissenting in part).

[29] Under *Schwartz*, 426 Mich at 325-326, the trial court had the power to grant injunctive relief permitting an MHC use only if the ordinance's classification of the property was unconstitutional. Similarly, we would hold that in the absence of an expressed prohibition of a lawful use in the zoning ordinance or a prohibition based on a suspect classification, an exclusionary zoning claim is not ripe for judicial review if the zoning authority has not first been afforded an opportunity to determine whether its ordinance has

> the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area with the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful. [Former MCL 125.297a.]

> property and were denied, or that they applied for the minimum variance necessary to place the land in productive economic use within the zoning classification. Plaintiffs did not seek a decision from the appropriate administrative body regarding either a rezoning application or a variance request regarding a 498-unit MHC and instead sought premature relief from the judiciary by filing the instant lawsuit.[30]

IV. CONCLUSION

We would hold that the trial court and the Court of Appeals erred by reaching the question whether the township zoning ordinance was unconstitutional and thus also erred by holding that plaintiffs were entitled to an order enjoining the township from interfering with plaintiffs' development of a 498-unit MHC. Plaintiffs never submitted an application for rezoning or a variance to construct an MHC. Thus, plaintiffs' claim was not ripe for judicial review.

Because plaintiffs' claim was not ripe for judicial review, the trial court had no basis to enjoin the township from enforcing its zoning ordinance, nor should the court have awarded plaintiffs their costs and expert witness fees.

We would reverse the judgment of the Court of Appeals and remand this case for entry of a dismissal order consistent with this opinion.

HATHAWAY, J., concurred with WEAVER, J.

CAVANAGH, J. (*concurring*). I concur in the result only. I agree that, on the facts of this case, plaintiffs' claims are not ripe for review. I write separately because I

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[30] *Hendee*, unpub op at 5-6 (DONOFRIO, P.J., concurring in part and dissenting in part).

continue to adhere to my dissenting positions in *Paragon Props Co v City of Novi,* 452 Mich 568, 583-593; 550 NW2d 772 (1996) (CAVANAGH, J., dissenting), and *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 92-132; 445 NW2d 61 (1989) (BRICKLEY, J., joined by LEVIN and CAVANAGH, JJ., dissenting). While I generally agree that challenges to zoning ordinances may require a final decision to ripen, the finality rule adopted in *Paragon* and *Electro-Tech* serves the purposes of the ripeness doctrine at best imprecisely, and at worst incorrectly. The lead opinion's reasoning would only exacerbate that error.

I. OVERVIEW OF FINALITY AND RIPENESS

The question before this Court is whether plaintiffs' constitutional and statutory exclusionary zoning claims are ripe for review. As stated by the *Paragon* majority, in the land-use context, " 'the doctrine of ripeness is intended to avoid premature adjudication or review of administrative action.' " *Paragon*, 452 Mich at 579 n 12 (citation omitted). Thus, when a final decision by the relevant governmental agency is necessary to establish whether the alleged injury has occurred, I would agree that it serves the purposes of the ripeness doctrine to require a final decision from that agency. As aptly stated in Justice BRICKLEY's *Electro-Tech* dissent, "a principled decision to apply, or not to apply, the finality requirement requires us to look beyond the label attached to a constitutional land use claim to the policy underlying the requirement and to the nature of the governmental conduct under attack." *Electro-Tech*, 433 Mich at 100.

The United States Supreme Court's jurisprudence is consistent with this approach and has required a final decision by an agency only to the extent that the decision is necessary for evaluating the claim that is

before the reviewing court. Thus, in the taking context, it has held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 186; 105 S Ct 3108; 87 L Ed 2d 126 (1985). The Court has not applied this rule, however, if a final decision would not serve the ripeness doctrine, such as when the agency no longer has discretion in how the regulation is applied to a plaintiff's property and, thus, a final decision on the applicability of the regulation to the plaintiff's property is not necessary to evaluate the plaintiff's taking claim. See *Suitum v Tahoe Regional Planning Agency*, 520 US 725, 738-740; 117 S Ct 1659; 137 L Ed 2d 980 (1997), stating that "[b]ecause the agency has no discretion to exercise over Suitum's right to use her land, no occasion exists for applying *Williamson County*'s requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel." Thus, the Court has not drawn bright-line rules about what degree of finality is required to meet the ripeness doctrine based on the types of claims raised.

This Court's finality and ripeness jurisprudence stands in marked contrast to the United States Supreme Court's sensible and reasoned approach. In *Electro-Tech*, the Court held that the finality requirement applied in the taking context, regardless of whether the claim arose out of the Just Compensation Clause or the Due Process Clause of the constitution. *Electro-Tech*, 433 Mich at 76 n 21, 79. This holding was erroneously used to extend the *Williamson* finality rule

to *all* constitutional challenges to zoning regulations.[1] See, e.g., *Lake Angelo Assoc v White Lake Twp*, 198 Mich App 65, 72-73; 498 NW2d 1 (1993). The *Paragon* majority cemented this error in our jurisprudence in two ways. First, it broadly declared that as-applied challenges are subject to the *Williamson* rule of finality, but facial challenges are not. Second, it cavalierly stated that this rule is applicable to all as-applied challenges to zoning ordinances, regardless of whether analyzed "as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment . . . ." *Paragon*, 452 Mich at 576. It is an extremely imprecise measure of ripeness to require the same type of final decision regardless of whether that decision actually serves the purposes of the ripeness doctrine. As discussed, the United States Supreme Court has not even applied the *Williamson* test to every *taking* claim, let alone every *constitutional* claim.[2]

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[1] This extension is particularly unfortunate given that the underpinnings for applying this test to constitutional challenges outside the Fifth Amendment have since been rejected. In *Lingle v Chevron USA, Inc*, 544 US 528; 125 S Ct 2074; 161 L Ed 2d 876 (2005), the United States Supreme Court clarified that regulatory taking claims arise *exclusively* out of the Just Compensation Clause and never out of the Due Process Clause. Thus, the regulation's underlying validity is an inquiry that "is logically prior to and distinct from the question whether a regulation effects a taking . . . ." *Id.* at 543. This calls into question cases in which this Court held that taking claims may be framed in terms of either the Due Process Clause or the Taking Clause. See, e.g., *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998), and *Bevan v Brandon Twp*, 438 Mich 385, 391; 475 NW2d 37 (1991).

[2] It also has not generally shared *Paragon*'s dependence on classifying claims as facial or as-applied. See, e.g., *Suitum*, 520 US at 736 n 10, stating that " 'facial' challenges to regulation are *generally* ripe the moment the challenged regulation or ordinance is passed . . . ." (Emphasis added.) Although the enactment of the ordinance itself generally ripens a facial claim for review, I do not favor adopting a bright-line rule to this effect. It merely

II. RIPENESS AND EXCLUSIONARY ZONING CLAIMS

The lead opinion's analysis today would exacerbate the errors in *Paragon* and *Electro-Tech* by extending the requirement that a final decision must have been made regarding the regulation's application to the plaintiff's property to all as-applied exclusionary zoning claims. An essential feature of every type of exclusionary zoning claim is that the alleged injury *is to an entire geographic area* and not a single parcel of land.[3] As a result, exclusionary zoning claims exemplify the logical flaw in applying the *Williamson* taking finality test to all constitutional claims. While a particular plaintiff may need to show an injury to have standing, the injury alleged in an exclusionary zoning claim is not specific to one parcel, and, therefore, whether it is ripe for review may be unrelated to whether a final decision has been made regarding the applicability of the regulation to one specific parcel or plaintiff.[4] Thus, a final decision regarding the applicability of a regulation to a particular parcel may be needed to develop an injury suffi-

forces a court to engage in the additional analytical step of definitively labeling a claim as either facial or as-applied.

[3] This is true regardless of whether the claim is facial or as-applied. I am thus somewhat troubled by Justice CORRIGAN's conclusion that this case presents an as-applied exclusionary zoning claim on the basis that plaintiffs' claim relates to the infringement of plaintiffs' right to develop manufactured housing *on their property*. Plaintiffs did raise constitutional claims that were specific to their property, but those are distinct from their exclusionary zoning claims.

[4] For this reason, I find puzzling the lead opinion's quotation of *Warth v Seldin*, 422 US 490; 95 S Ct 2197; 45 L Ed 2d 343 (1975), which addresses the importance of *standing* in exclusionary zoning claims. While standing "bears close affinity to questions of ripeness," ripeness addresses "whether the harm asserted has matured sufficiently to warrant judicial intervention," whereas standing addresses whether the particular plaintiff has suffered a harm. *Id.* at 499 n 10. In this case, the question is not standing but whether plaintiffs' alleged harm has matured sufficiently for judicial review.

ciently for a claim to be ripe in the context of a *taking* claim, in which the alleged harm is specific to the plaintiff's parcel, but it is not necessarily needed for an exclusionary zoning claim, in which the alleged injury is to an entire area.

Further, although it is not clear whether the lead opinion's and Justice CORRIGAN's analyses address constitutional or statutory exclusionary zoning claims, I would note that to the extent that the opinions apply the *Williamson* ripeness requirements to *statutory* exclusionary zoning claims, I disagree.[5] While a statutory exclusionary zoning claim may not be ripe for review in the absence of the decision necessary to evaluate whether the plaintiff has suffered the harm required by the exclusionary zoning statute, MCL 125.3207, this inquiry is wholly distinct from the *Williamson* analysis.

III. APPLICATION OF THE RIPENESS DOCTRINE TO THIS CASE

Nonetheless, even though I disagree with the lead opinion's reasoning, I agree that plaintiffs' statutory and constitutional exclusionary zoning claims are not ripe for review on the facts of this case. Plaintiffs essentially alleged that defendant's "actions" excluded manufactured housing communities (MHCs) from the township. Therefore, to the extent that plaintiffs pleaded a constitutional exclusionary zoning claim, and regardless of whether it was based in substantive due process or equal protection, in order for plaintiffs' claim

[5] To the extent that the opinions could be read to implicitly adopt the position of the Court of Appeals partial dissent that MCL 125.3207 provides the requirements for both constitutional and statutory claims, I disagree. A statute may not supersede a constitutional claim recognized by this Court because the power to interpret the constitution and the scope of the rights it provides is within the judicial power held exclusively by the courts. Const 1963, art 6, § 1; see also *People v Salsbury*, 134 Mich 537, 546; 96 NW 936 (1903).

to be ripe, they must show that defendant has made decisions excluding MHCs to an impermissible disagree.[6] I do not think that plaintiffs' claim of an alleged injury is ripe for review, especially given that defendant's ordinance recognizes an MHC zoning classification and has a process for requesting that classification. While I do not believe that plaintiffs must necessarily show that MHCs have been excluded from *every* parcel in the defendant township in order for their claim to be ripe, they have not shown that they have been excluded from *any* parcels suitable for that use, including their own. Thus, I do not think that plaintiffs' constitutional exclusionary zoning claim is ripe for review.

Similarly, plaintiffs' statutory exclusionary zoning claim is not ripe. The current exclusionary zoning statute, MCL 125.3207,[7] requires in part that there be a "zoning ordinance" or a "zoning decision" that has "the effect of totally prohibiting the establishment of a land use within a local unit of government . . . ." This case does not involve the former, so plaintiffs must allege that there has been a zoning decision that has the effect of *totally* prohibiting MHCs from the defendant township. Again, given that the township ordinance has a process by which a landowner could seek rezoning and plaintiffs have not shown that they or any landowners were denied an MHC use on their property, plaintiffs have not presented a "zoning decision" that has the effect of totally prohibiting a use and ripening their claim for judicial review.

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[6] As noted by the Court of Appeals partial dissent, there is some question about whether plaintiffs pleaded such a claim. But, for purposes of this analysis, I will assume that they did.

[7] When plaintiffs filed their complaint, the exclusionary zoning statute that applied to townships was former MCL 125.297a. See MCL 125.3702. While the previous statute applied only to townships, the current statute applies to all local units of government. This change does not affect the analysis in this case, and the statutes are otherwise identical.

IV. CONCLUSION

Although I disagree with the lead opinion's analysis, which would extend and exacerbate the errors in *Electro-Tech* and *Paragon*, ultimately I agree with its conclusion that plaintiffs have not presented any exclusionary zoning claims that are ripe for review. Therefore, I concur with the decision to reverse the judgment of the Court of Appeals and remand the case for entry of a dismissal order consistent with this Court's decision.

KELLY, C.J., concurred with CAVANAGH, J.

CORRIGAN, J. (*concurring*). In this zoning action, we consider whether the ripeness doctrine barred plaintiffs' exclusionary zoning claim and, if so, whether the Court of Appeals majority properly held that defendant township's previous denials of plaintiffs' application to rezone their property for a less intensive land use excused plaintiffs from having to formally pursue an application for a more intensive land use under the futility exception to the rule of finality. I concur in the result of the lead opinion, which holds that plaintiffs' exclusionary zoning claim is not ripe for judicial review. However, I cannot join its reasoning. I write separately to provide my analysis for concluding that plaintiffs' as applied exclusionary zoning claim is not ripe for judicial review and that the futility exception to the rule of finality is inapplicable.

I. THE COURT OF APPEALS MAJORITY OPINION

After acknowledging the connection between the ripeness doctrine and the rule of finality in zoning actions, the Court of Appeals majority concluded that it was unnecessary to determine whether plaintiffs' exclusionary zoning claim constituted either a "facial" or an

"as applied" challenge to defendant's zoning ordinance.[1] The majority also concluded that it was unnecessary to determine whether plaintiffs' exclusionary zoning claim was subject to the rule of finality, "holding that further township proceedings would have been futile assuming application of the rule."[2] The Court of Appeals majority reasoned that although plaintiffs had presented defendant an application to rezone their property as a 95-unit planned unit development (PUD) and not as a 498-unit manufactured housing community (MHC), "presenting an MHC application to the township would have been an exercise in futility and nothing more than a formal step to the courthouse."[3] The majority, therefore, held that the doctrine of ripeness did not bar plaintiffs' action.

II. RIPENESS AND FINALITY IN ZONING

The Court of Appeals majority properly acknowledged the interrelation between the ripeness doctrine and the rule of finality in our zoning jurisprudence. At common law, the ripeness doctrine is one of several justiciability doctrines developed "to ensure that cases before the courts are appropriate for judicial action."[4] Generally, "[a] claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."[5] " 'In land use challenges, the doctrine of ripeness is intended to avoid premature

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[1] *Hendee v Putnam Twp*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2008 (Docket Nos. 270594 and 275469).

[2] *Id*. at 6.

[3] *Id*. at 7.

[4] *Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363, 370; 716 NW2d 561 (2006).

[5] *Id*. at 371 n 14 (citation and quotation marks omitted).

adjudication or review of administrative action.' "[6] The rationale of the ripeness doctrine in zoning actions " 'rests upon the idea that courts should not decide the impact of regulation until the full extent of the regulation has been finally fixed and the harm caused by it is measurable.' "[7]

In *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57; 445 NW2d 61 (1989), this Court discussed the connection between the ripeness doctrine and the rule of finality in deciding whether the taking claim alleged by the plaintiff property owner was ripe for adjudication. *Electro-Tech* introduced its discussion of finality with the following observation from *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172; 105 S Ct 3108; 87 L Ed 2d 126 (1985), about the conceptual distinction between the exhaustion of administrative remedies and the finality of the administrative decision:

> "The question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate."[8]

Electro-Tech stated that the first finality requirement under *Williamson* required "the plaintiff [to] obtain a

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[6] *Paragon Props Co v City of Novi*, 452 Mich 568, 579 n 12; 550 NW2d 772 (1996), quoting *Herrington v Sonoma Co*, 834 F2d 1488, 1494 (CA 9, 1987).

[7] *Paragon*, 452 Mich at 579 n 12, quoting *Herrington*, 834 F2d at 1494.

[8] *Electro-Tech*, 433 Mich at 80-81, quoting *Williamson*, 473 US at 192-193.

final decision regarding the application of the zoning ordinance and subdivision regulations to its property."[9] "The second finality requirement set forth by the *Williamson* Court is that a taking claim is not ripe until a plaintiff has sought compensation through state procedures."[10] *Electro-Tech* concluded that the plaintiff, at most, had satisfied the second *Williamson* finality requirement and held that "because the conditional approval of the plaintiff's site plan was not the city's final disposition of the matter, we hold that the plaintiff's action under 42 USC 1983 was not ripe for adjudication."[11]

This Court also addressed the import of *Electro-Tech* and the finality requirements of *Williamson* in subsequent cases. For example, *Paragon* stated that *Electro-Tech* "expressly adopted the *Williamson* finality requirements . . . ."[12] *Paragon* also reaffirmed that the rule of finality or the first finality requirement of *Williamson* " 'is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury . . . .' "[13] Additionally, *Paragon* observed that "*Williamson* articulated the need for finality in the context of land use regulation."[14] The interrelation between the ripeness doctrine and the rule of finality is so

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[9] *Electro-Tech*, 433 Mich at 81.

[10] *Id.* at 87.

[11] *Id*. at 91.

[12] *Paragon*, 452 Mich at 578.

[13] *Id*. at 577, quoting *Williamson*, 473 US at 193; see also *MacDonald, Sommer & Frates v Yolo Co*, 477 US 340, 348; 106 S Ct 2561; 91 L Ed 2d 285 (1986) ("It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. *A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes*.") (emphasis added).

[14] *Paragon*, 452 Mich at 577.

embedded in our zoning jurisprudence that this Court has occasionally discussed the two concepts interchangeably.[15] In any event, I would conclude that this Court's discussions concerning the ripeness doctrine and the rule of finality in *Electro-Tech* and *Paragon* remain equally instructive today.

III. "FACIAL" AND "AS APPLIED" CHALLENGES

While the Court of Appeals majority acknowledged the connection between the ripeness doctrine and the rule of finality, it erroneously concluded that it was unnecessary to determine whether plaintiffs' exclusionary zoning claim constituted a facial or an as applied challenge to defendant's zoning ordinance. The lead opinion repeats this error by failing to define plaintiffs' exclusionary zoning claim as either a facial or an as applied challenge. In so doing, the lead opinion blurs the established distinctions between facial and as applied challenges and sidesteps any substantive discussion about the differing ripeness and finality analyses applicable to each type of challenge.

As the lead opinion explains in part, a facial challenge to the validity of a zoning ordinance asserts that "the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market."[16] By contrast, "[a]n 'as applied' challenge alleges a present infringement or denial of a specific right or of a

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[15] See, e.g., *Bevan v Brandon Twp*, 438 Mich 385, 392 n 8; 475 NW2d 37 (1991) (stating that the plaintiffs' claim "falls short of compliance with finality (ripeness) requirements laid down in *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172; 105 S Ct 3108; 87 L Ed 2d 126 [1985], and applied by this Court in *Electro-Tech*, *supra*.").

[16] *Paragon*, 452 Mich at 576, citing *Village of Euclid v Ambler Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926).

particular injury in process of actual execution."[17] Whether it is analyzed under 42 USC 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, an as applied challenge is subject to the rule of finality.[18] This contrasts with a facial challenge, to which the rule of finality does not apply because "such challenges attack the very existence or enactment of an ordinance."[19] Simply stated, the threshold issues posed by the rule of finality and the ripeness doctrine do not apply to facial challenges to a zoning ordinance.[20]

Accordingly, it is essential to first resolve the question avoided by the Court of Appeals majority and the lead opinion: whether plaintiffs' exclusionary zoning claim constituted a facial or an as applied challenge. This determination is the critical starting point in any analysis of the extent to which the ripeness doctrine and the rule of finality apply in this case. Defendant urges this Court to conclude that plaintiffs' exclusionary zoning claim is not ripe for adjudication because plaintiffs neither sought nor obtained a decision concerning their contemplated development of a 498-unit

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[17] *Paragon*, 452 Mich at 576, citing *Euclid*, 272 US at 395.

[18] *Paragon*, 452 Mich at 576; see also *Lake Angelo Assoc v White Lake Twp*, 198 Mich App 65, 71; 498 NW2d 1 (1993) ("[W]hen our Supreme Court followed *Williamson*, it logically adopted the finality requirement to claims based on the Fifth and Fourteenth Amendments, not just to actions based on [42 USC] 1983.").

[19] *Paragon*, 452 Mich at 577.

[20] As the United States Supreme Court explained, " 'facial' challenges . . . are generally ripe the moment the challenged regulation or ordinance is passed, but face an 'uphill battle,' since it is difficult to demonstrate that ' "mere enactment" ' of a piece of legislation 'deprived [the owner] of economically viable use of [his] property.' " *Suitum v Tahoe Regional Planning Agency*, 520 US 725, 736 n 10; 117 S Ct 1659; 137 L Ed 2d 980 (1997) (citations omitted).

MHC from defendant before filing suit. Plaintiffs respond that their exclusionary zoning claim presents a facial challenge, which is ripe for adjudication as a matter of law under *Paragon*. I disagree with plaintiffs' contention.

A review of plaintiffs' multicount complaint reveals that plaintiffs alleged facial and as applied challenges in four counts, including a denial of equal protection, a deprivation of substantive due process, a regulatory taking, and a statutory exclusionary zoning claim. Yet plaintiffs' exclusionary zoning claim does *not* amount to a facial challenge because the claim does not allege that "the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market."[21] Instead, plaintiffs' exclusionary zoning claim alleges "a present infringement or denial of a specific right," namely plaintiffs' right to develop a 498-unit MHC on their property.[22] Alternatively, the complaint alleges that plaintiffs suffered "a particular injury in [the] process of actual execution" or enforcement of defendant's zoning ordinance.[23] Because plaintiffs' exclusionary zoning claim challenges the infringement of a specific right or aspects of the enforcement of the zoning ordinance, I would conclude that plaintiffs presented an as applied challenge.[24]

Even though I conclude that plaintiffs' exclusionary zoning claim is an as applied challenge, I emphasize

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[21] *Paragon*, 452 Mich at 576, citing *Euclid*, 272 US at 395.

[22] *Paragon*, 452 Mich at 576, citing *Euclid*, 272 US at 395.

[23] *Paragon*, 452 Mich at 576, citing *Euclid*, 272 US at 395.

[24] See *Susan R Bruley Trust v City of Birmingham*, 259 Mich App 619, 626; 675 NW2d 910 (2003) (concluding that because the plaintiff's complaint did not dispute any aspect of the execution or enforcement of the zoning ordinance, it presented a facial challenge).

that future litigants should not endeavor to avoid the threshold issues of ripeness and finality by masking an as applied challenge as a facial challenge. As Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit aptly observed:

> [A] property owner may not avoid *Williamson* by applying the label "substantive due process" to the claim. So too with the label "procedural due process." *Labels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court*.[25]

Judge Easterbrook's statement is similarly persuasive when considering the substance of a zoning challenge. Whether the challenge is labeled "facial" or "as applied," it is not the label that matters. Instead, a reviewing court should analyze the substance of the challenge and what that challenge requires the court to resolve.[26]

IV. THE FUTILITY EXCEPTION TO THE RULE OF FINALITY

Having concluded that plaintiffs presented an as applied challenge to defendant's zoning ordinance, I would hold that both the ripeness doctrine and the rule of finality apply to plaintiffs' exclusionary zoning claim, consistent with *Paragon*. That conclusion does not end my analysis. As the Court in *Paragon* implicitly recognized, a judicially created futility exception to the rule of finality exists.[27] In order to invoke the futility excep-

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[25] *River Park, Inc v Highland Park*, 23 F3d 164, 167 (CA 7, 1994) (citation omitted).

[26] See *Smookler v Wheatfield Twp*, 394 Mich 574, 581; 232 NW2d 616 (1975) (opinion by WILLIAMS, J.) ("[W]hen confronted with a regulation invalid on its face, it is not necessary for this Court to examine the reasonableness of the ordinance *as applied* to plaintiffs' land.") (emphasis added).

[27] *Paragon* rejected the plaintiff's argument that it would have been futile to seek a use variance from the defendant's zoning board of

tion, " 'it must be "*clear* that an appeal to an administrative board is an exercise in futility and nothing more than a formal step on the way to the courthouse." ' "[28] Additionally, federal common law generally recognizes that the plaintiff must submit at least one "meaningful application" to the local zoning agency before asserting the applicability of the futility exception.[29] Further, federal caselaw confirms that "[t]he futility exception is narrow, and mere uncertainty does not establish futility."[30]

I am not persuaded that the futility exception to the rule of finality applied in this case. Contrary to the Court of Appeals majority, I think that it is unclear whether plaintiffs' pursuing an application for a 498-unit MHC development would have been little more than a formal step to the courthouse. I agree with the lead opinion that defendant's previous denials of plaintiffs' application to rezone their property for a 95-unit PUD does not summarily establish that it would have been futile for plaintiffs to apply for a more intensive land use, including the 498-unit MHC development eventually sought by plaintiffs in the trial court. "Land

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appeals. *Paragon*, 452 Mich at 581-583. As the lead opinion correctly notes, our Court of Appeals has discussed the futility exception at greater length in more recent opinions. See, e.g., *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 358; 733 NW2d 107 (2007).

[28] *L & L Wine*, 274 Mich App at 358, quoting *Manor House Apartments v City of Warren*, 204 Mich App 603, 605; 516 NW2d 530 (1994).

[29] See *Bannum Inc v City of Louisville*, 958 F2d 1354, 1363 (CA 6, 1992) ("For the exception to be available to an aggrieved landowner, the landowner must have submitted at least one 'meaningful application' for a variance from the challenged zoning regulations."); see also *MacDonald*, 477 US at 353 n 8 ("The implication is not that future applications would be futile, but that a meaningful application has not yet been made.").

[30] *Manufactured Home Communities Inc v City of San Jose*, 420 F3d 1022, 1035 (CA 9, 2005).

use planning is not an all-or-nothing proposition."[31] The denial of one proposed development by a local zoning agency "cannot be equated with a refusal to permit any development . . . ."[32]

Moreover, I agree with the lead opinion insofar as it concludes that plaintiffs failed to submit at least one meaningful application to defendant. As *MacDonald* stated, "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."[33] In the same fashion, it stands to reason that the rejection of a less intensive land use does not offer a fair indication of how the local zoning authority would receive a comprehensive proposal for a more intensive land use.[34] In either instance, the plaintiff has not filed one meaningful application, and the local zoning authority is deprived of the opportunity to reach "a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[35]

The bottom line is that this Court cannot decide whether defendant is, in fact, excluding MHCs without first knowing how the township would have responded to a proposed MHC development within the township.

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[31] *MacDonald*, 477 US at 347.

[32] *Id*.

[33] *Id*. at 353 n 9.

[34] One of the reasons that defendant rejected the 95-unit PUD was because it determined that there was no additional need for that use as there was already sufficient property zoned for PUDs in the township. If plaintiffs had submitted their MHC proposal to the township, the township would have had the opportunity to determine whether there was a need for MHCs in the township that was not being fulfilled. However, because plaintiffs never requested rezoning for that purpose, there is no way to know what the township would have done.

[35] *Williamson*, 473 US at 191.

In other words, this Court cannot conclude that the township is excluding MHCs when nobody has ever asked the township for permission to develop a MHC. Just as this Court held in *Mich Chiropractic Council*, 475 Mich at 382, that the issue was not ripe for review in that case because the plaintiffs had not yet suffered an "actual . . . injury," the issue in the instant case is also not ripe because plaintiffs have not yet suffered an actual injury. Plaintiffs have not yet been injured because the township has not yet refused to allow them to use their property for an MHC since plaintiffs have not yet made such a request to the township. "[A] landowner must give a land-use authority an opportunity to exercise its discretion . . . ."[36] Here, the township never had an opportunity to exercise its discretion regarding the contemplated 498-unit MHC development.

V. CONCLUSION

Plaintiffs' exclusionary zoning claim is not ripe for adjudication because plaintiffs neither sought nor obtained a decision concerning their contemplated development of a 498-unit MHC before filing suit. I would hold that plaintiffs' as applied challenge to the validity of defendant's zoning ordinance is subject to the threshold doctrine of ripeness and the interrelated rule of finality. Because plaintiffs cannot cross this threshold and because the futility exception to the rule of finality is inapplicable in this case, I would reverse the judgment of the Court of Appeals.

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

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[36] *Palazzolo v Rhode Island*, 533 US 606, 620; 121 S Ct 2448; 150 L Ed 2d 592 (2001).

PEOPLE v GURSKY

Docket No. 137251. Argued March 9, 2010 (Calendar No. 3). Decided July 22, 2010.

Jason M. Gursky was convicted in the Macomb Circuit Court of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), on the basis of allegations that he had had sexual contact with his girlfriend's minor daughter. The allegations came to light when Stacy Morgan, a friend of the complainant's mother, asked the seven-year-old complainant whether anyone had been touching her, then asked a series of related, more detailed questions after the complainant answered affirmatively. The trial court, Edward A. Servitto, Jr., J., allowed Morgan to testify about the complainant's responses to Morgan's questions over defendant's objection that they were not spontaneous as required by the "tender years" hearsay exception, MRE 803A, ruling that the only issue the court could consider was whether the delay between the alleged incidents and the complainant's disclosures to Morgan was reasonable. The Court of Appeals, FITZGERALD, P.J., and TALBOT and DONOFRIO, JJ., affirmed, holding that although the trial court had erred as a matter of law by not considering whether the statements were spontaneous, the error was harmless because, taken as a whole, the statements were spontaneous despite having been prompted by Morgan's questions. Unpublished opinion per curiam of the Court of Appeals, issued July 17, 2008 (Docket No. 274945). This Court granted defendant's application for leave to appeal. 483 Mich 999 (2009).

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

The complainant's statements were not spontaneous and therefore should not have been admitted under the "tender years" hearsay exception, MRE 803A. However, because the statements were not used substantively to prove guilt, the statements were cumulative, and other evidence corroborated defendant's guilt, the error was harmless.

1. MRE 803A provides an exception to the rule against admitting hearsay for statements of children regarding sexual assault under certain circumstances if the statements were spontaneous.

Although the Michigan Rules of Evidence do not define "spontaneous," the dictionary definition of that term and caselaw from Michigan and other jurisdictions indicate that spontaneous statements fall into three general categories: those that result from pure impulse; those that result from a prompt, plan, or questioning but are atypical, unexpected, or do not logically follow from the prompt; and those that result from open-ended questions that include information outside the scope of those questions. For a statement to be considered spontaneous under MRE 803A, the complainant must have initiated the subject of sexual abuse, and any questioning from adults in relation to the statement must have been nonleading or open-ended. Making this determination requires a court to review the totality of the circumstances surrounding the statement. Before the statement may be admitted, the court must also determine that it meets the other requirements of MRE 803A, including that the statement was the creation of the child. The complainant's statements in this case, under the totality of the circumstances, were not spontaneous because they were prompted by an adult's questions that specifically concerned sexual abuse, and the trial court abused its discretion by allowing Morgan to testify about those statements.

2. Admission of the testimony regarding the complainant's statements, while erroneous, was not sufficiently prejudicial to warrant reversal of defendant's convictions. First, the prosecution offered Morgan's testimony to corroborate the complainant's testimony and to establish that the complainant's account of events had not changed over time, not as substantive proof of defendant's guilt. Second, Morgan's testimony was cumulative to that of the complainant, which indicates that the error was not highly prejudicial, particularly given the corroborating evidence from the complainant's mother and the examining nurse. Third, Morgan's testimony included accounts of how the complainant reacted emotionally to the conversation, which was not hearsay but nonassertive conduct. Under these circumstances, defendant cannot meet his burden of showing that a different outcome would probably have resulted absent Morgan's testimony.

Court of Appeals decision vacated; defendant's conviction affirmed on other grounds.

Justice CAVANAGH, joined by Chief Justice KELLY, concurring in part and dissenting in part, agreed that the complainant's statements to Morgan were not spontaneous under MRE 803A, but dissented from the majority's conclusion that allowing Morgan to testify about the statements was harmless error given that this

testimony bolstered the complainant's credibility, which was the point on which the prosecution's case largely rested.

EVIDENCE — HEARSAY — TENDER YEARS EXCEPTION — SPONTANEOUS STATEMENTS.

For the statement of a child to be considered spontaneous under the tender-years exception to the rule against hearsay in sexual abuse cases, the child must have broached the subject of sexual abuse, any questioning or prompts from adults must have been nonleading and open-ended, and the statement must have been the child's creation (MRE 803A).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Robert Berlin*, Chief Appellate Lawyer, and *Joshua D. Abbott*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Peter Jon Van Hoek*) for defendant.

Amicus Curiae:

Jeffrey L. Sauter and *William M. Worden* for the Prosecuting Attorneys Association of Michigan.

YOUNG, J. Defendant was charged with and convicted of four counts of first-degree criminal sexual conduct for sexually abusing his girlfriend's child. At trial, the child's hearsay statements to a third party were admitted over defendant's objection. Those statements, which were made when the child first revealed the allegations of abuse, contained all the details of the alleged assaults and were used at trial to corroborate the child's testimony. Defendant appealed, arguing that the statements should not have been admitted because they were not spontaneously given as required by Michigan Rule of Evidence 803A.

We agree that the child's statements were not "spontaneous" and therefore hold that the statements should not have been admitted under the limited "tender

years" hearsay exception created by MRE 803A. We nevertheless affirm defendant's convictions because the improper admission of the hearsay statements was harmless error. The error is not so prejudicial as to require reversal because the hearsay statements were not used substantively at trial to prove guilt (but rather only to show consistency in the child's testimony), the statements were cumulative to the victim's testimony at trial, and there was other corroborating evidence of defendant's guilt.

Accordingly, we affirm the judgment of the Court of Appeals, but do so on alternative grounds.

I. FACTS AND PROCEDURAL HISTORY

Defendant Jason Gursky was tried on and convicted of four counts of criminal sexual conduct in the first degree (CSC-I) for sexual penetration of a person under the age of 13.[1] The victim in this case, GA, was the daughter of Gursky's girlfriend, Lori.[2]

The charges against Gursky arose out of two alleged incidents of sexual contact with GA: one in September 2005, when GA was six, and the second around April 30, 2006, when GA was seven. On May 4, 2006, during a visit to the home of Stacy Morgan, a close friend of Lori, GA first alleged that Gursky had improperly touched her.

The focus of this appeal is the proper characterization of GA's statements when she first discussed the sexual abuse. Those statements are thus provided here in detail, as relayed by Morgan during her testimony at Gursky's trial.

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[1] MCL 750.520b(1)(a) ("A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if . . . [t]hat other person is under 13 years of age.").

[2] I refer to the complainant by her initials and her mother simply as "Lori" in order to protect their identities.

Lori arrived at Morgan's home about 8:00 p.m. after picking her children up from their father's home. Morgan, acting on a suspicion that "something had been going on" with Gursky,[3] asked GA "*if anyone had been touching her*." GA did not verbally respond, but "*got a horrified look on her face*," and her eyes welled up. Morgan summoned GA to come closer and talk with Morgan and Lori, which she did and orally responded "*What do you mean?*" Morgan answered: "*Has anyone ever touched your private parts?*" GA's eyes welled up again, she started to suck her thumb, and she responded that somebody had. Morgan followed up: "*Where have you been touched? Who touched you?*" and then listed "*people's names, every man's name that could come to mind, the last of which was Jason* [*Gursky*]."[4] At the mention of defendant's name, GA began "*bawling,* [*and*] *gasping for breath*," pointed to her vaginal area, and indicated that defendant had touched her "*down there*." Morgan continued questioning GA: "*How did he touch you? What did he touch you with?*" GA responded: "*With his finger.*" Morgan asked: "*Did he touch you any other way? Did he touch you with his penis?*" And GA responded that he had not. Morgan asked: "*Did he ever touch you any other way?*" and GA responded that "*he kissed me with his tongue.*" Morgan followed up: "*On your mouth?*" GA responded: "*No, down here*" and again pointed to her vaginal area.

Morgan noted that GA was "*kind of hesitant*" so she hugged GA and said to her, "*Miss Stacy is your safe*

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[3] Earlier in the day Morgan and Lori had a private conversation wherein Lori mentioned "a situation that had happened prior" involving defendant and GA. Apparently this is what stirred Morgan to ask GA if anyone had been touching her.

[4] Morgan was also asked if there were different reactions by GA when the names of the men were mentioned; she answered: "Each one, she just told me no, no, no, and as soon as Jason's name was mentioned, she welled up and said he did it."

person. You know, tell me and I'll make sure it doesn't happen again." She gave GA time to calm down, during which time Lori left the room to call Gursky. Morgan then asked how many times the alleged abuse had happened. GA "*kind of looked in the sky*" and responded "*I think it was four times because the first time was when we lived at Miss Tracy's basement.*" Later Lori confronted Gursky, who denied touching GA; when Lori brought GA into the room with Gursky, GA again began to cry but did not make any further accusations against Gursky. A few days later, GA wondered aloud to her mother, "*what if it was a bad dream?*"[5]

The following day Lori went to the police and prepared a written statement describing GA's allegations. A detective subsequently asked Gursky to come to the police station, where he questioned Gursky for approximately two hours. Gursky answered all the detective's questions, denied the accusations, and never requested a lawyer. During these interviews, the detective noted that Gursky's fingernails were "jagged."

That same day GA was examined by a nurse, which is

[5] Lori's testimony concerning the circumstances surrounding GA's statement was largely consistent with that of Stacy Morgan. Lori testified that she believed something was wrong before she and GA arrived at Morgan's house because GA was acting "a little different." Once Lori and her children arrived at Morgan's house, the children were running around, but "Stacy wanted me to have [GA] sit on my lap and ask her some questions, and I did, I asked [GA] some questions, and that's when I learned of—." Counsel did not allow her to finish, but asked what GA's reaction was after the first question. Lori testified that GA started to cry, noting that GA hesitated for "quite a while" before she began to talk, and that she had a four to five minute conversation with GA. She stated that Morgan was present but she did not say whether Morgan asked any of the questions.

When asked whom she first told about the abuse, GA testified, "[m]y mom." When the prosecutor asked whether anyone else was there, GA said "Her friend," "Miss Stacy." When asked "Do you remember how it came about that you told them?" GA responded that she did not. When asked whether she told "both of them or just one of them," GA testified, "Both."

common when a sexual assault is believed to have happened within the prior 96 hours. GA complained to the nurse of experiencing pain in her vaginal area since "Jason put his finger in my pee-pee." GA told the nurse that defendant had kissed and touched her "where her pee-pee comes out from." During the examination, the nurse noted that GA had an abrasion on her labia minora, which appeared to have occurred within the last 24 to 48 hours, but could have occurred earlier. The nurse later testified that the abrasion was "consistent" with a fingernail scratch, or could have resulted from innocent behavior. Other than the scratch, the nurse found no other trauma to GA.

Defendant was charged with four counts of CSC-I. Pursuant to MRE 803A, the prosecution provided notice that it would call Stacy Morgan to testify regarding what GA told her when GA first relayed the details of sexual abuse. MRE 803A provides a hearsay exception to allow the admission of statements by victims of child abuse under the age of 10 that would otherwise be excluded.[6]

Before trial, defendant objected to the admission of

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[6] Michigan Rule of Evidence 803A, which is a hearsay exception for a child's statement about sexual assault, provides in relevant part:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was *under the age of ten* when the statement was made;
>
> (2) the statement is shown to have been *spontaneous* and *without indication of manufacture*;
>
> (3) either the declarant made the statement *immediately after the incident* or any *delay is excusable* as having been caused by fear or other equally effective circumstance; and

GA's statements to Morgan on the grounds that they did not fall within the parameters of MRE 803A's hearsay exception—specifically, that the statements were not "spontaneous" as required by MRE 803A(2). Defendant argued that "it is clear from the statement of this Stacy Morgan . . . that while she's there[,] names are suggested to this child, including [Mr. Gursky's] name . . . she is continuously questioned as to what occurred here . . . . It is not spontaneous by any means." The trial court did not directly rule on this issue or address defendant's arguments regarding the lack of spontaneity. Instead, the court stated that "the reasonableness of the delay [between the alleged incidents and GA's disclosures is] . . . really the only issue I can consider." The court then held that the delay was reasonable, and Morgan's testimony thus admissible under MRE 803A.

The trial commenced, and GA testified that she had awakened on two separate occasions when defendant had touched her "private" with "his finger" and "tongue."[7] She also testified that she first told this to

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(4) the statement is introduced through the *testimony of someone other than the declarant*. [MRE 803A (emphasis added).]

[7] The facts of the actual sexual assaults, as described at trial, are as follows: The first and second contacts occurred on a night around August or September of 2005. GA was wearing pajamas and underwear in her bed. During the night, Gursky appeared in her bedroom, reached underneath her clothing, and touched her vaginal area with his finger and tongue. The third and fourth incidents occurred on one night at the end of April 2006. That night, GA had fallen asleep on the couch, so Lori put her to bed in her street clothes in the bedroom that GA shared with her brother, and Lori then went to bed herself. Lori woke up around 3:30 a.m. and noticed that her door had been closed; she walked out of her room and noticed that no one was in the living room where the TV was on, but she also saw that the door to the children's bedroom was slightly open. She opened the door and noticed Gursky kneeling by the middle of GA's bed, where the covers had been pushed to the end of the bed. GA was lying on her back and Gursky had his hand between her knee and

Morgan and her mother, but could not recall being asked any questions by Morgan. Morgan testified about what GA had originally told her when GA had first disclosed the alleged abuse, the details of which are set forth above. Lori testified about the circumstances regarding GA's first statement of sexual abuse. She further testified about how she had found defendant in GA's bedroom at 3:30 a.m. on the night of the second incident with the bedcovers pulled down and his hands on GA's legs. The nurse also testified about her medical evaluation of GA, including the scrape on GA's labia. In closing argument, the prosecutor argued that if the jury believed GA's testimony, they must convict; she then acknowledged that this testimony was buttressed by Morgan's testimony which "corroborates everything GA said on the stand."[8] Defendant was convicted of all four counts and sentenced to four concurrent terms of 15 to 30 years in prison.

On appeal, the Court of Appeals affirmed the admission of Morgan's testimony regarding GA's statements.[9] The panel concluded that although the trial court had abused its discretion by failing to address defendant's objection that GA's out-of-court statements were not spontaneously made, reversal was not required because

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feet. Lori asked Gursky what he was doing, and he replied that he was tucking in the children. Lori stood there a while longer, then left; a few minutes later she returned to the children's bedroom and noticed that GA had been changed into her nightgown. She then confronted Gursky: "Jason, what were you doing in there?" He repeated his prior answer: that he had changed GA into her nightgown. Lori stated that it left her feeling uneasy, so Gursky apologized and said it wouldn't happen again.

[8] The trial court also denied a directed verdict at the close of the prosecution's case, noting that GA "has been absolutely consistent with her version of events from the first time she disclosed it through . . . her testimony in court."

[9] *People v Gursky*, unpublished opinion per curiam of the Court of Appeals, issued July 17, 2008 (Docket No. 274945).

the error was harmless: either way, the testimony was admissible. The Court of Appeals cited *People v Dunham* for the proposition that "answers to open-ended, innocuous questions are spontaneous."[10] The Court reviewed the record and then reasoned as follows:

> The victim responded emotionally to the first mention of the subject matter, crying and sucking her thumb. She willingly gave details that exceeded the scope of Morgan's inquiry. She pointed to her vaginal area and reported that the touching had occurred "down there," volunteered that the touching was with a finger and a tongue, denied that defendant touched her with his penis, and volunteered that the conduct had occurred over a greater span of time than suspected by Morgan. *Taken as a whole, the victim's statements were primarily spontaneous, despite being prompted by Morgan's questions*. Thus, the testimony would have been admissible had the trial court considered this objection and, therefore, the court's erroneous legal conclusion had no effect on the outcome of the trial.[11]

On the basis of this reasoning and finding the statements to be "primarily spontaneous,"[12] the Court affirmed defendant's conviction.

Defendant sought leave to appeal in this Court. We granted his application for leave to appeal and directed the parties to address specifically

> (1) whether the statements made by the complainant to Stacy Morgan on or about May 4, 2006, were "shown to have been spontaneous and without indication of manufacture" within the meaning of MRE 803A(2), and (2) whether it was more probable than not that any error in this regard was outcome determinative.[13]

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[10] 220 Mich App 268, 271-272; 559 NW2d 360 (1996).

[11] *Gursky*, unpub op at 3 (emphasis added).

[12] *Id.*

[13] *People v Gursky*, 483 Mich 999 (2009).

II. STANDARD OF REVIEW

The decision whether to admit evidence is within the trial court's discretion, which will be reversed only where there is an abuse of discretion.[14] However, decisions regarding the admission of evidence frequently involve preliminary questions of law, such as whether a rule of evidence or statute precludes admitting of the evidence. This Court reviews questions of law de novo.[15] Accordingly, "when such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law."[16]

III. ANALYSIS

A. THE "SPONTANEITY" REQUIREMENT OF MRE 803A

1. PRINCIPLES OF LAW

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[17] Hearsay is generally prohibited and may only be admitted at trial if provided for in an exception to the hearsay rule.[18] MRE 803A provides just such an exception for a child's statement regarding sexual assault in certain circumstances. The rule provides:

> A statement describing an incident that included a sexual act performed with or on the declarant by the

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[14] *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

[15] *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

[16] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[17] MRE 801(c).

[18] MRE 802 ("Hearsay is not admissible except as provided by these rules.").

> defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) *the statement is shown to have been spontaneous and without indication of manufacture*;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.
>
> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.
>
> A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.[19]

MRE 803A, which codified the common-law "tender years exception," is also an exception to the prohibition against the use of hearsay testimony to bolster the credibility of a witness.[20] Relevant to this appeal, MRE

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[19] MRE 803A (emphasis added).

[20] This Court first recognized the common-law tender years rule in *People v Gage*, 62 Mich 271; 28 NW 835 (1886), as a permissible rule to allow hearsay in order to corroborate the testimony of a child complainant. "The rule in this State is that where the victim is of tender years the testimony of the details of her complaint may be introduced in corroboration of her evidence, if her statement is shown to have been spontaneous and without indication of manufacture; and delay in making the complaint is excusable so far as it is caused by fear or other equally effective circumstance." *People v Baker*, 251 Mich 322, 326; 232 NW 381 (1930) (holding also that only a child's first statement made is admissible

803A plainly requires the declarant's original statement to have been "spontaneous."

The Michigan Rules of Evidence do not define "spontaneous." As when construing statutes, in the absence of a specific definition of a common term used in an evidentiary rule, it is appropriate to look to the dictionary definition to discern the term's ordinary and generally accepted meaning.[21] "Spontaneous" is defined as: "(1) coming or resulting from natural impulse or tendency; without effort or premeditation; natural and unconstrained; unplanned; (2) of a person: giving to acting on sudden impulse."[22]

The standards for spontaneity have been well litigated. The leading case on this issue in Michigan is *People v Dunham*, a decision of the Court of Appeals holding that statements made in response to customary, open-ended questions may be considered spontaneous.[23] In *Dunham*, a child was asked questions by an adult mediator during the child's parents' divorce. The questions were generally innocuous and customarily asked of all children participating in divorce mediation, yet the child in *Dunham* responded with allegations of

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under the exception). However, this Court held in *People v Kreiner*, 415 Mich 372, 377-378; 329 NW2d 716 (1982), that the common-law tender years exception to hearsay did not survive the adoption of the Michigan Rules of Evidence in 1978. In its stead, MRE 803A was adopted on December 17, 1990, and became effective on March 1, 1991.

[21] See *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002) (providing that this Court construes a rule of evidence in the same manner as a court rule or statute); *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 113; 659 NW2d 597 (2003), citing *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999) (providing that this Court may refer to dictionary definitions in the absence of an explicit definition in the text being interpreted).

[22] *Webster's New Universal Unabridged Dictionary* (1996).

[23] 220 Mich App 268; 559 NW2d 360 (1997).

sexual abuse. Virtually every Court of Appeals decision (including the panel in this case) has applied *Dunham* when examining the issue of spontaneity, although the holding has been broadened to stand for the general proposition that statements made in response to questioning may be considered spontaneous.[24] Until this case, this Court has not itself discussed or defined the parameters under which a statement can be spontaneous for the purposes of MRE 803A.[25]

Other states' courts and the federal courts have addressed the issue of spontaneity as well; their decisions may be classified into separate groups for our

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[24] See, e.g., *Gursky*, unpub op at 3 ("In *People v Dunham*, 220 Mich App 268, 271-272; 559 NW2d 360 [1996], this Court declared that answers to open-ended, innocuous questions are spontaneous.").

[25] In 2008, this Court peremptorily reversed a decision of the Court of Appeals "for the reasons stated in the Court of Appeals dissenting opinion . . . ." *People v George*, 481 Mich 867 (2008), reversing and remanding *People v George*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2007 (Docket No. 271892). In *George*, the Court of Appeals affirmed the defendant's conviction in a split decision, with Judge GLEICHER dissenting from the portion of the majority opinion holding that the hearsay evidence provided by the victim's mother and sister was properly admitted under MRE 803A. The dissent argued that the trial court ignored evidence that the victim's hearsay statement was not the first one made to another person (as MRE 803A requires), that the statement was *not spontaneous*, and that the defendant was prejudiced by this error. Regarding spontaneity, Judge GLEICHER wrote:

> Additionally, the evidence did not support a finding that the victim spontaneously made her statement to [the victim's sister,] Marquayla. Both Marquayla and the mother testified that the victim's report to Marquayla was not spontaneous, but was made in response to questioning. Marquayla's testimony reflects that the questioning included threats about "lying" and "getting into trouble." The victim did not supply any other information regarding the circumstances of the statement she claimed to have made to Marquayla. The absence of a showing of spontaneity reinforces the need, in this case, for a pretrial determination as to the admissibility of the hearsay evidence pursuant to MRE 104. [*George*, unpub op at 4 (GLEICHER, J., dissenting).]

purposes here. The most recognizable spontaneous statements are those that arise out of pure impulse—that is, they are made by the declarant without prompt, plan, or questioning. This type of "impulsive" statement is prototypically spontaneous because it appears to "come out of nowhere" or "out of the blue." For example, in *People v Bowers*,[26] the Colorado Supreme Court held that a child's statements were spontaneous where she made unexpected allegations of sexual abuse with no questioning or prompting from the adult. There, a babysitter was changing the child's brother's diaper when the child pointed to her brother's penis and said that her father " 'had one just like that but it was bigger and he hurts me with it' " and the child also said to a foster care program coordinator that " 'I don't like boneys . . . I don't like Daddy to put his boney on me.' "[27] The Court held that the statements were made "spontaneously without prompting or suggesting."[28]

Statements that are made as a result of prompt, plan, or questioning by a third party, yet are in some manner atypical, unexpected, or do not logically follow from the prompt are also widely considered spontaneous. This type of "non sequitur" statement is generally considered spontaneous because it shows that the declarant

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[26] 801 P2d 511 (Colo, 1990).

[27] *Id.* at 514-515.

[28] *Id.* at 521. See also *State v Robinson*, 153 Ariz 191, 201; 735 P2d 801 (1987) (the absence of leading questions was an important factor supporting the admission of a child's statement after the child made statements implicating the defendant while at breakfast with her mother without being asked any questions; the statement was thus spontaneous and fully explained with "little prompting"); *In re Ne-Kia S*, 566 A2d 392, 395 (RI, 1989) (child responded to an adult's presence in his house by retrieving a stick and asking the adult to take it so the child's mother would no longer hit the child with it; the child later told the adult that his mother hit him on a daily basis and the adult testified that this was the "first thing Ne-kia told him. There was no reflection or deliberation involved.").

was acting from natural impulses or tendencies by responding atypically to what may otherwise have been innocent prompts. For example, in *State v Aaron L*,[29] the Connecticut Supreme Court held that the victim's statement showed spontaneity and consistency, and was therefore sufficiently reliable to be admissible under Connecticut's residual exception to the hearsay rule. There, the child's statement, " 'I'm not going to tell you that I touch daddy's pee-pee,' " did not "logically relate to the event that preceded it—her mother admonishing the victim that it was not nice to grope her breast."[30]

A third category that poses closer questions involves cases where statements are given as a result of open-ended and nonleading questions that include answers or information outside the scope of the questions themselves. Often, this type of unplanned yet responsive statement may be considered "spontaneous" because the information that results is based on knowledge independent of that provided in the question. For example, in *State v Shafer*, the Washington Supreme Court held that where the child "without prompting" told her mother about encounters with the defendant and the child's mother then inquired further, while the child's "statements in response to her mother's questioning were not entirely spontaneous, they were not the result of leading questions or a structured interro-

[29] 272 Conn 798; 865 A2d 1135 (2005).

[30] *Id.* at 816. See also *Swan v Peterson*, 6 F3d 1373, 1377, 1381 (CA 9, 1993) (where a child's day-care provider told the child to put her dress down because "no one should look at or touch her 'private parts,' " the child replied " 'Un-huh, Mommy and Daddy do' " and proceeded to make a detailed allegation of abuse, the court held that there was sufficient spontaneity because "[a]lthough [the child's] statement did not come out of the blue, it was not made in response to any question posed by [the caregiver]").

gation" and were thus admissible.[31] Similarly, the decision in *McCafferty v Leapley*[32] demonstrates how a spontaneous statement may arise out of simple questioning or innocent prompting. There, the child's statements "about how her 'daddy' sucked on her neck were given spontaneously in response to a nonleading question about how she got the mark on her neck. Her statements about this were consistent with what she told others and with what she demonstrated on [the adult's] own neck and with [the adult's] playroom dolls. . . . [It was also the child] who volunteered in play statements such as 'this is how she could sit on her daddy's weenie.' "[33] The aforementioned Michigan Court of Appeals decision in *Dunham*—holding that statements resulting from open-ended, nonleading questions may be spontaneous—is another prime example of this type of statement.

Statements falling within this last category, however, are also the type that are most likely to be nonspontaneous, and thus deserve extra scrutiny by trial courts before they may be admitted. When examining statements that have some of the same characteristics as GA's statements here, many courts have found a *lack* of spontaneity. The analysis they employed is informative for our purposes here. For example, the New Jersey Supreme Court's decision in *State v DG* provides a useful comparison.[34] There, the court concluded that

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[31] 156 Wash 2d 381, 390; 128 P3d 87 (2006). See also *State v Young*, 62 Wash App 895, 901; 802 P2d 829 (1991) ("Washington law . . . recognizes that a child's answers are spontaneous so long as the questions are not leading or suggestive. . . . [And caselaw had] broadened the definition of 'spontaneous' to include 'the entire context in which the child [made] the statement.' ").

[32] 944 F2d 445 (CA 8, 1991).

[33] *Id.* at 451.

[34] 157 NJ 112; 723 A2d 588 (1999).

there was not a " 'probability that the statement [was] trustworthy' " as required by New Jersey's applicable rule, because the "situation under which [the child] disclosed the sexual abuse was very stressful" and the child did not "spontaneously divulge information concerning the assault" to the adult, but rather the adult "interrogated her after finding her performing questionable acts while at play."[35] Interrogation, aggressive or leading questioning, and similar factual scenarios may all work to eliminate the spontaneity of a declarant's statement, which would thus render it inadmissible in the MRE 803A context.

2. APPLICATION

Having examined these principles of hearsay and the requirement of "spontaneity" generally, we must determine the parameters of this requirement in Michigan for the purposes of MRE 803A.

We hold that MRE 803A generally requires the declarant-victim to initiate the *subject of sexual abuse*. The question of spontaneity, at its essence, asks whether the statement is the creation of the child or another. There is certainly no doubt that the types of

[35] *Id.* at 122, 126-127 (holding that the child's statement regarding sexual abuse was not sufficiently trustworthy when made in direct response to the question " '[d]id anybody ever do anything like this to you to make you do this?' " after the child was found sexually touching her sister). See also *Felix v State*, 109 Nev 151, 167-168, 184; 849 P2d 220 (1993) (adult could not remember whether child's statement—"Martha hurt me here" while pointing to her vagina—was spontaneously made, and a second statement which came after "coercive questioning" could not be deemed reliable because answers provided by children after being questioned in a group were not spontaneous given that "there is no way to determine the extent to which the prior coercive questioning actually affected the statement."); *United States v Sumner*, 204 F3d 1182, 1186 (CA 8, 2000) (the child's statements were not spontaneous where the child responded to questions by merely answering "yes/no" or pointing).

"impulsive" or "non sequitur" statements described above should be considered spontaneous for the purposes of MRE 803A because they result from the declarant's "natural impulse or tendency" or are "unplanned" and made "without effort or premeditation," as a common definition of spontaneity provides. Such statements are quintessentially the "creation" of the child-declarant, and are thus certainly admissible under MRE 803A, assuming they meet the rule's other requirements.

This case, on the other hand, requires that we address the closer question: whether prompts from adults render a child's responsive statement inadmissible. This type of statement most often arises in the context of questioning by an adult. We hold that the mere fact that questioning occurred is not incompatible with a ruling that the child produced a spontaneous statement. However, for such statements to be admissible, the child must broach the subject of sexual abuse, and any questioning or prompts from adults must be nonleading or open-ended in order for the statement to be considered the creation of the child.

To be clear, we do *not* hold that any questioning by an adult automatically renders a statement "nonspontaneous" and thus inadmissible under MRE 803A. Open-ended, nonleading questions that do not specifically suggest sexual abuse do not pose a problem with eliciting potentially false claims of sexual abuse.[36] But where

[36] This approach is consistent with the Court of Appeals' original decision in *Dunham*, although not necessarily so with later panels of the Court of Appeals. For example, the Court of Appeals panel in the instant case applied *Dunham* in a broader context and unmoored from the factual situation of the original decision. In other instances, the Court of Appeals has applied this principle in a manner consistent with our decision today. By way of example, we note approvingly the analysis in *People v Leatherman*, unpublished opinion per curiam of the Court of

the initial questioning focuses on possible sexual abuse, the resultant answers are not spontaneous because they do not arise without external cause. When questioning is involved, trial courts must look specifically at the questions posed in order to determine whether the questioning shaped, prompted, suggested, or otherwise implied the answers.

This approach requires that trial courts review the totality of the circumstances surrounding the statement in order to determine the issue of spontaneity. Even though courts should look at the *surrounding circumstances* and *larger context* in order to understand whether the statement was spontaneously made, we note that this review is not solely determinative of the question of admissibility. As MRE 803A requires, the statement must be "shown to have been spontaneous *and* without indication of manufacture."[37] The language of MRE 803A(2) clearly demonstrates that spontaneity is an independent requirement of admissibility rather than one factor that weighs in favor of reliability or admissibility.[38] Thus, even if, considering the totality

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Appeals, issued June 30, 2005 (Docket No. 252679) at 8-9. There, the Court of Appeals properly assessed how this rule applies in close cases:

> Dona[, the victim's mother,] admitted asking the victim a few questions after the victim initially told her that "Uncle Brad touched me down there," gestured toward her private area, and said that defendant did other stuff, too. Dona then asked what other stuff defendant did and when the victim stated that defendant had a "vibrating handlebar machine," Dona asked what he did with it. Dona also asked the victim if defendant said anything to her. The questions were not so specific and leading [as] to taint the spontaneity of the victim's statements. Dona's questions were fairly general given the context of the victim's statements.

[37] MRE 803A(2) (emphasis added).

[38] This is contrary to similar rules in other states where spontaneity is but one factor taken into account in determining whether a statement is sufficiently reliable and thus admissible. See, e.g., Ohio Evid R 807(A)(1)

of the circumstances, the trial court determines that a statement is spontaneous for the purposes of MRE 803A(2), it must nevertheless also conduct the separate analyses necessary to determine whether the statement meets the other independent requirements of MRE 803A.

Turning to the facts of this case, we do not conclude that GA's statements were spontaneously given. Morgan directed GA to sit on Lori's lap, whereupon Morgan, Lori, or both questioned GA about sexual abuse. Morgan testified that she specifically broached the subject of sexual abuse on her initiative, questioning and otherwise probing GA for details. According to her trial testimony, Morgan asked GA numerous questions, including whether "anyone had been touching her," "Has anyone ever touched your private places?" "Where have you been touched? Who touched you?" and, after identifying defendant, "How did he touch you? What did he touch you with?" There is simply no indication in this case that GA would have made the statements she made or even broached the subject of sexual abuse if not otherwise prompted and, indeed, directly questioned by Morgan. Moreover, the testimony indicates that GA hesitated for "quite a while" before making the first statement; this tends to suggest that GA did not come forth with her statements on her own initiative, and thus that the statements were not necessarily products of her creation. More troubling, Morgan specifically

(providing that an out-of-court statement made by a child alleging sexual or physical violence against the child will not be excluded as hearsay if the "court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness" that render the statement reliable, "including but not limited to spontaneity . . . ."). However, unlike our sister-state's rule, MRE 803A contains no "factor among many" language that permits the admission of a child's statement simply upon a showing of reliability even if it was not spontaneously made.

suggested defendant's name to GA in a list of possible perpetrators. These facts demonstrate that GA's statements were not spontaneously given, nor did they arise out of an otherwise innocent conversation or set of nonleading and open-ended questions.

Although there were concededly spontaneous *elements* in GA's statements, this is insufficient to establish the *general* kind of spontaneity the rule requires. The Court of Appeals below concluded that "on balance" the statements were "primarily spontaneous" by focusing not on who broached the subject of sexual abuse, but instead on the nature of some of the questions that were open-ended, the degree of voluntariness GA displayed in answering questions and providing details not necessarily evident by the nature of the questions, and the physical reactions that GA exhibited as a result of the questioning. In this sense, the statements had spontaneous elements inasmuch as the answers were "given without premeditation," some answers seemed "unplanned," and some of her responses were "natural" and impulsive—and this is true *even if* GA's statements were given in response to direct questions. Nevertheless, when considering the questions in their entirety, we cannot conclude that GA's responses were, on the whole, spontaneous. As noted, because spontaneity is an independent requirement under MRE 803A(2) rather than one factor that weighs in favor of reliability and therefore admissibility, an overall sense of reliability or trustworthiness cannot render nonspontaneous statements admissible under MRE 803A.

In deciding that GA's statements are inadmissible, we must be clear that we do not expect a parent or other concerned adult not trained in the delicate nature of questioning a child regarding sexual abuse to recognize the danger of influencing a child's responses with the

type of questioning used here. Nor do we expect that most parents or adults would treat this situation casually in order to allow the child to come forward with a "spontaneous" statement. Indeed, quite the contrary is likely to be true: it is perfectly natural for a parent or other concerned adult to engage in direct questioning or seek as much information as possible if his suspicions are aroused regarding possible sexual abuse of a child. We merely hold that statements resulting from such questioning cannot meet the narrow grounds for admissibility under MRE 803A. The prohibition on hearsay is the longstanding general rule, and thus exceptions to this prohibition must be appropriately enforced.[39]

In sum, we hold that a statement prompted by an adult's question specifically concerning sexual abuse is not spontaneous. This is true even if other indicia of reliability exist, such as an emotional response or details provided by the child that exceed the scope of the adult's inquiry. The Court of Appeals thereby erred by focusing on these other indicia of reliability rather than who broached the subject of sexual abuse, the specific questions asked by the adult during the conversation, and how some of the questioning suggested or implied answers. Viewing GA's statements in light of the totality of the circumstances in this case, these critical factors render her statements nonspontaneous. In future cases, though, we emphasize that a statement made in response to an adult's question or comment that does not concern abuse, or where the *child* brings up the subject of abuse, may be spontaneous, and for the purposes of MRE 803A may be equally as admissible as if the child had made a statement arising "out of nowhere."

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[39] This Court will assess in its administrative rules process whether the language of the current rule should be amended.

B. HARMLESS ERROR ANALYSIS

Having determined that the trial court in this case abused its discretion by impermissibly allowing Stacy Morgan to testify regarding GA's out-of-court statements concerning alleged sexual abuse, we must next determine whether this error was sufficiently prejudicial to warrant reversal of defendant's convictions. We hold that it was not.

Defendant's claim of error in this case involves preserved, non-constitutional error. The standard we must apply here is governed by statute. MCL 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the *improper admission* or rejection *of evidence*, or for error as to any matter of pleading or procedure, *unless* in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that *the error complained of has resulted in a miscarriage of justice*.[40]

In making this determination for preserved, non-constitutional error, this Court asks whether, absent the error, it is "more probable than not" that a different outcome would have resulted.[41] The burden is on the defendant to show that the error resulted in a miscarriage of justice.[42] Where the error did not result in a miscarriage of justice and a defendant cannot meet this burden, we have deemed the error "harmless" and thus not meriting reversal of the conviction.[43]

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[40] MCL 769.26 (emphasis added); see also *Lukity*, 460 Mich at 494-495.

[41] See *Lukity*, 460 Mich at 495 ("[T]he effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error.").

[42] *Id.* at 493-494.

[43] See, e.g., *id.* at 491-493; *People v Mateo*, 453 Mich 203, 212-215; 551 NW2d 891 (1996).

Michigan law provides that where a hearsay statement is not offered and argued as substantive proof of guilt, but rather offered merely to corroborate the child's testimony, it is more likely that the error will be harmless.[44] Moreover, the admission of a hearsay statement that is cumulative to in-court testimony by the declarant can be harmless error, particularly when corroborated by other evidence.[45] This Court has cautioned, though, that "the fact that the statement [is] cumulative, standing alone, does not automatically result in a finding of harmless error. . . . [Instead, the] inquiry into prejudice focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence."[46] In a trial where the evidence essentially presents a one-on-one credibil-

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[44] *People v Straight*, 430 Mich 418, 426-428; 424 NW2d 257 (1988).

[45] See, e.g., *Solomon v Shuell*, 435 Mich 104, 146-149; 457 NW2d 669 (1990) (BOYLE, J., concurring) (citing federal and published Court of Appeals decisions standing for the proposition that "improperly admitted hearsay evidence constitutes harmless error when it is merely cumulative of other properly admitted evidence"); *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003) ("An erroneous admission of hearsay evidence can be rendered harmless error where corroborated by other competent testimony. . . . [Here, the admission of improper hearsay] was merely cumulative and did not place any relevant and damaging information before the jury that the jury did not know already. Therefore, there was not a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.").

[46] *People v Smith*, 456 Mich 543, 555; 581 NW2d 654 (1998) (quotation marks and citations omitted). The Supreme Court of the United States has elaborated on factors relevant to making this determination:

> [W]hether . . . the error was harmless beyond a reasonable doubt . . . in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and, of course, the overall strength of the prosecution's case. [*Delaware v Van Arsdall*, 475 US 673, 684; 106 S Ct 1431; 89 L Ed 2d 674 (1986).]

ity contest between the victim and the defendant, hearsay evidence may tip the scales against the defendant, which means that the error is more harmful.[47] This may be even more likely when the hearsay statement was made by a young child, as opposed to an older child or adult.[48] However, if the declarant himself testified at trial, "any likelihood of prejudice was greatly diminished" because "the primary rationale for the exclusion of hearsay is the inability to test the reliability of out-of-court statements[.]"[49] Where the declarant himself testifies and is subject to cross-examination, the hearsay testimony is of less importance and less prejudicial.

On the basis of this harmless error framework, we are not convinced that defendant has met the burden of showing that, but for the fact that Morgan testified regarding GA's original statements of abuse, it is more probable than not that a different outcome would have occurred.

First, the prosecutor relied on Morgan's testimony only as *corroboration* for GA's direct testimony, and did not admit the testimony for its substantive value. The prosecutor's opening sentence when discussing Morgan's testimony during closing arguments explicitly indicated the limited purpose for which this testimony was offered: "Stacy Morgan's testimony corroborates everything that [GA] said on the stand last Friday." The prosecutor then proceeded to describe precisely how Morgan's testimony confirmed that GA's statements at trial and when talking to Morgan were the same. In essence, Morgan's statement

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[47] *Straight*, 430 Mich at 427-428.

[48] See *Smith*, 456 Mich at 555 n 5 (distinguishing *Straight* from the facts of *Smith* because "it involved the testimony of a five-year-old complainant, while the present case involves the testimony of a sixteen-year-old complainant whom the defense had full opportunity to cross-examine").

[49] *Solomon*, 435 Mich at 148 (BOYLE, J., concurring), citing *Swartz v Dow Chem*, 414 Mich 433, 442; 326 NW2d 804 (1982).

was used to show that GA had not changed her story in the intervening time. Although Morgan's testimony was undoubtedly important, the record is clear that it simply was never used substantively by the prosecutor.[50] This is consistent with an MRE 803A statement generally, which is only "admissible to the extent that it corroborates testimony given by the declarant during the same proceeding . . . ."[51]

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[50] By way of example, the facts of this case stand in stark contrast to those of *People v Straight*. In *Straight*, this Court stated as follows:

> The hearsay testimony of the parents was not offered merely to corroborate the child's testimony, but rather was offered and argued for its substantive worth as the prosecution's closing argument clearly reveals:
>
> "And ladies and gentlemen, I would suggest to you that that was what was happening on that night in question that the statements made by [the child] at the hospital can be considered by you and even if she hasn't said on the stand what happened as she did yesterday, she just clammed up and said, 'I don't remember,' or, 'I don't want to say anything,' you can still find that the defendant is guilty merely from the testimony that the mother gave as to the information given to her and to the father as to what she said in the hospital."

These comments establish that the parents' testimony was presented to the jury *without limitation as substantive proof of defendant's guilt*. [*Straight*, 430 Mich at 426-427 (emphasis added).]

Moreover, reviewing the entire record, we do not agree with defendant's characterization of Morgan's testimony as outcome-determinative in the trial. In support, defendant argues that the prosecutor devoted pages of the record to discussing Morgan's testimony. While true that the prosecutor discussed Morgan's testimony in her closing statement, it was the prosecutor's "fifth reason" for conviction out of seven reasons total. Moreover, the prosecutor's discussion of Morgan's testimony accounts for less than $2\frac{1}{2}$ transcript pages, which likely amounted to no more than a few minutes time during the prosecutor's closing statement. Despite defendant's characterization to the contrary, we do not believe that this represents the type of overwhelming reliance that would lead to the conclusion that Morgan's testimony was highly prejudicial.

[51] MRE 803A. This has always been the standard in Michigan, even under the prior common-law "tender years" version of the rule. See

Second, Morgan's testimony was cumulative to GA's testimony at trial. GA testified at trial and was subject to cross-examination. GA's testimony at trial was sufficient *standing alone* to support defendant's conviction of all four CSC charges.[52] Although whether a hearsay statement is cumulative is not dispositive to this analysis under Michigan law, it is an indicator that the error was not highly prejudicial, particularly in the presence of other corroborating evidence. Here, the improperly admitted portions of Morgan's testimony did not introduce any new information to the jury. Instead, Morgan's testimony was merely cumulative to GA's in-court testimony.

Defendant contends that this case largely rested on GA's credibility and believability, which Morgan undoubtedly bolstered. However, there was *additional*

Baker, 251 Mich at 326 ("[W]here the victim is of tender years the testimony of the details of her complaint may be introduced in corroboration of her evidence . . . .").

[52] MCL 750.520h provides that "[t]he testimony of a victim need not be corroborated in prosecutions under sections [MCL 750.]520b to [MCL 750.]520g." Defendant was charged of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and thus GA's testimony did not need to be corroborated in order for the jury to convict defendant, assuming of course that the jury found her credible. And it appears that the jury *did* find GA credible in this case. For example, GA's testimony was the only direct evidence supporting the allegation that defendant had sexually assaulted her on the first occasion, yet the jury returned verdicts of guilty on those charges. Contrary to the dissent's implication, our assertion that the jury must find the victim credible if the victim's testimony is the only evidence of a crime in this type of case is merely a statement of obvious fact, not commentary on GA's credibility in this case.

Moreover, we reject the dissent's citation of a single law review article in an attempt to discredit GA's testimony in toto. *Post* at 629-630. While there are admittedly unique difficulties in questioning children, we certainly find no support in the dissent's sweeping proclamation that cross-examination of GA was possibly "useless" in this case. As discussed earlier, even though GA's statements were not "spontaneous," there are many other indicia of reliability with regard to her statement, which remained consistent over time.

corroborating evidence introduced which tends to belie this claim. Perhaps the most damaging of this evidence is Lori's testimony that she walked in to GA's room at 3:30 a.m. and found defendant kneeling at GA's bed, with the bedcovers pushed down, touching GA in the leg area. This testimony corroborates GA's testimony regarding the timing of the alleged crime, namely that defendant had touched and "kissed" her vaginal area that night, and corroborates precisely GA's testimony that her mother entered the room during the sexual assault and then left the room again. The nurse also testified that GA stated during the medical examination that she experienced pain in her vaginal area because "Jason put his finger in my pee-pee" and that defendant had kissed and touched her "where her pee-pee comes out from." This testimony was properly admitted under MRE 803(4), which allows the admission of statements made for purposes of medical treatment.[53] The nurse's testimony also introduced the fact that GA had recently suffered a scratch on her labia minora.[54] Thus, the other properly admitted evidence reveals that this case was *not* purely a one-on-one credibility contest between the defendant and the victim.

Third, to the degree that Morgan's testimony prejudiced defendant when she described how GA *reacted*

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[53] MRE 803(4) provides for admission of

> [s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

[54] Although the nurse testified that the scratch had likely occurred within the last 24 to 48 hours, she also testified that it could have occurred earlier, encompassing a period that corresponds to GA's account of when defendant assaulted her. The police officer who interviewed defendant testified that he noted that defendant's fingernails were "jagged or sharp, uneven."

during the conversation, the victim's emotional reactions *are not hearsay* and are perfectly admissible at trial.[55] Morgan testified about the horrified look on GA's face, how her eyes welled up, how she began sucking her thumb, and her crying, bawling, and gasping for breath. Testimony to this effect would be damaging inasmuch as these were GA's inadvertent, noncoerced physical reactions that tended to show the reliability of her statements. More important, though, the testimony about these reactions *is admissible* as non-hearsay because they are nonassertive conduct.[56] Morgan could properly testify as to GA's nonassertive conduct that she personally observed and about which she has first-hand knowledge.

On the basis of this analysis, we hold that although Morgan's testimony was erroneously admitted, the error does not require reversal. Morgan's testimony was cumulative to and corroborated GA's testimony, which was further buttressed by other evidence. On this record, defendant cannot meet his burden of showing that a different outcome would have been the more probable result without Morgan's testimony.[57]

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[55] See MRE 801(c), which defines "hearsay" as a "statement"; a "statement" is then defined in MRE 801(a) as "(1) an oral or written assertion or (2) *nonverbal conduct of a person, if it is intended by the person as an assertion*." (Emphasis added). Thus, physical conduct or reactions are *not* hearsay as long as the conduct or reactions are not intended as assertions.

[56] This conduct can be contrasted with actual assertive conduct by GA, which would not be admissible. For example, when Morgan asked GA if Gursky had "kissed" her with his tongue on her mouth, GA replied "No, down here" and pointed to her vaginal area. GA's act of pointing would be assertive conduct designated as hearsay by MRE 801(a) and (c), and would not admissible in this case given the foregoing analysis.

[57] For these reasons, we similarly reject the dissent's contention that the error here was so harmful as to require a new trial. While the dissent criticizes a few of this opinion's characterizations or the weight this

IV. CONCLUSION

We hold that the child's statements in this case were not "spontaneous" and therefore should not have been admitted under the limited hearsay exception created by MRE 803A. Statements specifically prompted by an adult's question concerning sexual abuse are not spontaneous, even if other indicia of trustworthiness or reliability exist. However, where the child brings up the subject of abuse, the resulting statement may be considered spontaneous, even if later questioning occurs by an adult. For such statements to be admissible, the child must broach the subject of sexual abuse, any questioning or prompts from adults must be nonleading and open-ended, and the statement must be the creation of the child.

Although the trial court abused its discretion by admitting hearsay testimony in this case, we nonetheless affirm defendant's convictions because the improper admission was harmless error. Defendant has not been able to show that the error is so prejudicial as to require reversal. Here, the hearsay statements were not used substantively at trial to prove guilt (but rather only to show consistency in the child's testimony), the statement was cumulative to other trial evidence, and there was other corroborating evidence of defendant's guilt.

The decision of the Court of Appeals is thus vacated, and defendant's conviction is affirmed on other grounds.

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opinion gives to certain evidence, it fails to demonstrate how defendant has met *his* burden. Both defendant and the dissent call into question the credibility of certain evidence when viewed singularly, but when taken as a whole, the properly admitted evidence is sufficient to sustain defendant's conviction to the extent that we cannot say that it is more probable than not that a different outcome would have resulted.

WEAVER, CORRIGAN, MARKMAN, and HATHAWAY, JJ., concurred with YOUNG, J.

CAVANAGH, J. (*concurring in part and dissenting in part*). I agree with the majority that the testimony at issue in this case did not involve statements that satisfy the "spontaneous" requirement of MRE 803A, and, as a result, the trial court abused its discretion when it allowed the testimony. I disagree, however, that this error was harmless. I think that a full review of the record reveals that this case rested largely on the complainant's credibility, and, as the prosecution stressed in its closing argument, Stacy Morgan's corroborating testimony bolstering GA's credibility was an essential piece of evidence that was critical to the outcome of this case. Therefore, I think that defendant has satisfied his burden under *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999), to show that it is "more probable than not" that a different outcome would have resulted absent Morgan's testimony. Thus, I respectfully dissent from part III(B) of the majority opinion.[1]

The majority's harmless-error analysis goes astray in several places. First, the majority glosses over the key details regarding the important facts in this case. Second, the majority gives insufficient weight to this Court's caselaw regarding the importance of improperly admitted hearsay. Finally, I disagree with the majority's attempt to minimize the importance of the hearsay testimony to the prosecution's case.

To begin with, the majority ignores several key details regarding the facts that it relies on to argue that

[1] Although I remain committed to my *Lukity* dissent, 460 Mich at 504-510 (CAVANAGH, J., dissenting), because I think that defendant is entitled to a new trial even under the higher burden created by the majority in *Lukity*, I will apply that standard here.

there was evidence, other than Morgan's testimony, that corroborated GA's testimony.

First, the majority states that "the most damaging of this [corroborative] evidence" was Lori's testimony "that she walked in to GA's room at 3:30 a.m. and found defendant kneeling at GA's bed, with the bedcovers pushed down, *touching GA in the leg area*." *Ante* at 624 (emphasis added). The majority mischaracterizes Lori's testimony and overlooks a potentially innocent explanation for the evidence that it finds so damning. A full review of the record indicates that Lori testified that defendant stayed up late playing video games with her son on the night that she saw defendant in GA's room. She also testified that she had told defendant previously that she preferred that GA sleep in her pajamas, but, on that night, she had put GA to bed in her street clothes because GA had fallen asleep in the living room. When Lori confronted defendant about what he was doing in GA's room, he explained that he had changed GA into her pajamas. Further, while the majority states that Lori saw defendant "touching GA in the leg area," the record indicates that what Lori actually testified is that she saw defendant's hand "between [GA's] knee and feet," which has much less sinister implications. In light of these details, the corroborative nature of this particular evidence is substantially weakened, along with the majority's harmless-error conclusion.

Second, the majority also ignores several important details surrounding the nurse's and investigating detective's testimony. As the majority notes, the nurse testified that GA had a scratch on her labia minora, and the investigating detective testified that defendant's fingernails were jagged or sharp when he interviewed defendant. Although the majority acknowledges that the nurse testified that the scratch likely occurred in the 24

to 48 hours preceding her examination of GA, it fails to mention that the exam occurred *five days after* defendant allegedly sexually abused GA. Nor does the majority consider that the nurse testified that the scratch could have resulted from totally innocent behavior, such as a child playing. Furthermore, the nurse's testimony regarding GA's description of what had happened to her corroborates at most one instance of sexual abuse. It does not corroborate the testimony related to the other accusation of sexual abuse against defendant. Again, when this particular evidence is considered in context, its corroborative nature is substantially weakened, and the majority's harmless-error conclusion is further eroded.

The majority also gives insufficient weight to this Court's caselaw when it concludes that the prejudicial nature of the error was limited because GA testified at trial and was subject to cross-examination, making Morgan's testimony merely corroborative and cumulative. In making these generalizations, the majority pays lip service to this Court's warnings that "the fact that the statement was cumulative, standing alone, does not automatically result in a finding of harmless error," *People v Smith*, 456 Mich 543, 554; 581 NW2d 654 (1998), and that hearsay evidence may tip the scales against a defendant when a case presents a credibility contest, especially when the declarant is a young child. *People v Straight*, 430 Mich 418, 427-428; 424 NW2d 257 (1988); *Smith*, 456 Mich at 555 n 5. Unfortunately, however, the majority largely fails to heed those warnings in reaching its conclusion.

To start with, the utility of cross-examining a seven-year-old girl is debatable. In order to avoid the appearance of bullying a child before the jury, "no defense lawyer will subject a small child to an unnecessarily

traumatic courtroom experience," even at the expense of leaving a possible error in the testimony undiscovered. Christiansen, *The testimony of child witnesses: Fact, fantasy, and the influence of pretrial interviews*, 62 Wash L R 705, 719 (1987). Further, a child "will adopt false memory as truth and be unable to distinguish the source of what she recalls. The sources of her knowledge are obscured and the possibility of falsehood hidden behind her sincere belief in the truth of her memory." *Id.* This concern is reflected in MRE 803A's limitations on the admissibility of hearsay statements made by children, which require that a child's statements be made as soon as practicable after the incident and that the statements be spontaneous and without indication of manufacture. Therefore, given that Morgan's suggestive questioning occurred before GA testified at trial, cross-examination may have been useless in this case. As a result, the jury may have been "presented with an unshakably false basis for assessing the weight of her testimony," and defendant's felony convictions may have been based on inaccurate information that was impossible to test. *Id.* at 719-720.

Also, the majority's reliance on MCL 750.520h to argue that the prosecution in this case did not need to corroborate GA's testimony is misplaced. The credibility of GA's testimony was a critical issue because there was little physical evidence in this case. Indeed, as the majority notes, GA's testimony was the *only* basis for defendant's conviction for one of the alleged incidences of abuse. Presumably, the only support for the jury's finding was its belief that GA was credible, which was unfairly bolstered by the inadmissible hearsay. Therefore, as the majority acknowledges, the prosecution did not need to corroborate GA's testimony only if we are willing to "*assum*[*e*] . . . *that the jury found her credible.*" *Ante* at 623 n 52 (emphasis added).

The fact that GA's credibility was the key issue is precisely why the error was not harmless: Morgan's erroneously admitted hearsay testimony strongly bolstered GA's credibility. Thus, as the majority admits, we are left to assume that even without Morgan's testimony the jury would have found GA credible. This case simply presents too many unknowns to base multiple serious criminal convictions on a bare assumption.

Furthermore, there are several problems with the majority's reference to GA's credibility. First, it inaccurately states that GA's statements were "consistent over time." This ignores that several days after Morgan's conversation with her, GA made a seemingly inconsistent statement when she asked Lori, "Mommy, what if it was a bad dream?"

Second, the majority's statement that it is not commenting on GA's credibility is incorrect and irrelevant. The majority does comment on the credibility of GA's testimony when it notes that GA's statement "remained consistent over time." *Ante* at 623 n 52. Because the majority must rely on GA's admittedly inadmissible statement to Morgan to label her statements "consistent," the majority only compounds the harm and proves that Morgan's testimony was critical to the prosecution's case.

Third, the majority's commentary on the credibility of GA's statements is irrelevant. The question is not whether this Court finds GA credible but whether the inadmissible hearsay unfairly influenced *the jury's* ability to determine GA's credibility. Because it is more probable than not that the hearsay influenced the jury and affected the trial's outcome, the error was not harmless.

Contrary to the majority's claim, I do not discredit GA's testimony "in toto." Rather, I merely note that

children, by no fault of their own, are highly susceptible to influence. On the basis of this widely accepted observation, which the majority accepts, I conclude that the jury's ability to determine whether it found GA's testimony credible was unfairly influenced by Morgan's inadmissible testimony to the point that the error was not harmless.

Finally, the majority's attempt to minimize the importance of Morgan's hearsay testimony to the prosecution's case is also misleading. *Ante* at 622 n 50. Simply because the prosecution listed Morgan's testimony as the "fifth reason" supporting conviction in her closing argument is not evidence that the testimony was not important. The order in which the prosecution presented the supporting evidence in her closing argument is not an indication of the weight that the prosecution or, more importantly, the jury gave the evidence. And, even if the order of presentation did somehow relate to the testimony's importance, it should be noted that in the first paragraphs of its closing argument, the prosecution stressed that GA's believability was key to the case. Furthermore, the first sentence of the prosecution's discussion of Morgan's testimony during closing argument stressed that Morgan's testimony "corroborated everything that [GA] said on the stand . . . ." Similarly, it is irrelevant that "the prosecutor's discussion of Morgan's testimony accounts for less than $2\frac{1}{2}$ transcript pages," given that this is no indication of the weight that the jury gave Morgan's testimony. Indeed, in *People v Snyder*, 462 Mich 38; 609 NW2d 831 (2000), we remanded for a new trial under the *Lukity* standard because of an erroneous evidentiary ruling by the trial court that affected the complainant's credibility. We reasoned that, much like this case, "the prosecution's case rested almost entirely on the testimony of the

complainant," and the "prosecutor took advantage of the circuit court's erroneous ruling during her closing argument." *Id.* at 44-45.

In summary, defendant's convictions largely rested on GA's credibility, and, as the prosecution stressed, Morgan's corroborating testimony bolstering her credibility was an essential piece of evidence in this case.[2] Furthermore, much of the admissible "corroborating" evidence cited by the majority is less convincing when viewed in context, and the majority's conclusion that this case was not merely a credibility contest is called into question. Finally, as the majority acknowledges, this Court has held that hearsay evidence is more harmful in credibility contests, particularly when the declarant is a young child. Accordingly, I do not agree with the majority that the trial court's abuse of discretion was harmless error, and I would remand for a new trial.

KELLY, C.J., concurred with CAVANAGH, J.

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[2] Indeed, the trial court based its decision to deny defendant's motion for a directed verdict on its belief that "[t]he complainant . . . has been absolutely consistent with her version of events from the first time she disclosed it [to Morgan] through . . . her testimony in court."

EDRY v ADELMAN

Docket No. 138187. Argued January 12, 2010 (Calendar No. 4). Decided July 22, 2010.

Tracy Edry brought a medical-malpractice negligence action in the Oakland Circuit Court against Marc Adelman, D.O., and his professional corporation, alleging that he had breached the applicable standard of care by failing to test for cancer after plaintiff showed him a lump under her arm. Plaintiff was later diagnosed with cancer and underwent a mastectomy, chemotherapy, and radiation therapy. Plaintiff alleged that the delay in diagnosing and treating her condition required her to undergo more extensive and invasive medical treatment than would have been necessary otherwise, and also decreased her opportunity to survive. To support her claims, plaintiff sought to introduce the testimony of Dr. Barry Singer, whose method of estimating plaintiff's reduced chances of survival was at odds with that of the authoritative manual on the subject and unsupported by other authorities. Defendants moved for summary disposition on the ground that Singer's testimony was not admissible under MRE 702, which requires that expert testimony meet certain standards of reliability. The court, Rudy J. Nichols, J., ruled that Singer could not testify as an expert, but did not rule on defendants' motion for summary disposition. Plaintiff moved to set this order aside, and defendants moved to dismiss the complaint on the ground that plaintiff could not prove medical malpractice without Singer's testimony. The trial court then denied plaintiff's motion and granted defendants' motion to dismiss the entire case with prejudice. The Court of Appeals, ZAHRA, P.J., and OWENS and K. F. KELLY, JJ., reviewed the decision as though it had been based on a motion for summary disposition and affirmed on the ground that Singer's testimony had been properly barred under MRE 702. Unpublished opinion per curiam of the Court of Appeals, issued December 23, 2008 (Docket No. 279676). This Court granted plaintiff's application for leave to appeal. 485 Mich 901 (2009).

In a memorandum opinion signed by Chief Justice KELLY and Justices CAVANAGH, CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

The trial court did not abuse its discretion by excluding plaintiff's expert's testimony under MRE 702 and dismissing plaintiff's entire complaint.

1. The trial court did not abuse its discretion by excluding the testimony of Singer under MRE 702 because it was not based on reliable principles or methods, was contradicted by both the defendant's oncology expert and published literature that Singer himself considered authoritative, and was not supported by any evidence that would demonstrate its reliability.

2. Summary disposition in defendants' favor was proper because plaintiff failed to provide any admissible evidence that the delay in diagnosis resulted in an injury that presented a cognizable medical-malpractice claim. Although there was admissible evidence that the delay decreased her odds of survival, this alone is not sufficient to support a medical-malpractice claim under MCL 600.2912a(2) as interpreted by *Wickens v Oakwood Healthcare Sys*, 465 Mich 53 (2001), which requires a showing that the decreased odds resulted in a present injury. Because the evidentiary issue in this case is dispositive, the question whether *Wickens* was correctly decided need not be reached.

Affirmed.

Justice HATHAWAY, joined by Justice WEAVER, dissenting, would hold that the trial court erred by reviewing only one of the factors that must be considered under MCL 600.2955 to determine whether the testimony of plaintiff's expert was reliable.

Sommers Schwartz, P.C. (by *Richard D. Toth*), for plaintiff.

Saurbier & Siegan, P.C. (by *Debbie K. Taylor*), for defendants.

Amici Curiae:

Warner Norcross & Judd LLP (by *John J. Bursch*, *Matthew T. Nelson*, and *Julie Lam*) for the Michigan Health & Hospital Association.

Kerr, Russell and Weber, PLC (by *Daniel J. Schulte* and *Joanne Geha Swanson*) for the Michigan State Medical Society.

Barbara H. Goldman for the Michigan Association for Justice.

MEMORANDUM OPINION. In this case we must decide whether the trial court abused its discretion by excluding plaintiff's expert's testimony under MRE 702 and whether the trial court erred by dismissing plaintiff's entire complaint. We affirm the Court of Appeals judgment that the trial court did not abuse its discretion by barring the expert's testimony as unreliable and did not err by dismissing plaintiff's entire complaint.[1]

In June 2003, plaintiff noticed an approximately three-millimeter lump under her arm. Before noticing the lump, plaintiff had been seeing defendant,[2] an obstetrician and gynecologist (OB/GYN), for routine check-ups. According to plaintiff, she brought the lump to defendant's attention in 2003, and defendant told her to check back with him if the lump increased in size, but he did not order any tests, consult with a surgeon, or schedule a follow-up appointment. In 2005, plaintiff was diagnosed with breast cancer. The initial biopsy indicated that the cancer was invasive and had spread to 16 lymph nodes. Plaintiff then had a radical mastectomy, three rounds of chemotherapy, and radiation therapy.

Plaintiff filed a suit against defendant, alleging that defendant breached the applicable standard of care by

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[1] The Court of Appeals also opined that *Wickens v Oakwood Healthcare Sys*, 465 Mich 53; 631 NW2d 686 (2001), bars plaintiff's claim to the extent that it is based on a loss of an opportunity to survive. *Edry v Adelman*, unpublished opinion per curiam of the Court of Appeals, issued December 23, 2008 (Docket No. 279676), p 4. We granted leave to appeal in part to consider whether *Wickens* was properly decided. 485 Mich 901 (2009). In light of the evidentiary issue in this case, however, we need not reach this issue here.

[2] Although Marc Adelman and Marc Adelman, D.O., P.C., are both named defendants in this case, because only Marc Adelman's conduct is the focus of this case, we will simply refer to "defendant."

failing to test for cancer when plaintiff first brought the lump to defendant's attention in 2003. Plaintiff alleged that her opportunity for long-term survival was substantially diminished by the delay in diagnosis and treatment and that she was subjected to more invasive, severe, and disfiguring medical treatment as a result of defendant's negligence. Dr. Rainna Brazil, an OB/GYN, signed plaintiff's affidavit of merit, which explained defendant's standard of care and how he breached that standard of care, and claimed that defendant's breach resulted in plaintiff having to undergo more invasive medical treatment. Dr. Brazil also testified at a deposition regarding defendant's standard of care. Specifically, Dr. Brazil testified that cancer growth rates and survival statistics of breast cancer patients are not within her area of expertise and that such determinations are best left to a medical oncologist. Plaintiff's second OB/GYN expert, Dr. Roger Kushner, also testified that cancer growth rates are best determined by an oncologist.

Dr. Barry Singer testified at a deposition as plaintiff's oncology expert. He stated that plaintiff's chances of surviving five years would have been 95 percent if she had been diagnosed in June 2003 and that the delay in diagnosis reduced her five-year survival chance to 20 percent. Dr. Singer acknowledged that the American Joint Cancer Commission (AJCC) manual was authoritative on this subject and reported a 60 percent five-year survival rate for breast cancer patients when the cancer has spread to four or more lymph nodes. Dr. Singer stated, however, that the manual was not applicable to plaintiff's case because the cancer had spread to 16 lymph nodes, and he believed that the more lymph nodes involved, the poorer the chance of survival. During his deposition, Dr. Singer referred to textbooks and journal articles that supported his theory, but plaintiff never produced those authorities to support his testimony.

Defendant's oncology expert, Dr. Joel Appel, testified that plaintiff's chance of survival was 60 percent based on the AJCC manual and that it was medically improper to consider the number of lymph nodes involved as a predictor of a patient's chance of survival. Further, Dr. Appel testified that Dr. Singer's opinion was not based on recognized scientific or medical knowledge, was not generally accepted in the medical community, and could not be substantiated with any medical evidence.

Defendant moved for summary disposition on the basis that Dr. Singer's testimony was not admissible under MRE 702. After a hearing on the issue, the trial court entered an order that barred Dr. Singer from testifying at trial, but it did not state whether it was granting defendant's motion for summary disposition. Plaintiff moved to set aside the trial court's order barring Dr. Singer's testimony, and defendant moved to dismiss the complaint, arguing that plaintiff could not prove medical malpractice without Dr. Singer's testimony. After a second hearing, the trial court denied plaintiff's motion and granted defendant's motion to dismiss the case in its entirety with prejudice. Plaintiff appealed as of right.

Noting that the trial court's basis for disposing of the case was not clear, the Court of Appeals reviewed the record and determined that the trial court's decision should be reviewed as a decision on a motion for summary disposition under MCR 2.116(C)(10).[3] *Edry v Adelman*, unpublished opinion per curiam of the Court

[3] Under MCR 7.216(A), "[t]he Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just . . . enter any judgment or order or grant further or different relief as the case may require . . . ." MCR 7.216(A)(7). Therefore, it was proper for the Court of Appeals to review the trial court's decision as a decision on a motion for summary disposition.

of Appeals, issued December 23, 2008 (Docket No. 279676), p 2. The Court of Appeals then affirmed, reasoning that Dr. Singer's testimony was properly barred under MRE 702, among other reasons. *Id.* at 5. This Court granted leave to appeal. *Edry v Adelman*, 485 Mich 901 (2009).

This Court reviews a motion for summary disposition de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). This Court has stated that "the proponent of evidence bears the burden of establishing relevance and admissibility . . . ." *People v Crawford*, 458 Mich 376, 386 n 6; 582 NW2d 785 (1998).

The admissibility of expert witness testimony is governed by MRE 702, which states:

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

This Court has stated that MRE 702 incorporates the standards of reliability that the United States Supreme Court described to interpret the equivalent federal rule of evidence in *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). *Gilbert*

v DaimlerChrysler Corp, 470 Mich 749, 781; 685 NW2d 391 (2004). Under *Daubert*, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 US at 589. This Court has implied that, while not dispositive, a lack of supporting literature is an important factor in determining the admissibility of expert witness testimony. See *Craig*, 471 Mich at 83-84 (stating that the expert's singular reliance on his own hypothetical depiction of an event may have been too speculative and, therefore, inadmissible under MRE 702). See, also, *Daubert*, 509 US at 593 (stating that whether there is peer-reviewed and published literature on a theory is a "pertinent consideration" because "submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected").

Here, Dr. Singer's testimony failed to meet the cornerstone requirements of MRE 702. Dr. Singer's opinion was not based on reliable principles or methods; his testimony was contradicted by both the defendant's oncology expert's opinion and the published literature on the subject that was admitted into evidence, which even Dr. Singer acknowledged as authoritative. Moreover, no literature was admitted into evidence that supported Dr. Singer's testimony. Although he made general references to textbooks and journals during his deposition, plaintiff failed to produce that literature, even after the court provided plaintiff a sufficient opportunity to do so. Plaintiff eventually provided some literature in support of Dr. Singer's opinion in her motion to set aside the trial court's order, but the material consisted only of printouts from publicly accessible websites that provided general statistics about survival rates of breast cancer patients. The fact that

material is publicly available on the Internet is not, alone, an indication that it is unreliable, but these materials were not peer-reviewed and did not directly support Dr. Singer's testimony.[4] Moreover, plaintiff never provided an affidavit explaining how Dr. Singer used the information from the websites to formulate his opinion or whether Dr. Singer ever even reviewed the articles.

Plaintiff failed to provide any support for Dr. Singer's opinion that would demonstrate that it has some basis in fact, that it is the result of reliable principles or methods, or that Dr. Singer applied his methods to the facts of the case in a reliable manner, as required by MRE 702. While peer-reviewed, published literature is not always a necessary or sufficient method of meeting the requirements of MRE 702, in this case the lack of supporting literature, combined with the lack of any other form of support for Dr. Singer's opinion, renders his opinion unreliable and inadmissible under MRE 702.[5] See, generally, *Craig*, 471 Mich at 83-84; *Daubert*,

[4] The dissent notes that one of the printouts that plaintiff provided was from the American Cancer Society (ACS) website and quotes statistics from the AJCC. The dissent ignores, however, the fact that (1) Dr. Singer acknowledged that the AJCC manual contradicted his opinion, (2) the ACS website does not provide survival rates for patients with Stage IIIC breast cancer, which was plaintiff's expert's diagnosis regarding plaintiff's cancer, and (3) the other materials provided by plaintiff are from lifetimetv.com and imaginis.com, which the dissent does not argue are peer-reviewed. And, regardless of the peer-reviewed status of these materials, the dissent fails to acknowledge that these materials do not directly support Dr. Singer's testimony, and plaintiff never explained how or even whether Dr. Singer used the information to formulate his opinion.

[5] Although the dissent faults the trial court for not conducting an evidentiary hearing, the trial court properly based its decision on the admissibility of Dr. Singer's testimony on the testimony and evidence before it at that time, particularly given that *plaintiff* argued that there was no reason for the trial court to hold a *Daubert* hearing regarding Dr. Singer's testimony.

509 US at 593-594. Under MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible.[6] Plaintiff has failed to satisfy her burden regarding the admissibility of Dr. Singer's opinion; therefore, the trial court did not abuse its discretion by excluding Dr. Singer's testimony as unreliable under MRE 702.[7]

Because the trial court did not abuse its discretion by excluding Dr. Singer's testimony, the next issue is whether defendant is entitled to summary disposition as a matter of law under MCR 2.116(C)(10) on the ground that plaintiff failed to establish a genuine issue of material fact. Plaintiff argues that the trial court erred by dismissing her entire complaint because, even without Dr. Singer's testimony, she had provided sufficient evidence that the delay in diagnosis resulted in the need for more invasive medical treatment and decreased her odds of surviving five years, which established a genuine issue of material fact. We reject these arguments.

First, plaintiff cannot pursue a claim based solely on her decreased odds of survival because that alone does not create a basis for relief under MCL 600.2912a(2). Defendant's expert did testify that the delay decreased

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[6] Similarly, federal courts applying *Daubert* have held that "the whole point of *Daubert* is that experts can't 'speculate.' They need analytically sound bases for their opinions," *DePaepe v Gen Motors Corp*, 141 F3d 715, 720 (CA 7, 1998), and "[i]t is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate." *Goebel v Denver & R G W R Co*, 215 F3d 1083, 1088 (CA 10, 2000).

[7] We need not address MCL 600.2955 in this case because an expert witness who is qualified under one statute may be disqualified on other grounds. See *Woodard v Custer*, 476 Mich 545, 574 n 17; 719 NW2d 842 (2006). Here, Dr. Singer's opinion is inadmissible under MRE 702; therefore, it is unnecessary to consider the admissibility of his opinion under MCL 600.2955.

plaintiff's odds of surviving five years, but he did not testify that any present injury arose from that reduction in her survival chance. This Court has held that a reduced chance of survival alone is not a cognizable injury under MCL 600.2912a(2). See *Wickens v Oakwood Healthcare Sys*, 465 Mich 53; 631 NW2d 686 (2001).[8] Defendant's expert merely testified that the delay reduced plaintiff's odds of surviving five years, which is not a present injury as required by MCL 600.2912a(2). Because defendant's expert did not testify as to any other harm that could be considered a present injury, plaintiff cannot support her claim with defendant's expert's testimony.

Second, plaintiff also cannot recover for her claimed injury of needing more invasive medical treatment because she did not satisfy her burden to show that the delayed diagnosis caused the need without Dr. Singer's testimony.[9] Her OB/GYN expert's affidavit of merit cannot satisfy this burden. Cancer growth rates would seemingly be a key factor in determining whether the delayed diagnosis resulted in the need for more invasive medical treatment, and yet Dr. Brazil specifically testified during her deposition that she would defer to an oncologist on the issue of cancer growth rates. Therefore, Dr. Brazil admitted that she was not qualified to testify as an expert on the issue of cancer growth rates, which is the only support that

[8] Even under the opinion concurring in part and dissenting in part in *Wickens*, plaintiff would not have a cognizable claim because she has failed to provide any evidence of a present injury resulting from any possible loss of an opportunity to achieve a better result. *Wickens*, 465 Mich at 63 (CAVANAGH, J., concurring in part and dissenting in part).

[9] Moreover, Dr. Singer never testified that the delay in diagnosis resulted in the need for more invasive medical treatment, and the Internet articles that plaintiff eventually provided in an effort to support Dr. Singer's testimony actually indicate that treatment even for Stage I cancer often involves chemotherapy and a mastectomy.

plaintiff offers for her claim that the delay in diagnosis resulted in the need for more invasive medical treatment. As a result, plaintiff has failed to provide any admissible evidence to prove that the delay in diagnosis of her cancer resulted in the need for more invasive medical treatment.[10]

In conclusion, plaintiff has failed to provide sufficient evidence to support either of her claims. Although there was evidence that plaintiff's odds of survival had decreased as a result of the delayed diagnosis, plaintiff did not provide sufficient evidence to prove that these decreased odds resulted in a present injury, which is required under MCL 600.2912a(2). See *Wickens*, 465 Mich at 53. Plaintiff also failed to provide sufficient evidence to support her claim that the delayed diagnosis resulted in the need for more invasive medical treatment because the testimony of Dr. Singer, who was plaintiff's only potential source of evidence that could satisfy her burden on this point, was properly barred under MRE 702. Because plaintiff has not satisfied her burden as to either claim, the Court of Appeals correctly determined that there was no genuine issue of material fact, and summary disposition in favor of defendant was proper under MCR 2.116(C)(10).

Affirmed.

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[10] The dissent argues that granting defendant's motion for summary disposition is premature because the trial court did not consider Dr. Brazil's potential testimony regarding plaintiff's theory of proximate causation. The dissent ignores two key problems, however. First, the trial court did not consider Dr. Brazil's testimony as it relates to plaintiff's theory of proximate causation because plaintiff never indicated that Dr. Brazil would testify regarding that subject. A plaintiff must satisfy the burden of proving support for a claim, but plaintiff failed to do so, see *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994), and MCL 600.2912a. Second, Dr. Brazil's testimony was inadmissible for that purpose for the reasons explained above.

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

HATHAWAY, J. (*dissenting*). I respectfully dissent from the majority opinion which holds that the trial court did not abuse its discretion by precluding plaintiff's expert witness's testimony. In performing its gatekeeping role, a trial court is required to consider *all* factors enumerated in MCL 600.2955 before it strikes an expert witness, and it is an abuse of discretion for the trial court to fail to do so. *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067 (2007). In this case, the trial court reviewed only one § 2955 factor to determine if plaintiff's expert's testimony had an indicia of reliability, rather than examining all of the § 2955 factors to determine if any one of the factors established an indicia of reliability. Based on this narrow review, the trial court precluded plaintiff's expert from testifying because plaintiff did not present medical articles on the growth rate of cancer in support of her position. By limiting its inquiry to only one enumerated criterion of MCL 600.2955, the trial court abused its discretion. Because the majority ignores the plain language of MCL 600.2955, which mandates that a trial court review *all* the enumerated factors within § 2955 to determine if any one § 2955 factor established an indicia of reliability, as well as this Court's clear directive in *Clerc*, I must respectfully dissent.

Accordingly, I would reverse the Court of Appeals judgment and remand this matter to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

This case involves allegations of medical malpractice. Plaintiff, Tracy Edry, alleges that defendant, Dr. Marc

Adelman, violated the standard of care and committed professional negligence as a result of his failure to timely diagnose and treat plaintiff's breast cancer. Plaintiff alleges that the delay in diagnosis and the failure to timely treat her cancer resulted in an unnecessary progression of her cancer, which, in turn, caused a need for more invasive treatment and a loss in her chance of survival. The plaintiff pled two separate claims, one for loss of opportunity to survive and one for a present injury. At issue before us is whether the trial court properly precluded plaintiff's oncology expert from testifying on the issue of proximate causation on both the loss of opportunity to survive claim as well as the claim for a present injury.

The issue was initially brought before the trial court by way of defendants' "motion for summary disposition premised on plaintiff's inability to prove a greater than 50% loss of opportunity to survive, or alternatively motion for MRE 702 evidentiary hearing." At the hearing, the trial court ruled that the plaintiff's expert, Dr. Barry Singer, was precluded from testifying at trial. The transcript reflects that the court did not conduct an evidentiary hearing under MRE 702, but, instead, briefly summarized its understanding of the parties' positions on the record. The court stated that it was familiar with its gatekeeping function and the requirements of MRE 702 and MCL 600.2955. The court then ruled that Dr. Singer's testimony was unscientific because plaintiff had failed to produce articles to support his position; however, it did not address any of the other § 2955 criteria. The trial court did not rule on defendants' motion for summary disposition to dismiss plaintiff's complaint, nor did it grant defendants' request for an MRE 702 evidentiary hearing; rather, it ruled that it was striking plaintiff's expert witness. The trial court stated:

> This Court's review of Singer's deposition transcript reveals that he is an experience—he is experienced in what likely will qualify as an expert in oncology. However, Singer recites an opinion, to wit; that plaintiff had a 20% chance of survival at the time of diagnosis, which plaintiff fails to establish this—to this Court as supported and reliable in the scientific community. In other words, it is speculation.
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> Therefore, for the reasons stated herein, and those outlined by defendants, the Court grants defendant's motion under MRE 702 and *Daubert* [*v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993)]. Defendants may present an order consistent with this opinion, indicating that plaintiff's witness may not testify because it appears his testimony is unreliable. Have a good day.
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> *Ms. Siegan [defense counsel]*: Your Honor, may I ask for clarification? Does that mean that the Court is granting summary disposition of the whole case?
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> *The Court*: I'm leaving plaintiff to figure that out. Have a good day.

The defendants then brought a second motion, this time entitled "[m]otion for dismissal for [plaintiff's] failure to meet her burden of proof." Plaintiff brought a "[m]otion to set aside [the] order [to strike her witness]." In support of her motion, plaintiff submitted four medical articles concerning the staging of cancer. Two of the articles were publications from the American Cancer Society (ACS), discussing the various stages of breast cancer as set forth by the American Joint Committee on Cancer (AJCC). Both the plaintiff's and the defense's expert agreed that the AJCC was a reliable source on the staging of breast cancer. Plaintiff's counsel argued that the expert's opinion was supported by and flowed logically from that literature. Defense counsel argued that because the American Cancer Society articles that contained the AJCC standards could be found on a public website they were not peer reviewed or scientific. Defendants also argued that the

articles did not support plaintiff's theory; that defendants' expert disputed plaintiff's expert's testimony; and, finally, that plaintiff's expert's testimony was contradicted by the AJCC standards.

The trial court again did not conduct an evidentiary hearing. The trial court only addressed the issue of plaintiff's literature, this time finding that it was not accompanied by expert testimony and that the literature did not appear to support plaintiff's theory. The court then ruled that it was granting defendants' motion to dismiss.

The Court of Appeals affirmed the trial court holding and stated:

> In this case, Dr. Singer's testimony clearly contradicted the AACJ [sic: AJCC] standards. Additionally, defendants' expert, Dr. [Joel] Appel, testified that it was medically improper to simply use the number of positive lymph nodes, as Dr. Singer had done, to assess the chance of survival. Dr. Appel also claimed that Dr. Singer's opinion that plaintiff had less than a 20 percent chance of survival due to the number of positive lymph nodes was not based on any scientific, technical, or specialized knowledge, was not generally accepted within the scientific community, and could not be substantiated by any medical evidence. At his deposition, Dr. Singer testified that his opinion was supported by the medical literature. Plaintiff was given an opportunity to submit the articles that Dr. Singer claimed supported his opinion, but never did so. Instead, plaintiff presented generalized Internet articles that did not clearly support Dr. Singer's testimony. In particular, none of the articles that plaintiff submitted indicated that a person with plaintiff's pathology (i.e., tumor size and number of positive nodes) had less than a 20 percent chance of survival. For these reasons, the trial court did not abuse its discretion in determining that Dr. Singer's testimony was not shown to be sufficiently accepted in the scientific community to be reliable and, therefore, was not admissible. Without Dr. Singer's testimony, plaintiff had no other evidence showing that she sustained a loss of the opportunity to survive that

> was greater than 50 percent. [*Edry v Adelman*, unpublished opinion per curiam of the Court of Appeals, issued December 23, 2008 (Docket No. 279676), p 4.]

Plaintiff sought leave to appeal in this Court, and we granted leave asking the parties to include "among the issues to be briefed: (1) whether *Wickens v Oakwood Healthcare Sys*, 465 Mich 53 [631 NW2d 686] (2001), was correctly decided; and (2) whether the lower courts erred in finding that Dr. Singer's testimony was inadmissible under MRE 702."[1]

II. STANDARD OF REVIEW

This case involves review of a trial court's ruling concerning the admissibility of an expert's opinion which this court reviews for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). The case also presents issues of statutory interpretation. Statutory interpretation is a question of law that is reviewed de novo. *In re Investigation of March 1999 Riots in East Lansing*, 463 Mich 378, 383; 617 NW2d 310 (2000). Finally, we review the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) de novo. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999).

III. ANALYSIS

The first issue to be addressed is whether the trial court abused its discretion by precluding plaintiff's oncology expert from testifying on the issue of proximate causation. The majority opines that plaintiff's expert was properly stricken. I respectfully disagree. I believe that the majority's analysis and conclusion are

[1] *Edry v Adelman*, 485 Mich 901 (2009).

erroneous because they completely ignore *Clerc* as well as the clear and unambiguous language of MCL 600.2955.

I agree with the majority that the trial court must engage in a preliminary gatekeeping function to determine whether to admit expert testimony. I disagree with the majority on what factors are to be considered when a court makes such a determination. This Court has already addressed this precise issue in *Clerc*, holding that all the § 2955 factors need to be examined before an expert's testimony can be precluded, and it is an abuse of discretion to fail to do so. I see no compelling reason to depart from the clear directive of *Clerc* in the matter before us.

Clerc was a medical malpractice case involving lung cancer. The issue presented on appeal was whether the trial court had abused its discretion by striking the plaintiff's expert because the plaintiff had failed to produce scientific literature to support his claim. *Clerc* opined on the proper factors to be evaluated when considering whether to strike expert witness testimony. *Clerc* held that the admissibility of expert testimony is be evaluated under MRE 702, MCL 600.2169, *and MCL 600.2955*. In reversing the trial court's decision to strike the plaintiff's expert witness because it was *an abuse of discretion*, this Court held:

> Consistent with this role, the *court "shall" consider all of the factors listed in MCL 600.2955(1).* If applicable, the proponent must also satisfy the requirement of MCL 600.2955(2) to show that a novel methodology or form of scientific evidence has achieved general scientific acceptance among impartial and disinterested experts in the field.
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> *Here, the trial court did not consider the range of indices of reliability listed in MCL 600.2955. Rather, it focused on its concern that plaintiff could not present specific studies*

on the growth rate of untreated cancer. Therefore, the court did not fulfill its gatekeeping role because it failed to consider other factors such as, for example, whether the methodology used by plaintiff's experts is "generally accepted within the relevant expert community," is relied upon as a "basis to reach the type of opinion being proffered" by experts in the field, or is "relied upon by experts outside of the context of litigation." MCL 600.2955(1)(e)-(g).

Accordingly, we remand to the Chippewa Circuit Court to complete the proper inquiry.[2]

I find *Clerc* indistinguishable from the case before us. In *Clerc* the plaintiff argued that studies that the trial court demanded did not exist because no such study had ever been conducted. In the case before us the plaintiff argues that there are no studies with the level of specificity that the trial court demanded. In fact, in the literature submitted by plaintiff, the American Cancer Society discusses Stage IIIC, which is the stage of cancer that plaintiff had, and notes that "survival rates are not yet available for Stage IIIC breast cancer because this stage was defined only a few years ago."[3]

In *Clerc* this Court remanded the case to the trial court to consider all the factors enumerated in § 2955 because the presence or absence of scientific studies or literature is not dispositive as it is not the only factor used to evaluate reliability. Other factors are equally important, and medical literature is not going to exist in all circumstances. This same rationale and logic is applicable to this case. This case should be similarly remanded to the trial court to consider all the factors of § 2955 because while there may not be literature to

[2] *Clerc*, 477 Mich at 1068 (emphasis added).

[3] American Cancer Society, Detailed Guide: Breast Cancer, *How Is Breast Cancer Staged?* (September 18, 2006, revision), reproduced in plaintiff-appellant's appendix, pp 153a-156a, citing AJCC statistics.

support plaintiff's expert's opinion, there may be another § 2955 factor that provides the necessary indicia of reliability for it.

Section 2955 is specific in its directives. The statute provides:

> (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, *the court shall* examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, *and shall consider all of the following factors:*
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

> (2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.
>
> (3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169. [Emphasis added.]

The well accepted rules of statutory construction apply here. Assuming that the Legislature has acted within its constitutional authority, the purpose of statutory construction is to discern and give effect to the intent of the Legislature.[4] The Court must interpret the language of a statute in a manner which is consistent with the legislative intent.[5] In determining the legislative intent, we must first look to the actual language of the statute.[6] As far as possible, effect should be given to every phrase, clause, and word in the statute.[7] (Emphasis added.)

Section 2955 states that the court "*shall consider all*" the factors. All of the § 2955 factors must be reviewed to determine if any one of the factors demonstrate an indicia of reliability.[8] Moreover, pursuant to § 2955(2) expert testimony that is considered novel in methodology or form that does not meet the § 2955(1) factors may be admitted into evidence.[9] The trial court in this matter failed to review all the § 2955(1) factors and failed to consider whether this testimony met the criteria of § 2955(2).

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[4] *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009), citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[5] *Potter*, 484 Mich at 411.

[6] *Id*. at 410.

[7] *Sun Valley*, 460 Mich at 237.

[8] *Clerc*, 477 Mich at 1068.

[9] Section 2955(2) provides:

Thus, the trial court failed in its gatekeeping duties and failed to follow the clear mandates of the statute. Accordingly, remand to the trial court is necessary because the trial court abused its discretion in making its decision. On remand, the court must consider all the factors in § 2955(1) and (2). If, after consideration of all the factors, the court finds that plaintiff's expert's opinion does not have the threshold indicia of reliability, the court may preclude the testimony. Conversely, if there are threshold indicia of reliability, there is no basis to preclude the testimony.

Further, I am troubled by the majority's failure to make clear to the lower courts and litigants that there is a distinction between the proper role of the court as a *gatekeeper*, and the role of the *trier of fact*. Section 2955 imposes a gatekeeping function; it cannot mandate or permit the court to usurp the role of the trier of fact. Weighing the credibility of witnesses and determining which expert opinion is more persuasive are questions of fact for the jury, not ones to be usurped by the gatekeeping function of the court. The right to a jury trial, when demanded by a party in a civil action, is a constitutionally protected right.[10] This right cannot be usurped by legislative mandates.[11] Determining the credibility of a witness is always a question of fact to be decided by the trier of fact.[12] I decline to interpret the statute in the case before us in a manner contrary to constitutional constraints.

> A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

[10] Const 1963, art 1, § 14.

[11] *Whitson v Whiteley Poultry Co*, 11 Mich App 598; 162 NW2d 102 (1968).

[12] *Travelers Indemnity Co v Duffin*, 384 Mich 812 (1971).

I am also troubled by the lower courts' pejorative references to articles and publications being publicly available on the Internet, as well as the majority's assertion that plaintiff's literature was not peer reviewed. First, the fact that literature can be accessed on the Internet is not an indication that it is unreliable. This Court's opinions are available on a public website. Most published medical articles, studies, and journals are available on publicly accessible websites. It is the source of a publication that must be considered, not whether it is available on line. Two of the articles referred to as "website" literature are from the American Cancer Society. Second, while the majority asserts that plaintiff's literature was not peer reviewed, the statistics quoted in the American Cancer Society literature are from the AJCC, which is a source that both parties and the trial court acknowledged is a reliable source. The AJCC's statistics are peer reviewed by the medical community.

Moreover, I disagree that summary disposition was properly granted. Summary disposition has been granted in this matter without a reference by the trial court to plaintiff's second expert, Dr. Rainna Brazil, who allegedly supports her proximate causation theory. In granting the motion to dismiss, which I can only presume should have been entitled a motion for summary disposition, the trial court never mentioned or discussed Dr. Brazil. Further, the Court of Appeals never addressed Dr. Brazil, and recognized that the basis for the trial court's disposing of the case was not clear. I am unwilling to affirm the trial court's decision to grant summary disposition without an explanation by the trial court of the basis for the ruling. While I recognize that the majority has come to a conclusion regarding the admissibility of Dr. Brazil's testimony, I find it inappropriate to do so absent review of this issue

by the trial court or the Court of Appeals. On remand I would direct the trial court to set forth the basis for rejecting Dr. Brazil's testimony so it can be determined if summary disposition was appropriate.

Finally, the majority in this case opines that a reduced chance of survival is not a cognizable injury under MCL 600.2912a(2), citing *Wickens v Oakwood Healthcare Sys*, 465 Mich 53; 631 NW2d 686 (2001). *Wickens* held that the language of § 2912a(2) only allows recovery for injuries that have already been suffered, thus precluding any and all claims for loss of opportunity absent a present injury. I have serious concerns that *Wickens* failed to properly interpret § 2912a(2) and joined in the grant of leave to appeal in this case which asked the parties to brief whether *Wickens* was correctly decided. However, given the majority's holding, I find this issue to be premature and leave the exploration of this important issue to a future date.

IV. CONCLUSION

I respectfully dissent from the majority opinion, which holds that the trial court did not abuse its discretion by precluding plaintiff's expert witness's testimony. In serving in its gatekeeping role, a trial court is required to consider *all* factors enumerated in MCL 600.2955 before it strikes an expert witness, and it is an abuse of discretion for the trial court to fail to do so. In this case, the trial court reviewed only one § 2955 factor. The trial court precluded plaintiff's expert from testifying because plaintiff did not present medical articles on the growth rate of cancer in support of her position. By limiting its inquiry to only one enumerated criterion of MCL 600.2955, the trial court abused its discretion because it failed to consider *all* the indices of

reliability in MCL 600.2955. Because the majority ignores the plain language of MCL 600.2955, which mandates that a trial court review *all* the enumerated factors within § 2955, as well as this Court's clear directive in *Clerc*, I must respectfully dissent.

Accordingly, I would reverse the Court of Appeals judgment and remand this matter to the trial court for further proceedings consistent with this opinion.

WEAVER, J., concurred with HATHAWAY, J.

PEOPLE v HILL

Docket No. 138668. Argued January 13, 2010 (Calendar No. 7). Decided July 23, 2010.

Brian L. Hill was bound over to the Muskegon Circuit Court for trial on five counts of making or producing child sexually abusive material, in violation of MCL 750.145c(2), after images depicting child sexually abusive activities were found on his laptops and numerous recordable compact discs (CD-Rs). Defendant moved to quash the information, arguing that copying images or data to a CD-R does not rise to the level of making or producing child sexually abusive material and that the transfer of images from the Internet to his computer's hard drive and then to CD-Rs constituted nothing more than the storage of data, and therefore constituted only the knowing possession of that material under MCL 750.145c(4). The court, Timothy G. Hicks, J., denied the motion. The Court of Appeals, ZAHRA, P.J., and MURPHY and NEFF, JJ., affirmed, agreeing that defendant had made child sexually abusive materials. 269 Mich App 505 (2006). The Supreme Court denied defendant's application for leave to appeal, 477 Mich 897 (2006), as well as his motion for reconsideration, 477 Mich 1016 (2007). After unsuccessfully seeking relief in federal district court, defendant was convicted in a bench trial in the circuit court. The court of Appeals, SAWYER, P.J., and SERVITTO and M. J. KELLY, JJ., affirmed defendant's convictions in an unpublished opinion per curiam, issued February 19, 2009 (Docket No. 281055), but remanded for resentencing because of errors in scoring the sentencing guidelines. The Supreme Court granted defendant's application for leave to appeal. 485 Mich 911 (2009).

In an opinion by Justice MARKMAN, joined by Chief Justice KELLY and Justices CAVANAGH and HATHAWAY, the Supreme Court *held*:

A person who downloads child sexually abusive material from the Internet and copies the images to a CD-R may not be convicted of making or producing child sexually abusive material, in violation of MCL 750.145c(2), if there is no evidence that the person had a criminal intent to do something other than possess the CD-R for his or her own personal use, but may only be convicted of knowingly possessing that material, in violation of MCL 750.145c(4).

1. In MCL 750.145c, the Legislature established a three-tiered scheme of offenses and punishments: (1) a felony punishable by a maximum sentence of 20 years for a person who "arranges for, produces, makes, or finances" child sexually abusive material, (2) a felony punishable by a maximum sentence of 7 years for those who distribute or promote that material, and (3) a felony punishable by a maximum sentence of 4 years for those who knowingly possess that material. The three-tiered scheme of offenses and punishments reflects the Legislature's determination that those who distribute or promote child sexually abusive material are more morally and criminally culpable than those who knowingly possess it and that those who create or originate the material are more morally and criminally culpable than those who distribute or promote it or who knowingly possess it. Those who create or originate child sexually abusive material are punished more severely because they are the reason the prohibited images exist in the first place.

2. The pertinent language in MCL 750.145c(2) is "a person who arranges for, produces, makes, or finances" any child sexually abusive material. Consideration of the verbs "produces" and "makes" in light of their placement with "arranges for" and "finances" leads to the interpretation that one who produces child sexually abusive material is the person directly responsible for the creation or origination of the material and that one who makes child sexually abusive material is the person who is primarily involved in the creation or origination of the material.

3. Given that the terms "produce or makes" are best understood as primarily addressing those who are involved in the creation or origination of the material, and in light of the three-tiered scheme of offenses and punishments under the statute, it is untenable to conclude that downloading an existing image from the Internet and copying it to a CD-R for personal use constitutes making or producing child sexually abusive material, just as it would be unreasonable to characterize the conduct of a person who downloads songs, movies, television shows, music videos, or books from the Internet and copies them to a CD-R or other storage device as making or producing the song, movie, show, video, or book. MCL 750.145c(2) is primarily concerned with punishing those involved in the creation or origination of child sexually abusive material, not those who download and maintain such material for personal use.

Reversed in part; convictions vacated and case remanded for further proceedings.

Justice WEAVER, dissenting, would affirm defendant's convictions under MCL 750.145c(2) because he intentionally made copies

of child sexually abusive material. She agreed with Justice YOUNG that the majority opinion relieves a defendant of criminal responsibility for making copies of child sexually abusive material and creates an additional hurdle for the prosecution.

Justice YOUNG, joined by Justice CORRIGAN, dissenting, stated that MCL 750.145c(2) is not limited to punishing the original creator of child sexually abusive material. Rather, it expressly criminalizes making copies of that material without requiring the prosecution to prove what the defendant intended to do with the copies. The majority opinion relieves defendants of criminal responsibility for making copies of child pornography and creates an additional hurdle for the prosecution. MCL 750.145c(2) has two distinct clauses. The first clause punishes those who cause a child to engage in a sexual act for the purpose of producing child sexually abusive material, that is, the creators or originators of the material. The second clause sanctions arranging for, producing, making, or financing any child sexually abusive activity or child sexually abusive material, which is "any depiction" of a child engaged in a sexual act, including a depiction on a computer storage device as well as any reproduction or copy of the depiction. Defendant produced or made a reproduction or copy of an electronic visual image or computer-generated image when he took the deliberate action of copying a file containing an illicit photograph to his hard drive and then took the additional, volitional steps of copying the image to his computer a second time as well as copying it to CD-Rs. Making even a single copy of child sexually abusive material violates MCL 750.145c(2).

CRIMINAL LAW — CHILD SEXUALLY ABUSIVE MATERIAL — MAKING OR PRODUCING CHILD SEXUALLY ABUSIVE MATERIAL.

A person who downloads child sexually abusive material from the Internet and saves the images to a recordable storage medium may not be convicted of a violation of MCL 750.145c(2), which prohibits "arrang[ing] for, produc[ing], mak[ing], or financ[ing]" child sexually abusive material, if there is no evidence that the person had a criminal intent to do something other than possess the image on the storage medium for his or her own personal use.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Tony Tague*, Prosecuting Attorney, and *Charles F. Justian*, Assistant Prosecuting Attorney, for the people.

Frank Stanley for defendant.

MARKMAN, J. This case presents the question whether a defendant who downloads child sexually abusive material from the Internet and "burns" that material to a CD-R[1] may be convicted of violating MCL 750.145c(2), which provides that any person who "arranges for, produces, makes, or finances . . . any . . . child sexually abusive material," is guilty of a felony punishable by imprisonment for not more than 20 years or whether the defendant may only be convicted of violating MCL 750.145c(4), which makes the knowing possession of child sexually abusive material a felony punishable by imprisonment for not more than 4 years.

The Court of Appeals held that a defendant, even if his intent in burning the prohibited images to a CD-R was to retain those images for personal use, may be convicted of the 20-year felony under MCL 750.145c(2). We respectfully disagree. MCL 750.145c has a graduated scheme of offenses and punishments. It punishes (1) those who are responsible for the *origination* of child sexually abusive material (a 20-year felony), (2) those who are responsible for the distribution and promotion of the prohibited material (a 7-year felony), and (3) those who are responsible for the knowing possession of the prohibited material (a 4-year felony). From these three tiers of offenses and punishments, we conclude that the Legislature did not intend the imposition of the same maximum punishment on a person who downloads a prohibited image from the Internet and burns it to a CD-R for personal use as on the person who is responsible in the first instance for the creation and

[1] CD stands for "compact disc." A CD-R (compact disk-recordable) is a blank compact disc that an individual can purchase and onto which pictures, movie or video files, and various other digital images, information, and data can be "burned," or saved permanently, through the use of a computer. One definition of the term "burn" is "to record data on (a compact disc)." *Random House Webster's College Dictionary* (2001).

existence of the pornographic images of minors. The person who is responsible for bringing the prohibited images into existence is obviously more morally, and under the statute, more criminally, culpable than the person who downloads an image and saves it to another medium for personal use.

We hold that when the terms "produces" and "makes" in MCL 750.145c(2) are construed in accordance with their immediately surrounding text and with a view toward the statute's overall organization, including a graduated scheme of offenses and punishments, a defendant may not be convicted of the 20-year felony when there is not proof beyond a reasonable doubt that he had a criminal intent to do something other than possess the CD-Rs for his own personal use. Just as a person who downloads a song from the Internet and burns it to a CD-R is not considered to have produced or made a song, so a person who burns a prohibited image to a CD-R for his personal use has not produced or made the image.

It is clear that the Legislature intended only that defendant could be convicted of the 4-year felony of knowingly possessing child sexually abusive material under MCL 750.145c(4). Those who copy or duplicate *existing* prohibited images for personal use do not produce or make child sexually abusive material under MCL 750.145c(2); rather, they are only in possession of it. MCL 750.145c(2) is primarily applicable to those who *originate* child sexually abusive material. Therefore, we reverse in part the judgment of the Court of Appeals, vacate defendant's convictions under MCL 750.145c(2), and remand for further proceedings not inconsistent with this opinion.[2]

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[2] Defendant was also convicted of five counts of using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(f), and three counts

I. FACTS AND HISTORY

As relevant here, defendant was charged with five counts of "arrang[ing] for, produc[ing], mak[ing], or financ[ing]" child sexually abusive material, in violation of MCL 750.145c(2), after a search of his two laptop computers and approximately 50 CD-Rs found in his bedroom. After being bound over for trial, defendant moved to quash the information with regard to these charges, arguing that the burning or saving of images or data to a CD-R does not rise to the level of producing or making child sexually abusive material. He further argued that the transfer of images from the Internet to his computer's hard drive and then to the CD-Rs constituted nothing more than the storage of data. Thus, he contended that he should only be charged with "knowingly possess[ing]" child sexually abusive material under MCL 750.145c(4) because he had not originated the prohibited images.

The trial court denied this motion, stating:

> [T]he only question, one of apparent first impression, is whether the act of downloading the image from the internet and "burning" (recording) the image to a CD constitutes the "making" or "production" of such materials.
>
> The dictionary . . . contains several definitions of the word "make." Among them are:
>
> To cause to exist, occur, or appear; create; to fit, intend, or destine by, or as if by creating; to bring into being by forming, shaping, or altering material; to put together from components.
>
> Applying this definition here, the "bottom line" is that, after the requisite, mechanical, and technical functions, some things exist (CD-Rs with these images on them) that did not exist prior to that act.

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of installing a device for observing, photographing, or eavesdropping in a private place, MCL 750.539d. These convictions are not before us.

Defendant appealed by leave granted, and the Court of Appeals affirmed in a published opinion, stating:

> The term "make" is defined as follows: "to bring into existence by shaping, changing, or combining material[.]" *Random House Webster's College Dictionary* (2001). Defendant acquired child sexually abusive material through the Internet, and he shaped, formed, and combined the material through placement of various selected pictures, videos, and images onto specific CD-Rs, bringing into existence something that had not previously existed, i.e., distinctly created and compiled child-pornography CD-Rs. [*People v Hill*, 269 Mich App 505, 518; 715 NW2d 301 (2006).]

The Court of Appeals also stated:

> Regardless of whether defendant's actions are viewed as copying the original photographs and videos, or copying electronic or computer visual images of the downloaded photographs and videos, the fact remains that copies and reproductions were made. Defendant's argument that use of the CD-Rs was just a mechanism by which to store possessed child pornography ignores the reality that the storing of the images was accomplished through the copying or duplication of already existing images that continued to exist after the images were burned onto the CD-Rs. The language of the statute is clear and unambiguous. The decision by the Legislature to specifically include reproductions or copies in defining "child sexually abusive material," which term is then incorporated into [MCL 750.145c(2)], leaves no room for a contrary judicial construction. [*Id.* at 517.]

We denied defendant's application for leave to appeal, with three justices indicating that they would grant leave to appeal. 477 Mich 897 (2006). We also denied defendant's motion for reconsideration, with three justices indicating that they would grant reconsideration and, on reconsideration, would grant leave to appeal.[3] 477 Mich 1016 (2007). Defendant next unsuccessfully

[3] See also *People v Hartman*, 480 Mich 1058 (2008), in which three justices indicated that they would grant leave to appeal to consider

sought relief in federal court. *Hill v People*, 2007 US Dist LEXIS 47700 (WD Mich, July 2, 2007, Case No 1:07-CV-271), and then proceeded to a bench trial. As relevant to the convictions under review, the evidence demonstrated that defendant had downloaded and copied to CD-Rs five specific images depicting child sexually abusive material.[4] The trial court found defendant guilty of five counts of violating MCL 750.145c(2), stating:

> The proofs show a repeated pattern of taking an image off the computer and moving it or saving it somewhere else where it did not previously exist. . . . Mr. Hill is guilty of . . . making, producing etc. child sexually abusive materials . . . [that] were created by affirmative action by the user.

Defendant appealed in the Court of Appeals, which affirmed his convictions and declined his request to reconsider its earlier published decision holding that the downloading and burning of child sexually abusive material to a CD-R constitutes making or producing child sexually abusive material. *People v Hill*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2009 (Docket No. 281055).[5] This Court then granted leave to appeal. 485 Mich 911 (2009).

II. STANDARD OF REVIEW

Whether conduct falls within the scope of a penal

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whether someone who downloaded child sexually abusive material from the Internet and saved it to a "flash drive" could properly be convicted of violating MCL 750.145c(2).

[4] Although the convictions under review pertained only to 5 images, the evidence here showed that defendant possessed 50 CD-Rs containing approximately 100,000 images and that an estimated 70 percent of these constituted child sexually abusive material.

[5] The Court of Appeals did, however, identify errors in the scoring of defendant's offense variables under the sentencing guidelines and remanded for resentencing.

statute, in this case MCL 750.145c(2), is a question of statutory interpretation that we review de novo. *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001).

III. RULES OF INTERPRETATION

MCL 750.145c is a relatively lengthy statute. Most relevant for present purposes are subsections (2) through (4), which provide:

> (2) A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material[6] is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a

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[6] MCL 750.145c(1)(m) defines "child sexually abusive material" as follows:

> "Child sexually abusive material" means any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act; a book, magazine, computer, computer storage device, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording.

child, or that person has not taken reasonable precautions to determine the age of the child.

(3) A person who distributes or promotes, or finances the distribution or promotion of, or receives for the purpose of distributing or promoting, or conspires, attempts, or prepares to distribute, receive, finance, or promote any child sexually abusive material or child sexually abusive activity is guilty of a felony, punishable by imprisonment for not more than 7 years, or a fine of not more than $50,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. This subsection does not apply to the persons described in section 7 of 1984 PA 343, MCL 752.367.

(4) A person who knowingly possesses any child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $10,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.

The issue here is how the terms "produces" and "makes" in subsection (2) should be interpreted.

The rules of statutory construction are well established. As this Court explained in *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420-422; 662 NW2d 710 (2003):

When construing a statute, the Court's primary obligation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the stat-

> ute. If the language of the statute is unambiguous, the Legislature is presumed to have intended the meaning expressed.
>
> * * *
>
> The doctrine of *noscitur a sociis*, i.e., that "a word or phrase is given meaning by its context or setting," affords us assistance in interpreting [statutes]. . . .
>
> . . . "[Statutes] exist[] and must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute . . . ." "[W]ords in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole." Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. "In seeking meaning, words and clauses will not be divorced from those which precede and those which follow." "It is a familiar principle of statutory construction that words grouped in a list should be given related meaning." [Citations omitted.]

We are also instructed to give undefined statutory terms their plain and ordinary meaning unless the undefined word or phrase is a term of art.[7]

The Legislature did not specifically define the terms "produces" or "makes." Therefore, it is appropriate to consider dictionary definitions to discern the meanings of these terms. *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998).

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[7] MCL 8.3a provides:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

From all of this, it is clear that what a court should do in construing a term in a criminal statute for which there are a variety of potential definitions is to determine from among those definitions which the Legislature most reasonably intended by the specific context in which the term is found.

IV. APPLICATION

This Court first considered MCL 750.145c in *People v Tombs*, 472 Mich 446; 697 NW2d 494 (2005). In *Tombs*, the defendant turned in a company laptop computer, and more than 500 images of child pornography were found on it in a file location not readily or easily locatable. The defendant was convicted of violating MCL 750.145c(3), promoting or distributing child sexually abusive material. This Court first recognized the longstanding principle that a criminal statute is presumed to include a criminal intent or *mens rea* absent an express or implied indication that the Legislature wanted to dispense with it. *Id*. at 456-457 (opinion by KELLY, J.); *id*. at 466 (TAYLOR, C.J., concurring).[8] We then held that the criminal intent to possess child sexually abusive material was not the same as the criminal intent to promote or distribute child sexually

[8] As explained in *People v Beaudin*, 417 Mich 570, 574; 339 NW2d 461 (1983): "Performance of the physical act proscribed in the statute is not enough to sustain a conviction. The act must be coincident with an intent to bring about the particular result the statute seeks to prohibit." It is also the case that common-law defenses are "read into" criminal statutes. See, e.g., *United States v Panter*, 688 F2d 268, 271 (CA 5, 1982), which explained that a legislature's

> failure to provide specifically for a common-law defense in drafting a criminal statute does not necessarily preclude a defendant charged with violating that statute from relying on such a defense. This conclusion is unassailable; statutes rarely enumerate the defenses to the crimes they describe.

abusive material. *Id*. at 448 (opinion by KELLY, J.). We affirmed the decision of the Court of Appeals that reversed the defendant's conviction for distributing or promoting child sexually abusive material, stating: "Although defendant intended to distribute the laptop containing child sexually abusive material to his former employer, no evidence suggests that he distributed the material with a criminal intent." *Id*. at 459-460.

The lead opinion in *Tombs* examined MCL 750.145c and proceeded to summarize the Court's position as follows: "The Legislature expressly separated the crimes of production of child sexually abusive material, distribution or promotion of the material, and simple possession." *Id*. at 464. It further stated:

> Possession is not the same as promotion. The prosecutor blurs the two, asserting that by obtaining the material from the Internet, defendant promoted it. To accept that argument, this Court would have to ignore the express language of the Legislature that created a graduated scheme of offenses and punishments regarding child sexually abusive material. [*Id*.][9]

Tombs recognized that MCL 750.145c clearly establishes three tiers in its graduated scheme of both offenses and punishments. Those who are involved in the production of child sexually abusive material are subject to a maximum sentence of 20 years, those who

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[9] Accord *People v Adkins*, 272 Mich App 37, 40; 724 NW2d 710 (2006) ("We conclude that the language of [MCL 750.145c(2)] clearly and unambiguously imposes criminal liability on three distinct groups of 'person[s],' provided that at the time of their actions, the persons met the requisite knowledge element."). See also *People v Ward*, 206 Mich App 38, 42-43; 520 NW2d 363 (1994), in which the Court of Appeals observed that MCL 750.145c(2) "focuses on protecting children from sexual exploitation, assaultive or otherwise" and that the purpose of the statute is "to combat the use of children in pornographic movies and photographs, and to prohibit the production and distribution of child pornography."

distribute or promote such material are subject to a maximum sentence of 7 years, and those who knowingly possess such material are subject to a maximum sentence of 4 years.

There is an inherent logic to this scheme. The Legislature reasonably concluded that those who distribute or promote child sexually abusive material are more morally and criminally culpable than those who possess such material and that those who create or originate such material are the most morally and criminally culpable. The case at bar requires us to determine whether defendant's act of downloading and burning child sexually abusive material to CD-Rs falls within the top tier or the bottom tier; it is not argued by either party that it falls within the middle tier, and we also do not believe that it does, for what defendant has done does not constitute the promotion or distribution of child sexually abusive material. That is, unlike *Tombs,* this case does not involve determining whether a defendant's conduct falls within adjacent tiers and whether it is punishable as a 4-year or 7-year felony. Rather, this case involves determining whether defendant's conduct falls within the *lowest* or the *highest* tier and thus whether defendant has committed a 4- or 20-year felony.

We keep the graduated scheme of MCL 750.145c and the magnitude of the potential disparity in defendant's criminal liability in mind as we attempt to discern the most reasonable definitions for "produces" and "makes" as used in MCL 750.145c(2). Again, the pertinent language of that subsection is "arranges for, produces, makes, or finances" any child sexually abusive material. On the basis of the previously stated principles, we must consider MCL 750.145c *as a whole* in determining the meaning of "produces" and "makes" in this statutory context. Pursuant to the maxim of *nosci-*

tur a sociis, these words must be viewed in light of the surrounding terms employed in MCL 750.145c(2), i.e., "arranges for" and "finances," because the latter supply guidance regarding what the former mean in context.

"Makes" and "produces" are used in MCL 750.145c(2) as verbs that may communicate a variety of different concepts. The Court of Appeals adopted the first definition of "make" in the *Random House Webster's College Dictionary* (2001)—"to bring into existence by shaping, changing, or combining material[.]" *Hill*, 269 Mich App at 518. But this is only one of many definitions for "make" in that dictionary. The second and third definitions are as follows: "2. to cause to exist or happen . . . . 3. to cause to become . . . ." The same dictionary also provides the following relevant definitions of "produce": "1. to cause to exist; give rise to . . . . 2. to bring into existence . . . . 7. to bring (a play, movie, opera, etc.) before the public." We also consider the surrounding words, "arranges for" and "finances." The dictionary offers the following relevant definitions of "arrange" as in "arranges for": "3. to prepare or plan . . . . 5. to make plans or preparations . . . ." For "finances," it offers the following relevant definition: "3. to supply with money or capital . . . ."

The definitions of "arranges for," "finances," and "produce" afford obvious insight into how the adjoining term "make" should be interpreted. When these four words are viewed together, their relatedness or common meaning becomes increasingly apparent—each constitutes a verb selected by the Legislature to communicate that persons included within this subsection are those who are somehow responsible for the creation or origination of child sexually abusive material. Those who arrange for child sexually abusive material are involved at the front end of the process by identifying and

coordinating the participants, equipment, and locations. That is, the arranger has undertaken actions that lead to the actual production of the child sexually abusive material. Those who finance child sexually abusive material provide funding that leads to the same result. The terms "arranges for" and "finances" suggest that the most reasonable understanding of "produce" is "to bring (a play, movie, opera, etc.) before the public." In other words, one should envision a producer as a person similar to the producer of a play, movie, or opera who is directly responsible for the creation or origination of a particular production, in this case child sexually abusive material. "Produce" refers to the conduct of those persons but for whom the production (the material) would not exist in the first place, i.e., those who have transformed an idea into a reality. Without those who have arranged for, financed, or produced, there would be no child sexually abusive material at all.

This leaves the term "makes." Given the related definitions and understandings of "arranges," "produces," and "finances," we believe that "makes" should be interpreted in a similar manner as meaning "to cause to exist or happen" or "to cause to become."[10] That is, "makes" should be interpreted in the common fashion as referring to someone who is primarily involved in the creation or origination of the child sexually abusive material.[11]

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[10] While we agree with the first part of the definition adopted by the Court of Appeals, "to bring into existence," we reject the second half of that definition, "by shaping, changing, or combining material," *Hill*, 269 Mich App at 518, because it adds a limiting dimension to "makes" that is inconsistent with the meanings of the surrounding terms, "arranges for," "produces," or "finances."

[11] This understanding of "produces" and "makes" is consistent with the opening clause of MCL 750.145c(2), which describes other individuals subject to punishment under that subsection: "[a] person who persuades,

When the terms "produces" and "makes" are understood in this light, it is simply untenable to conclude that downloading an existing image from the Internet and burning it to a CD-R for personal use constitutes producing or making child sexually abusive material under MCL 750.145c(2). While such conduct certainly constitutes proof of knowing possession of such material, it does not constitute sufficient proof of the making or producing of that material. Thus, when we consider the statute as a whole, especially the maxim of *noscitur a sociis* in conjunction with the graduated scheme of offenses and punishment, we conclude that MCL 750.145c(2) is primarily concerned with punishing those who are involved in the creation or origination of child sexually abusive material and not those who download and maintain that material for personal use.[12]

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induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material[.]" The terms used in the opening clause clearly refer to those who have had *direct* contact with a minor, either through the minor's recruitment or through the minor's "performance" in the prohibited material. While those identified in the opening clause definitely are persons who directly deal with the children, those identified in the second clause, the arrangers, producers, makers, and financers, *may* also on frequent occasion have direct contact with the children.

[12] Indeed, we note that before the instant Court of Appeals opinion, all published Michigan caselaw only applied the portion of MCL 750.145c(2) concerning a person who "produces" or "makes" child sexually abusive material to those involved in the creation or origination of prohibited images. See, e.g., *People v Heim*, 206 Mich App 439; 522 NW2d 675 (1994) (defendant who photographed his 16-year-old niece), *People v Hack*, 219 Mich App 299; 556 NW2d 187 (1996) (defendant who coerced two children to engage in sexual acts that he videotaped), *People v Riggs*, 237 Mich App 584; 604 NW2d 68 (1999) (defendant who photographed and videotaped four young girls), *People v Harmon*, 248 Mich App 522, 526-528; 640 NW2d 314 (2001) (defendant who photographed two minors engaged in sexual acts), and *People v Wilkens*, 267 Mich App 728; 705 NW2d 728 (2005) (defendant who recorded himself and two minors engaging in sexual acts). Thus, those who originate or create child

The Court of Appeals held that defendant had made child sexually abusive material, in violation of MCL 750.145c(2), because he brought into existence something that had not previously existed. We respectfully disagree with this analysis. While the burned *CD-Rs* may not have previously existed, this does not mean, in our judgment, that defendant made child sexually abusive material within the scope of MCL 750.145c(2). The fact that defendant placed prohibited images from different websites onto CD-Rs does not by itself rise to the level of making child sexually abusive material within the scheme enacted by the Legislature.[13] Rather, such a reading of the statute can only be reached if one fails to give full consideration to the statute's graduated scheme of offenses and punishments and if the term "makes" is read in isolation and without considering the immediately surrounding words. When "makes" is

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pornography are guilty of violating MCL 750.145c(2), even if they only intend to keep the material for personal use.

[13] In *Tombs*, we held that the criminal intent to knowingly possess child sexually abusive material was not the same as the criminal intent to promote or distribute child sexually abusive material. *Tombs*, 472 Mich at 448 (opinion by KELLY, J.). Similarly, we hold here that the criminal intent to knowingly possess child sexually abusive material, when the possession is accomplished by burning a CD-R for the purpose of possessing the prohibited images and not for future distribution or promotion, does not establish the criminal intent to produce or make child sexually abusive material. In *Tombs*, we also held that one who handed a computer containing child pornography to someone else did not distribute child pornography, even though the act of handing a computer to another person would satisfy a dictionary definition of "distribute." The Court held that the act of intentionally handing a computer over to another was insufficient by itself to constitute distributing child pornography. Rather, there had to be some criminal intent to distribute, and the defendant in *Tombs* did not possess that intent. Similarly, defendant here burned CD-Rs, and these acts by themselves did not constitute making or producing child pornography because there was no proof beyond a reasonable doubt that this was defendant's intent when he burned the CD-Rs for his personal use.

given a meaning reasonably compatible with those companion terms, its most reasonable interpretation pertains to the creation or origination of the child sexually abusive material in the first instance.

We believe our conclusion is reinforced by consideration of the manner in which most persons ordinarily think about other types of Internet downloading. It is common today for computer users to legally, and sometimes illegally, download songs, movies, television shows, music videos, and books from the Internet. When such materials are subsequently burned to a CD-R or recordable DVD or some other storage device, as they often are, few would be inclined to characterize that conduct as the making or producing of that song, movie, television show, music video, or book. Such a characterization would, to say the least, be strained and incompatible with the "common and approved usage of the language . . . ." MCL 8.3a.[14]

The Court of Appeals and the dissents focus on the fact that MCL 750.145c(1)(m) defines "child sexually abusive material" as "any depiction," including any "reproduction [or] copy," of a "computer-generated image, or picture . . . ." Thus, they read the prohibition

[14] We further believe the Court of Appeals' analysis produces highly anomalous results. Consider two persons, one of whom downloads and burns child sexually abusive material to a CD-R for his personal possession and one of whom takes that CD-R and attempts to sell it. Under the dissents and the Court of Appeals' decision, the downloader has committed a 20-year felony while the seller has committed only a 7-year felony. We do not believe that this is consistent with the Legislature's intentions because the three tiers of MCL 750.145c instead suggest that the distributor is more criminally culpable than the downloader who, in order to obtain possession, has burned the prohibited images to a CD-R. When the Legislature has deemed the maker more culpable than the distributor, we disagree with the dissents' broad interpretation of "make," which we believe casts a far broader net than intended by the Legislature.

against making or producing child sexually abusive material in conjunction with the fact that a reproduction or copy of a computer-generated image falls within the ambit of prohibited images in concluding that burning a prohibited image to a CD-R constitutes making prohibited material. Again, we respectfully disagree. If an image constitutes child sexually abusive material, this is true without regard to whether a defendant is someone who arranges for, produces, makes, or finances, or who distributes or promotes, or who only knowingly possesses. In other words, once it is determined that an image constitutes child sexually abusive material, it must then be determined into which of the statute's three tiers the defendant's conduct falls.

The fact that the definition of "child sexually abusive material" in MCL 750.145c(1)(m) includes copies of computer-generated images does not provide particular insight into what either "makes" or "produces" means in MCL 750.145c(2). Rather, the fact that child sexually abusive material includes not just originals but also copies simply communicates that a person may be charged with knowingly possessing a copy of a computer-generated image, or with promoting or distributing a copy of a computer-generated image, or with arranging for, producing, making, or financing a copy of a computer-generated image, in a manner indistinguishable from the person engaged in those same activities in connection with an original image.

Defendant here was convicted of five counts of producing or making child sexually abusive material on the basis of 5 specific images. A review of his 2 laptop computers and 50 CD-Rs revealed 5 copies of one of the images and fewer, or no, duplicates of the other images that sustained his convictions. The fact that 5 copies of a single prohibited image were found after searching 52

different locations containing approximately 70,000 images is insufficient, in our judgment, in the absence of other evidence to establish beyond a reasonable doubt a criminal intent on defendant's part to produce or make this material.[15] Since a common definition of "child sexually abusive material" applies to all three tiers of MCL 750.145c, we conclude that the Legislature did not intend that burning, or copying, images to a CD-R would have any special significance when determining which particular tier had been violated by that burning or copying.

We are persuaded that the Legislature did not intend to impose the same maximum penalty on a person who downloads a prohibited image from the Internet and burns it to a CD-R for personal use as on the person who is responsible for the creation of the pornographic images of children. The latter is obviously more morally and criminally culpable than the person who downloads an image and saves it to another medium for personal use; at least, this is what the Legislature, in our judgment, has communicated by its enactment of MCL 750.145c. Those who arrange for, produce, make, or finance child sexually abusive material are punished more severely because they are the reason the images exist in the first place.

While the Court of Appeals' definition of "makes" has some dictionary support, its analysis was incomplete because it did not consider the statute as a whole and because it did not consider that "makes" should be

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[15] Cf. *People v Peterson*, 63 Mich App 538, 548; 234 NW2d 692 (1975):

> [T]he quantity of [marijuana] seeds possessed was so slight that we are constrained to find that reasonable jurors could not infer the intent to deliver from that quantity. There was no other evidence on the question of defendant's intent. It was therefore error for the trial judge to deny defendant's motion for a directed verdict of acquittal on the charged offense.

given a meaning compatible with its surrounding words. When properly construed, the terms "produces" and "makes" are best understood as addressing those who are involved in the creation or origination of child pornography, and not those who download and burn a CD-R of prohibited images for personal use.

V. RESPONSE TO THE DISSENTS

The dissents obscure the issue before the Court by emphasizing the large quantity of prohibited images found in defendant's possession. There is no doubt that defendant possessed a very considerable amount of child sexually abusive material. However, the question before this Court is not whether defendant was a committed user of child sexually abusive material—he was—or whether he criminally violated MCL 750.145c—he did—but whether burning even a single prohibited image to a CD-R constitutes producing or making child sexually abusive material in violation of MCL 750.145c(2).[16]

The dissents fail to adequately consider the statute's overall organization and graduated scheme of offenses and punishments. As a consequence, the dissents end up blurring, and eventually ignoring altogether, the very distinct criminal definitions and requisite states of mind necessary to obtain a conviction under MCL 750.145c when they interpret "makes" as encompassing the conduct of a person who burns a prohibited image to a CD-R for the purpose of storing, or making permanent, his possession of that image. Contrary to Justice

[16] Even Justice YOUNG recognizes this in asserting in his dissent that "[m]aking even a *single* copy of child pornography violates the statute." Whether there is a large number of prohibited images in defendant's possession may well be a factor for the trial court to consider at sentencing; however, this does not transform a violation of subsection (4) of MCL 750.145c into a violation of subsection (2) of that statute.

YOUNG's assertion that the majority "would prefer that the statute cease" after its most severe violation has been defined, it is the dissenting justices who inappropriately read this language in isolation, ignoring the overall structure and organization of the statute, ignoring the distinct offenses that the statute defines, and ignoring the gradations of punishment that the statute establishes. It is the dissents that distort what is manifest in the statute—that distinctions are to be made among criminal violators, distinctions predicated on whether the violator has created or originated the material, distributed the material, or merely possessed the material.

The dissents would compress nearly every criminal violator into the category of "creator" or "originator" on the basis of their having made a *copy* of material created or originated by others. Thus, to the dissenters, there is no distinction, as we believe is manifest in the statute, between a person who downloads and burns child sexually abusive material to a storage device and the person who procures the seven-year-old girl, pays her parents, and then produces a film or image in which she is depicted in sexual poses.[17] However, these are distinctions that the Legislature has made, and they are reasonable distinctions. The dissents notwithstanding, we do not "relieve[] . . . of criminal responsibility" the computer downloader when we recognize that the Legislature drew *distinctions* in MCL 750.145c between types of misconduct. No criminal responsibilities are being "relieved" when legislative distinctions are respected and the computer downloader of prohibited material is made subject to a 4-year term of imprison-

[17] The question of what offense a mass producer of copies of a single prohibited image would be guilty is not before us, and we do not address it in this case.

ment and the distributor of the same material is made subject to a 7-year term of imprisonment instead of the 20-year term of imprisonment reserved for the producer of the material, but for whose actions the material would never have existed in the first place. The Legislature is entitled to draw distinctions in its definitions of criminal activity, and this Court is obligated as a general matter to abide by those distinctions.

Given that various things can be downloaded from the Internet and burned to other media, the dissents' strained interpretation of the term "makes" would have consequences far beyond the instant case. A person can download—legally or illegally—songs, books, music videos, television shows, or movies from the Internet and burn them to another medium such as a CD-R or recordable DVD. Yet virtually no one beyond the dissenting justices would consider such a person to have "made" or "produced" those songs, books, music videos, television shows, or movies. The legal or illegal downloader of *Star Wars* is not the equivalent of George Lucas, the legal or illegal downloader of *The Da Vinci Code* is not the equivalent of Dan Brown, and the legal or illegal downloader of the *Sgt. Pepper's Lonely Hearts Club Band* album is not the equivalent of John Lennon or Paul McCartney. Even if these downloaders preserve the materials on a CD or DVD, they have not "made" those movies, "made" those books, or "made" that music in the same way as the creators of the materials.[18] Similarly, we are satisfied that a person who burns a prohibited image to a CD-R or recordable DVD for his

[18] That the illegal downloading and burning of a song, movie, or book may constitute a violation of federal copyright law, as Justice YOUNG asserts, *post* at 692 n 8, bears little relevance to whether a person who downloads and burns for personal use a song, movie, or book and thereby infringes on the copyright is making or producing the song, movie, or book under MCL 750.145c(2).

personal use is not the equivalent of the person who procured the child, placed the cameras in front of her, and created or originated child sexually abusive material. While both are criminally liable, they are liable under different sections of the statute.

Indeed, under the dissents' interpretations, one might argue that someone who only *viewed* a prohibited image on a computer screen is guilty of making child pornography, given that computers themselves automatically store viewed images in temporary files. In other words, if Justice YOUNG genuinely believes that burning even a single prohibited image to a CD-R always constitutes making child pornography because it increases "the net amount of child pornographic images in existence," it would seem that consistency would require that a defendant who is merely *aware* of such temporary files would also be guilty of making child sexually abusive material whenever he views those images.

Finally, the dissents also assert that the majority has created "out of whole cloth" an "additional hurdle" by requiring proof of a defendant's intent. This is plainly incorrect. There is nothing at all remarkable in a court's reading a criminal intent into a criminal statute, given that such statutes are generally presumed to include a criminal intent. See *Morissette v United States*, 342 US 246; 72 S Ct 240; 96 L Ed 288 (1952); *Staples v United States*, 511 US 600; 114 S Ct 1793; 128 L Ed 2d 608 (1994); *Tombs*, 472 Mich at 452-456 (opinion by KELLY, J.); *id.* at 465-468 (TAYLOR, C.J., concurring). Absent any state-of-mind requirement, a wife who transported her husband's laptop to the police station because she suspected that it contained child sexually abusive material would herself arguably be a possessor and distributor of the material. See *Tombs*, 472 at 458-459 (opinion by KELLY, J.). Similarly in this

case, absent any state-of-mind requirement, a wife who downloaded a child sexually abusive image from her husband's computer and brought it to the police would herself run the risk of being characterized as a maker of the material under the dissents' interpretations of MCL 750.145c. Contrary to the dissents, it does not create an "additional hurdle" to prosecutions, or create a new statute "out of whole cloth," to require proof of a criminal intent in a criminal statute.

VI. CONCLUSION

A defendant who downloads child sexually abusive material from the Internet and burns the images to a CD-R, when there is no evidence the defendant had a criminal intent to do something other than possess the CD-R for his own personal use, may not be convicted of violating MCL 750.145c(2), which makes it a 20-year felony for any person who "arranges for, produces, makes, or finances" "any child sexually abusive material . . . ." Rather, that person is properly convicted of knowing possession of child sexually abusive material in violation of MCL 750.145c(4), a 4-year felony. The three tiers of offenses and punishments in MCL 750.145c compellingly indicate the Legislature did not intend to impose the same maximum penalty on a person who downloads a prohibited image from the Internet and burns it to a CD-R for personal use as on a person who is involved in the creation or origination of child sexually abusive material. Therefore, we reverse in part the judgment of the Court of Appeals, vacate defendant's convictions under MCL 750.145c(2), and remand for further proceedings not inconsistent with this opinion.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., concurred with MARKMAN, J.

WEAVER, J. (*dissenting*). I dissent from the majority opinion, which reverses in part the judgment of the Court of Appeals and vacates defendant's convictions under MCL 750.145c(2). I would affirm defendant's convictions under MCL 750.145c(2) because defendant intentionally made copies of child sexually abusive material.

In this case, police officers obtained two laptop computers and numerous recordable compact discs from defendant's home containing approximately 70,000 to 80,000 pornographic images of boys ranging in age from "toddlers to teens." Within defendant's immense collection of pornographic images, authorities found multiple copies of a single pornographic image. The copies created the basis for charging defendant with making child sexually abusive material.

I agree with Justice YOUNG's statement in his dissent: "[T]he majority opinion relieves a defendant of criminal responsibility for making copies of child pornography 'for personal use' and creates out of whole cloth an additional hurdle for those prosecuting individuals who make child pornography . . . ."

YOUNG, J. (*dissenting*). In this case, defendant *admitted* making 50 recordable compact discs (CD-Rs) containing approximately 70,000 to 80,000 pornographic pictures depicting boys from "toddlers to teens," as well as videos depicting 12- to 13-year-old boys engaged in sexual acts. Within this compendious library of child pornography, *multiple* copies of one *particular* pornographic image formed the basis of the charges that were lodged against defendant for making child sexually abusive material.[1]

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[1] Five images, described as "Jeff0015.jpg," were created on defendant's laptop computer on October 5, 2002, and September 9, 2003, and found

The statute under which defendant was convicted plainly applies to *any* person who "makes" *copies* of child pornography.[2] Here, despite the uncontested proof that defendant made *numerous copies* of one particular pornographic image, the majority opinion reverses defendant's convictions because it contends that he *merely* intended to possess the copied images "for personal use" and because the majority opinion finds it "simply untenable" that the Legislature would punish "those who download and maintain that material for personal use" as harshly as those involved in the "creation or origination" of child pornography.

However, the straightforward language of the statute is not limited to the original creator of the child pornography. Rather, MCL 750.145c(2) explicitly criminalizes *making copies of child pornography,* without requiring the prosecution to prove what the defendant intended to do with the child pornography *once the crime had been committed*, that is, once the copies had been made. Because the majority opinion relieves a defendant of criminal responsibility for making copies of child pornography "for personal use" and creates out of whole cloth an additional hurdle for those prosecuting individuals who make child pornography, I vigorously dissent.

The relevant portions of MCL 750.145c provide:

> (2) A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, ***or*** a person who arranges

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on three separate CD-Rs created April 15, 2003, April 26, 2003, and June 11, 2003. The record also indicates that the Jeff0015.jpg file was attached to a November 28, 2003, e-mail. However, a computer forensic examiner testified that she was unable to determine whether defendant sent the e-mail or received it.

[2] MCL 750.145c(1)(m); MCL 750.145c(2).

> for, *produces, makes*, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or finance *any child sexually abusive activity or child sexually abusive material is guilty of a felony,* punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both . . . .
>
> (3) A person who distributes or promotes, or finances the distribution or promotion of, or receives for the purpose of distributing or promoting, or conspires, attempts, or prepares to distribute, receive, finance, or promote any child sexually abusive material or child sexually abusive activity is guilty of a felony, punishable by imprisonment for not more than 7 years, or a fine of not more than $50,000.00, or both . . . .
>
> (4) A person who knowingly possesses any child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $10,000.00, or both . . . . [Emphasis added.]

Also critical to interpreting the prohibition against making child pornography is the statutory definition of two relevant terms. "Child sexually abusive activity" is defined as "a child engaging in a listed sexual act,"[3] while "child sexually abusive material" is statutorily defined as

> *any depiction*, whether made or produced by *electronic*, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, *electronic visual image*, computer diskette, *computer or computer-generated image*, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act; a book, magazine, *computer, computer storage device*, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or *any reproduction,*

[3] MCL 750.145c(1)(*l*). When defendant created the images at issue, the definition was codified at MCL 750.145c(1)(k).

> *copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image,* or picture, other visual or print or printable medium, or sound recording.[4]

I agree with the majority opinion that MCL 750.145c establishes a graduated scheme of offenses and punishments. Broken down into its simplest terms, the statute provides a 20-year maximum sentence for those who make child pornography, a 7-year maximum sentence for those who distribute child pornography, and a 4-year maximum sentence for those who knowingly possess child pornography. It is the most severe sanction—the 20-year maximum sentence for those who make child pornography—that is at issue in this case.

MCL 750.145c(2) contains two distinct clauses, separated by the conjunction "or." The first clause covers a person who "persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material . . . ." This clause penalizes those who cause a child to *engage in* a sexual act for the purpose of producing child pornography. These are the "creators" or "originators" of the child pornography, those whom the majority opinion acknowledges as having "*direct* contact with a minor."

While the majority would prefer that the statute cease at the creators or originators of the child pornography, it does not. The second clause of MCL 750.145c(2) imposes criminal sanctions on a person who "arranges for, produces, *makes*, or finances . . . any child sexually abusive activity or *child sexually abusive*

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[4] MCL 750.145c(1)(m) (emphasis added). When defendant created the images, this definition was codified at MCL 750.145c(1)(*l*).

material . . . ."[5] (Emphasis added.) The latter portion of the statutory provision pertains to more than the child sexually abusive *activity*—significantly, it also relates to the child sexually abusive *material*. And that is a critical point in any effort to give full meaning to this statute.

As noted, "child sexually abusive material" is statutorily defined as *any depiction* of a child engaged in a sexual act. The statute uses broad language to cover a wide range of image formats, including images produced by electronic, mechanical, or other means, photographs, pictures, films, slides, videos, electronic visual images, books, and magazines. It also includes depictions on a computer diskette, a computer, or a computer storage device. Significantly, "child sexually abusive material" includes "*any reproduction, copy, or print* of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording."[6]

The definitive question in this case is quite simple: did defendant "produce [or] make" a "reproduction [or] copy" of an "electronic visual image," a "computer, or computer-generated image," or other "visual or print" medium when he took the deliberate action of copying "Jeff0015.jpg" to his computer hard drive? Unquestionably, the answer is *yes*. Defendant then took the additional, volitional steps of copying that image to his computer a *second* time, as well as copying it to several CD-Rs.

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[5] The statute also imposes criminal sanctions on one who "attempts or prepares or conspires to" arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material. MCL 750.145c(2).

[6] MCL 750.145c(1)(m).

The majority opinion's conclusion that MCL 750.145c(2) is "primarily concerned" with punishing "the creation or origination" of child pornography and "not those who download" it "for personal use" has no basis in the language of the statute. Indeed, the majority opinion takes great pains to avoid noting or giving significance to the fact that by downloading *and successively copying* child pornography, defendant intentionally produced or made a "reproduction [or] copy" of the same illicit pornographic image *five distinct times*.

Forced to acknowledge that the plain language of the statute says what it says and that "a person may be charged with" "producing, *making*, or financing a *copy* of a computer-generated image" in a "manner indistinguishable from the person" who created the original image, the majority opinion nevertheless proceeds to write the second clause of MCL 750.145c(2) out of existence by concluding that a defendant's ultimate plans for the child pornography negate the criminal prohibition regarding the method of acquisition.[7] Presumably, a defendant copying child pornography would only ever do so for one of two purposes—either to possess it for himself or to distribute it to others. Both of these purposes are reflected in MCL 750.145c(3) and (4), which provide for a 7-year maximum sentence for those who *distribute* child pornography and a 4-year maximum sentence for those who *possess* child pornog-

[7] Our criminal code is replete with examples of crimes that have heightened consequences because of a defendant's *chosen method of committing the crime*. For example, one who commits an assault is generally subject to a 93-day jail term for that misdemeanor. MCL 750.81. However, if the same assault is committed with a dangerous weapon, the crime is a four-year felony. MCL 750.82. If the analysis used in the majority opinion were applied to a felonious assault case, one would be forced to conclude that the defendant merely intended to commit a 93-day misdemeanor, not a four-year felony, despite the uncontested evidence that a dangerous weapon was used during the assault.

raphy. Under the majority opinion, despite the clear mandate imposing a 20-year sentence on those who make copies of child pornography, a defendant who makes copies of child pornography will *never* face more than either 4 or 7 years' imprisonment.

By holding that a defendant who makes copies of child pornography is guilty of only a 4-year felony when the copies are made "for personal use," the majority opinion essentially holds that defendant's criminal liability is limited to that of a mere possessor under MCL 750.145c(4). However, under the plain language of the statute, defendant is more than a mere possessor of child pornography. The majority's holding is especially hard to square with the fact that defendant took the additional, *volitional* steps of copying the images to his computer and separately to CD-Rs. I believe that these actions fall squarely under MCL 750.145c(2) rather than MCL 750.145c(4). As the Court of Appeals opinion noted, it is certainly possible to *possess* child pornography without copying or reproducing the images. Indeed, defendant could have satisfied his yen for "personal use" of child pornography and "merely possessed" the images by viewing them on the Internet without actually *copying* the images to his computer twice and recopying the images to several entirely separate compact discs. However, once he copied an image, he clearly violated MCL 750.145c(2). While the majority opinion maintains that the originator of child pornography is "obviously more morally" and "more criminally" culpable than the copier of child pornography, nothing in the statutory scheme indicates that the Legislature shares the majority's culpability assessment. Indeed, the clear language of the statute indicates that the Legislature has deemed that both are *equally culpable*, and certainly *more culpable* than a defendant who possesses an illicit image without having taken the additional step of copying it.

The majority opinion also indicates that defendant's making "5 copies of a single prohibited image" is insufficient as a matter of law to sustain defendant's convictions. This is a conclusion that has absolutely no basis in the text of the statute. It is unclear to me why making five copies of an identical pornographic image of a minor is insufficient to sustain defendant's convictions because the *entirety* of MCL 750.145c(2) contains no numerical minimum requirement concerning copies of child pornography. Making even a *single* copy of child pornography violates the statute. The reason the majority opinion makes no effort to explain the calculus involved in determining that making five copies is insufficient is because it simply cannot justify such a conclusion.

The majority opinion runs far afield in responding to this dissent—and naturally so because the statutory language is clear and the majority is forced to strain in order to justify its conclusion. Central to the majority opinion's argument is its false conclusion that MCL 750.145c(2) is limited to the *originator* of child pornography. Thus, only those defendants having "*direct* contact with a minor" may be charged with violating MCL 750.145c(2). Not surprisingly, the majority opinion gives absolutely *no meaning* to the fact that the statute also encompasses those who *make copies* of child pornography, not merely those who "procured the child" and "placed the cameras in front of her."

While the hyperbole comparing child pornography to downloading materials from the Internet in violation of federal copyright laws certainly makes for entertaining reading, it is equivalent to comparing apples to orangutans. The federal copyright laws encompass those who willfully infringe a copyright, which includes making

copies of the creator's copyrighted material.[8] By including a "reproduction [or] copy" of pornographic child images in the definition of "child sexually abusive material," *the very material prohibited* under MCL 750.145c(2), the Legislature has unambiguously indicated that one need not be the Cecil B. DeMille of child pornography in order to run afoul of MCL 750.145c(2) for "mak[ing]" child sexually abusive material.

I find nothing vexing, much less "simply untenable," about our Legislature's decision to place an increased sanction on defendants who *make copies* of child pornography, thereby increasing the net amount of child pornographic images in existence. Because there is no question that defendant intentionally made multiple copies of child pornography, his convictions were proper and should be affirmed. Because the majority opinion concludes otherwise, and because it creates additional hurdles to the prosecution of those who copy child pornography, I dissent.

CORRIGAN, J., concurred with YOUNG, J.

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[8] Title 17 of the United States Code establishes a creator's intellectual property rights in original works. 17 USC 102(a). The owner of the copyright has "the exclusive rights to do and to authorize . . . to reproduce the copyrighted work in copies," 17 USC 106(1), and "to distribute copies" of the copyrighted work, 17 USC 106(3). Federal law also establishes penalties for copyright infringement. It allows the copyright owner "to institute an action for any infringement," 17 USC 501(b), including injunctive relief (17 USC 502), impounding prohibited material (17 USC 503), and damages (17 USC 504).

Federal law also criminalizes an intentional copyright infringement committed "for purposes of commercial advantage or private financial gain[.]" 17 USC 506(a)(1)(A). There is a three-tiered system of punishment, as provided in 18 USC 2319(b): a 5-year maximum sentence for reproducing or distributing at least 10 copies of one or more copyrighted works whose total retail value is greater than $2,500, a 10-year maximum for repeat felony offenders, and a 1-year maximum for any other case. Thus, making unauthorized "copies" is *precisely* the nature of a copyright infringement claim.

PEOPLE v DUPREE

Docket No. 139396. Argued April 14, 2010 (Calendar No. 7). Decided July 23, 2010.

Roberto M. Dupree was charged in the Wayne Circuit Court with two counts of assault with intent to commit murder, felonious assault, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony, all stemming from an altercation and shooting at a party. With regard to the felon-in-possession charge, defendant's counsel asserted that defendant's temporary possession of the firearm was justified because he had seized it from the person he was struggling with to protect himself during the fight. Defendant's counsel requested a self-defense jury instruction on all the charges. The court, Brian R. Sullivan, J., gave the instruction, but sua sponte also instructed the jury that it could not convict defendant of being a felon in possession if it found that he possessed the firearm during a struggle and did not keep it any longer than necessary to defend himself. Defendant's counsel objected. Following arguments and further objections, the court modified its instruction concerning momentary innocent possession as a defense to the felon-in-possession charge, advising the jury that the modified instruction replaced its prior instruction. The jury acquitted defendant on all counts except the felon-in-possession charge. In separate opinions, the Court of Appeals, M. J. KELLY, J. (GLEICHER, J., concurring, and MURRAY, P.J., dissenting), reversed that conviction and remanded the case for a new trial, concluding that the affirmative defenses of self-defense and duress applied to the felon-in-possession charge and that defendant had established the elements of duress. The Court of Appeals further held that the instructional error was not harmless because the trial court's modified instruction had effectively directed a guilty verdict on the felon-in-possession charge. 284 Mich App 89 (2009). The Supreme Court granted the prosecution's application for leave to appeal. 485 Mich 916 (2009).

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

The common-law affirmative defense of self-defense is generally available to a defendant charged with being a felon in possession of a firearm.

1. Neither defendant nor the prosecution properly raised the affirmative defense of duress in the trial court, and defendant did not present evidence pertaining to that defense. Therefore, the parties did not preserve the issue of duress. Defendant, however, properly raised the common-law affirmative defense of self-defense in the trial court, introducing testimony supporting that theory and requesting a self-defense jury instruction, thus preserving the issue.

2. The felon-in-possession statute, MCL 750.224f, does not address the applicability of common-law affirmative defenses. The common-law defense of self-defense is firmly embedded in Michigan jurisprudence, however, and absent any clear indication that the Legislature abrogated or modified it in MCL 750.224f, the defense remains available.

3. Sufficient evidence supported a jury instruction on self-defense. Defendant presented evidence from which the jury could have concluded that his possession of the firearm was justified because he honestly and reasonably believed that his life was in danger during the struggle and that it was necessary for him to exercise force to protect himself.

4. Once a defendant injects the issue of self-defense and satisfies the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist, the prosecution bears the burden of disproving that affirmative defense beyond a reasonable doubt.

5. The trial court's instruction on the defense of momentary innocent possession was not harmless error. It must be presumed that the jury followed the trial court's instructions. Under the modified instruction given, which required defendant to show that he intended to deliver the firearm to the police at the earliest possible time, the jury had no alternative but to find defendant guilty in light of defendant's testimony that he threw the gun out of a car window some distance from the scene of the struggle. The modified instruction wholly negated defendant's theory of the case: that his temporary possession of the firearm was justified because he seized it to protect himself. A criminal defendant is entitled to have a properly instructed jury consider the evidence against him or her, and in this case it is more probable than not that the error was outcome determinative and resulted in a

miscarriage of justice. Defendant is entitled to a new trial on the felon-in-possession charge, and the Court of Appeals' result is affirmed.

Result affirmed and case remanded.

Justice CAVANAGH, joined by Chief Justice KELLY, concurring in part and dissenting in part, concurred in the result only. Justice CAVANAGH agreed that common-law self-defense is a valid defense to a felon-in-possession charge, that the prosecution bears the burden of disproving self-defense beyond a reasonable doubt once a defendant properly raises the defense, and that the trial court's erroneous jury instruction in this case was not harmless error. He disagreed that the affirmative defense of duress was not properly before the Supreme Court. Defendant's testimony concerning his struggle over the gun, during which the other person continued his attempt to take the firearm back from defendant despite having been shot three times and defendant's repeatedly telling him to stop, presents a textbook example of facts from which a jury could conclude that the essential elements of duress were present. Nonetheless, the result would be the same because the majority correctly held that defendant is entitled to a new trial.

1. CRIMINAL LAW — FELON-IN-POSSESSION — DEFENSES — SELF-DEFENSE — COMMON LAW.

The common-law affirmative defense of self-defense is generally available to a defendant charged with being a felon in possession of a firearm (MCL 750.224f).

2. CRIMINAL LAW — DEFENSES — SELF-DEFENSE — BURDEN OF PROOF OF SELF-DEFENSE.

Once a defendant satisfies the initial burden of producing some evidence from which the jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist, the prosecution bears the burden of disproving that defense beyond a reasonable doubt.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Joseph A. Puleo*, Assistant Prosecuting Attorney, for the people.

Kevin Ernst for defendant.

Amicus Curiae:

Brian A. Peppler, *David S. Leyton*, and *Donald A. Kuebler* for the Prosecuting Attorneys Association of Michigan

CORRIGAN, J. In this criminal case, we hold that the traditional common law affirmative defense of self-defense may be interposed to a charge of being a felon in possession of a firearm, MCL 750.224f. Defendant temporarily possessed a firearm in violation of the felon-in-possession statute but introduced evidence at trial supporting the theory that his violation was justified because he acted in self-defense. The prosecutor did not resist defendant's argument regarding the availability of self-defense, and the trial court gave a standard self-defense jury instruction. Over defendant's objection, the trial court also instructed the jury regarding the momentary innocent possession defense to the charge of being a felon in possession. The jury convicted defendant. The Court of Appeals reversed defendant's conviction and remanded for a new trial, concluding that the common law affirmative defenses of self-defense and duress are generally available to a defendant charged with being a felon in possession if supported by sufficient evidence.[1]

We originally granted leave to consider whether any of the traditional common law affirmative defenses are available for a charge of felon-in-possession and, if so, whether the defendant has the burden of proving the affirmative defense. We conclude, however, that only the common law affirmative defense of self-defense was properly raised before the trial court. Limiting our analysis to the issue preserved below, we agree with the

[1] *People v Dupree*, 284 Mich App 89; 771 NW2d 470 (2009).

Court of Appeals that self-defense is generally available for a felon-in-possession charge if supported by sufficient evidence. Defendant introduced sufficient evidence from which the jury could have concluded that he violated the felon-in-possession statute but that his violation could be justified because he honestly and reasonably believed that his life was in imminent danger and that it was necessary for him to exercise force to protect himself. Therefore, we hold that self-defense is an available defense under these facts.

We also take this opportunity to reaffirm that the prosecution bears the burden of disproving the common law affirmative defense of self-defense beyond a reasonable doubt. Finally, we conclude that the Court of Appeals properly ruled that the trial court's modified jury instruction on the momentary innocent possession defense was erroneous. Because this instructional error more probably than not resulted in a miscarriage of justice, defendant is entitled to a new trial on the felon-in-possession charge. Accordingly, we affirm the Court of Appeals' result and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On September 11, 2005, defendant Roberto Marchello Dupree and a female companion attended a birthday party for his brother at the house of defendant's sister-in-law, Adrian Dupree. Adrian's 24-year-old niece, Ashley Horton, and Horton's 24-year-old boyfriend, Damond Reeves, also attended. When the party was ending, defendant and Reeves began quarrelling on the porch. The altercation culminated in defendant shooting Reeves three times. As a result of the altercation, the prosecutor charged defendant with two counts

of assault with intent to commit murder,[2] felonious assault,[3] felon-in-possession,[4] and possession of a firearm during the commission of a felony.[5] After a three-day trial, the jury acquitted defendant of all charges except the felon-in-possession charge.

The witnesses gave conflicting testimony at trial about the circumstances surrounding the altercation. Reeves testified that defendant directed an expletive at him and shoved him for no reason. Reeves also testified that he and defendant fought until defendant left the fracas, went inside, and returned with a gun. Reeves stated that defendant shot him three times as he continued wrestling with defendant from the front yard to the street. Although the sequence of events was unclear, Horton testified that when she attempted to intervene, defendant struck her in the face with the gun. She went inside to call the police and heard a shot. Horton returned to the porch and heard a second shot before going back inside, where she heard a third shot. She stated that defendant later entered the house, put the gun to her chin, and pulled the trigger. The gun did not fire.

By contrast, defendant and two other bystanders testified that the altercation began when Reeves shoved Adrian Dupree off the porch. Defendant told Reeves not to disrespect his sister-in-law and asked him to leave. Reeves then pushed defendant. The two men fell off the porch and began wrestling. Reeves's shirt was pulled up, exposing a gun in the waistband of his pants. Defendant testified that he feared for his life because Reeves was larger than defendant, inebriated, and

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[2] MCL 750.83.

[3] MCL 750.82.

[4] MCL 750.224f.

[5] MCL 750.227b.

armed. Defendant stated that Reeves went for his gun and that defendant grabbed it to protect himself. As the two men struggled over the gun, defendant shot Reeves three times. Defendant kept the gun until he left with his female companion in her vehicle, throwing the gun out the window after he was some distance from the house.

During the three-day jury trial, defense counsel argued that defendant had not assaulted Horton, but had acted in self-defense in response to Reeves's actions. Regarding the felon-in-possession charge, defense counsel asserted that defendant's temporary possession of the gun was justified because defendant had seized possession of the gun to protect himself during the struggle. Defense counsel requested a standard self-defense jury instruction for all charges. The prosecutor did not object, and the trial court instructed the jury as requested. Additionally, the court instructed the jury sua sponte that it could find defendant not guilty of being a felon in possession if it found the following:

> As to being a felon in possession, [defendant] claims that the gun was produced in a struggle. And of course, if that's the case that the gun was produced during the course of a struggle and you find that it happened that way, that would be a defense to felon in possession provided you find that he did not keep the gun in his possession any longer than necessary to defend himself.

Defense counsel objected to the trial court's instruction, arguing that the court should not have included the phrase "any longer than necessary to defend himself." The trial court responded that it had crafted the instruction, which it labeled "the necessity defense to being a felon-in-possession," from federal law. After further discussion, the court gave defense counsel more time to locate legal authority to substantiate the objection.

When defense counsel failed to locate any legal authority invalidating the instruction, the prosecutor suggested that the trial court provide an instruction on the momentary innocent possession defense to carrying a concealed weapon then under consideration by this Court in *People v Hernandez-Garcia*, 477 Mich 1039 (2007).[6] Defense counsel objected. The court overruled the objection and reinstructed the jury concerning the momentary innocent possession defense to being a felon in possession as follows:

> And if the person had a brief or momentary possession of the weapon based on necessity, that's a defense to being a felon in possession. And the elements to that are that the defendant had the gun because he had taken it from someone else who was in wrongful possession of it, or he took it from him because of necessity, because he needed to. Second, that the possession after taking the gun was brief. *And third, that it was the defendant's intention to deliver the gun to the police at the earliest possible time.* The law imposes that duty as a concomitant part of that. [Emphasis added.]

The trial court stated that the modified instruction replaced its prior instruction regarding "the necessity defense." Subsequently, the jury acquitted defendant of all felony charges except the felon-in-possession charge. The court sentenced defendant to serve a term of 48 months' to 30 years' imprisonment as a fourth-offense habitual offender.[7]

In a published opinion, the Court of Appeals reversed defendant's conviction and remanded for a new trial.

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[6] Approximately five months following this trial, we affirmed and adopted the Court of Appeals' holding in *Hernandez-Garcia* that the momentary innocent possession of a concealed weapon is not a defense to the charge of unlawfully carrying a concealed weapon, MCL 750.227(2). *Hernandez-Garcia*, 477 Mich at 1040, overruling *People v Coffey*, 153 Mich App 311; 395 NW2d 250 (1986).

[7] MCL 769.12.

The majority concluded that defendant had not waived his claim of instructional error and that the common law affirmative defenses of self-defense and duress are generally available for felon-in-possession charges. The Court adopted the term "justification" to describe the affirmative defense under which "a defendant might be justified in temporarily possessing a firearm—even though the possession is unlawful—if the possession is immediately necessary to protect the defendant or another from serious bodily harm."[8] Using the elements of common law duress as its basis, the lead opinion listed five elements that would allow a defendant to raise a justification defense to a felon-in-possession charge.[9] The Court held that each of the five elements had been established in this case and that the instructional error was not harmless because the trial court's

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[8] *Dupree*, 284 Mich App at 104 (opinion by M. J. KELLY, J.).

[9] The Court of Appeals stated:

> [A] defendant may raise justification as a defense to being a felon-in-possession by introducing evidence from which the jury could conclude all the following:
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> (1) The defendant or another person was under an unlawful and immediate threat that was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, and the threat actually caused a fear of death or serious bodily harm in the mind of the defendant at the time of the possession of the firearm.
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> (2) The defendant did not recklessly or negligently place himself or herself in a situation where he or she would be forced to engage in criminal conduct.
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> (3) The defendant had no reasonable legal alternative to taking possession, that is, a chance to both refuse to take possession and also to avoid the threatened harm.
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> (4) The defendant took possession to avoid the threatened harm, that is, there was a direct causal relationship between the defendant's criminal action and the avoidance of the threatened harm.

modified jury instruction effectively directed a guilty verdict on the felon-in-possession charge. The dissenting Court of Appeals judge disagreed, concluding that the instructional error was harmless and that the evidence did not support a jury instruction on the justification defense.

The prosecution then applied for leave to appeal in this Court. We granted the application and directed the parties to address whether any of the traditional common law affirmative defenses of self-defense, necessity, or duress are available for the charge of being a felon in possession, MCL 750.224f, and, if so, whether the defendant has the burden of proof to establish the defense.[10]

II. STANDARD OF REVIEW

Whether common law affirmative defenses are available for a statutory crime and, if so, where the burden of proof lies are questions of law. This Court reviews questions of law de novo. *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). We review a claim of instructional error involving a question of law de novo, but we review the trial court's determination that a jury instruction applies to the facts of the case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice. MCL 769.26; *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999).

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(5) The defendant terminated his or her possession at the earliest possible opportunity once the danger had passed. [*Id*. at 107-108.]

[10] *People v Dupree*, 485 Mich 916 (2009).

III. ANALYSIS

The preliminary issue in this case is whether the prosecution or defendant properly raised and preserved the traditional common law affirmative defenses of self-defense and duress before the trial court. Although the Court of Appeals analyzed the availability of both affirmative defenses in its decision and the parties addressed both defenses in their arguments before this Court, our review is necessarily limited by the specific issue preserved below. We have "long recognized the importance of preserving issues for the purpose of appellate review." *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); see also *People v Brott*, 163 Mich 150, 152; 128 NW 236 (1910) ("This court has often held that it will not review questions that have not been raised in the trial court, and such is the rule according to the great weight of authority."). In accordance with the general rule of issue preservation, "issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances." *Grant*, 445 Mich at 546.

After thoroughly reviewing the record, we conclude that neither defendant nor the prosecution properly raised the affirmative defense of duress before the trial court. Defendant did not present evidence that pertained to the affirmative defense of duress or otherwise assert its availability for the charge of felon-in-possession. Similarly, the prosecution failed to interpose any issue concerning duress or its attendant burden of proof at trial. It appears that defendant first injected the issue of duress in the Court of Appeals. The prosecution seized on the issue in this Court, discussing duress extensively in its brief and at oral argument. In light of these facts, we cannot conclude that the parties preserved the issue of duress.

However, we conclude that defendant properly raised the common law affirmative defense of self-defense before the trial court. Defendant's theory of the case was that he did not assault Horton, but acted in self-defense in response to Reeves's actions. Defendant introduced testimony to support his self-defense theory at trial, which the prosecutor attempted to discredit. Further, defendant requested a standard self-defense jury instruction for all charges. The prosecutor did not object to defendant's request for a self-defense jury instruction. Consequently, we agree with the Court of Appeals to the extent that it concluded that self-defense is generally available for a felon-in-possession charge because defendant preserved the issue of self-defense for appellate review.[11]

The felon-in-possession statute, MCL 750.224f, places defendants in two distinct categories. *People v Perkins*, 473 Mich 626, 630; 703 NW2d 448 (2005).[12] The statutory prohibition is identical for defendants in either category. MCL 750.224f provides that both cat-

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[11] An affirmative defense admits the crime but seeks to excuse or justify its commission. It does not negate specific elements of the crime. *People v Lemons*, 454 Mich 234, 246 n 15; 562 NW2d 447 (1997); see also *People v Pegenau*, 447 Mich 278, 319; 523 NW2d 325 (1994) (BOYLE, J.) ("[A]n affirmative defense in effect concedes the facial criminality of the conduct and presents a claim of justification or excuse . . . .").

[12] The *Perkins* Court explained:

> The first category consists of persons convicted of a "felony." These persons regain their right to possess a firearm three years after paying all fines imposed for their violations, serving all jail time imposed, and successfully completing all conditions of parole or probation. MCL 750.224f(1). The second category consists of persons convicted of a "specified felony." These persons must wait five years after completing the same requirements and, moreover, must have their right to possess a firearm restored. MCL 750.224f(2). [*Perkins*, 473 Mich at 630-631.]

In this case, the parties stipulated that defendant had been convicted of a "specified felony" under MCL 750.224f(2).

egories of defendants "shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state" until a series of requirements is fulfilled. The statute does not address the availability of common law affirmative defenses, including self-defense.

The Legislature's failure to provide explicitly for the common law affirmative defense of self-defense does not foreclose defendants from relying on it to justify a violation of MCL 750.224f. It is axiomatic that the common law affirmative defense of self-defense is embedded in our criminal jurisprudence.[13] Historically, in cases in which the statutory provision did not squarely resolve the issue before this Court, we have applied the common law, presuming that the Legislature enacted statutes mindful of those aspects of common law that have become "firmly embedded in our jurisprudence . . . ."[14] More recently, the United States Supreme Court recognized the interrelated nature of criminal statutes and the common law, stating that legislative bodies enact criminal statutes "against a background of Anglo-Saxon common law . . . ."[15] We find this rationale

[13] See, e.g., *People v Coughlin*, 65 Mich 704; 32 NW 905 (1887).

[14] *Garwols v Bankers Trust Co*, 251 Mich 420, 424; 232 NW 239 (1930); see also Const 1963, art 3, § 7 ("The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.").

[15] *United States v Bailey*, 444 US 394, 415 n 11; 100 S Ct 624; 62 L Ed 2d 575 (1980). In *Bailey*, the trial court refused the defendants' requests for jury instructions on the common law defenses of duress and necessity in their prosecutions for escaping a federal prison. The majority of the Court concluded that the facts presented were insufficient to support the defenses. Significantly, however, all members of the Supreme Court agreed that the common law affirmative defenses could be asserted against the charged offense even though the statute did not specifically provide for it.

instructive. Absent some clear indication that the Legislature abrogated or modified the traditional common law affirmative defense of self-defense for the felon-in-possession charge in MCL 750.224f or elsewhere in the Michigan Penal Code, we presume that the affirmative defense of self-defense remains available to defendants if supported by sufficient evidence.

Our conclusion that self-defense remains an available defense is reinforced by our canvass of authorities elsewhere. Among the states that have addressed whether self-defense is an available defense to a statutory prohibition against felons possessing firearms, most other jurisdictions have concluded that self-defense is an available defense. The Tennessee Supreme Court, for example, acknowledged the availability of self-defense as one potential affirmative defense to the charge of being a felon in possession. See *State v Bledsoe*, 226 SW3d 349, 357 n 7 (Tenn, 2007). Similarly, the Indiana Court of Appeals concluded that

> Indiana's prohibition against a felon possessing a firearm was not intended to affect his or her right to use a firearm in self-defense, but was intended only to prohibit members of the affected classes from arming themselves with firearms or having such weapons in their custody or control in circumstances other than those in which the right to use deadly force in self-defense exists or reasonably appears to exists. [*Harmon v State*, 849 NE2d 726, 734 (Ind App, 2006).]

The Minnesota Supreme Court also recognized the availability of self-defense for the charge of felon-in-possession but stated that "the closer questions are whether the defendant, even if justified in wresting the gun away from [a dangerous aggressor], continued his aggression beyond the limits of self-defense or his possession of the pistol beyond justifiable possession." *State v Spaulding*, 296 NW2d 870, 876 (Minn, 1980).

We agree with the weight of authority from our sister jurisdictions that self-defense is an available defense to the charge of being a felon in possession if supported by sufficient evidence.

At common law, the affirmative defense of self-defense justifies otherwise punishable criminal conduct, usually the killing of another person, "if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself."[16] Generally,

> [o]ne who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger.[17]

"A finding that a defendant acted in justifiable self-defense necessarily requires a finding that the defendant acted intentionally, but that the circumstances justified his actions."[18] Professor LaFave articulated the rationale of the affirmative defense of self-defense:

> It is only just that one who is unlawfully attacked by another, and who has no opportunity to resort to the law for his defense, should be able to take reasonable steps to defend himself from physical harm. When the steps he takes are reasonable, he has a complete defense to such crimes against the person as murder and manslaughter, attempted murder, assault and battery and the aggravated forms of assault and battery, and perhaps other crimes as well. His intentional infliction of (or, if he misses, his attempt to inflict) physical harm upon the other, or his threat to inflict such harm, is said

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[16] *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002).

[17] 2 LaFave, Substantive Criminal Law (2d ed), § 10.4, p 142.

[18] *People v Heflin*, 434 Mich 482, 503; 456 NW2d 10 (1990).

> to be justified when he acts in proper self-defense, so that he is not guilty of any crime.[19]

With the enactment of the Self-Defense Act (SDA), MCL 780.971 *et seq.*, the Legislature codified the circumstances in which a person may use deadly force in self-defense or in defense of another person without having the duty to retreat.[20] However, the SDA did not become effective until October 1, 2006, and the altercation in this case occurred on September 11, 2005. Because the SDA does not retroactively apply to conduct that occurred before its effective date,[21] the traditional common law affirmative defense of self-defense in existence before the enactment of the SDA governs.[22]

In this case, sufficient evidence supported a jury instruction on the common law affirmative defense of self-defense. As the Court of Appeals succinctly observed, "[defendant] presented evidence from which a jury could find—and apparently did find—that he acted in self-defense when he struggled over the gun with Reeves and ultimately shot Reeves three times."[23] We agree that defendant introduced evidence from which a jury could conclude that defendant's criminal possession of the firearm was justified because defendant honestly and reasonably believed that his life was in imminent danger and that it was necessary for him to exercise force to protect himself.

Defendant testified that when he intervened after Reeves shoved defendant's sister-in-law off the porch,

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[19] 2 LaFave, § 10.4(a), pp 143-144.

[20] See MCL 780.972.

[21] *People v Conyer*, 281 Mich App 526, 531; 762 NW2d 198 (2008).

[22] See MCL 780.973 ("[T]his act does not modify the common law of this state in existence on October 1, 2006 regarding the duty to retreat before using deadly force or force other than deadly force.").

[23] *Dupree*, 284 Mich App at 101 (opinion by M. J. KELLY, J.).

Reeves responded by grabbing defendant and pulling him off the porch. Defendant stated that as he and Reeves continued wrestling, he became aware that Reeves had a gun. Further, defendant testified that he feared for his life because Reeves was a large man, weighing approximately 300 pounds, and because Reeves was intoxicated and armed. Defendant also testified that he and Reeves continued struggling over the gun even after he shot Reeves three times. Defendant stated that he repeatedly told Reeves "Just stop" and "Let me go" after Reeves said "I'm hit." Additionally, defendant testified that he retained possession of the gun after he and Reeves separated and that he threw the gun from the window of his female companion's vehicle once they had driven some distance from the house. However, the testimony is unclear whether Reeves remained in the vicinity of the house before defendant left the scene with his female companion. The record is similarly unclear concerning at what point Reeves no longer posed a threat to defendant, particularly because the testimony suggests that Reeves continued to challenge defendant for possession of the gun even after he had been shot three times. Under these facts, defendant introduced sufficient evidence from which the jury could have concluded that defendant violated the felon-in-possession statute but that his violation could be justified because he acted in self-defense.

Having concluded that the common law affirmative defense of self-defense may be interposed in this felon-in-possession case, we also conclude that the prosecution bears the burden of disproving the common law defense of self-defense beyond a reasonable doubt. Stated another way, once the defendant injects the issue of self-defense and satisfies the initial burden of producing some evidence from which a jury could conclude

that the elements necessary to establish a prima facie defense of self-defense exist, the prosecution bears the burden of proof " 'to exclude the possibility that the killing was done in self-defense . . . .' "[24] This allocation of the burden of proof is well settled in this Court[25] and the Court of Appeals.[26] We discern no cogent reason to disrupt the established burden of proof. Accordingly, we reaffirm that once the defendant satisfies the initial burden of production, the prosecution bears the burden of disproving the common law defense of self-defense beyond a reasonable doubt.

Finally, we conclude that the trial court's jury instruction on the momentary innocent possession defense was not harmless error. Defendant, therefore, is entitled to a new trial on the felon-in-possession charge. Under MCL 769.26, a preserved nonconstitutional error is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the asserted error was outcome determinative.[27] In this case, after instructing

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[24] *People v Jackson*, 390 Mich 621, 626; 212 NW2d 918 (1973), quoting *People v Stallworth*, 364 Mich 528, 535; 111 NW2d 742 (1961) ("[O]nce the issue of self-defense is injected and evidentially supported, '[t]he burden of proof to exclude the possibility that the killing was done in self-defense, rests on the prosecution.' ").

[25] See *Coughlin*, 65 Mich at 705 ("The charge made against respondent in this case could not be made out unless the testimony should exclude the idea of self-defense beyond a reasonable doubt. Consequently it was incumbent upon the people to show such facts and circumstances as convinced the jury that the killing was not done in self-defense.").

[26] See *People v Pearson*, 13 Mich App 371, 377; 164 NW2d 568 (1968) ("[It is] the well-settled law of this State that in criminal cases where the issue of self-defense has been raised, the burden of proof, beyond a reasonable doubt, still rests with the people, and that the burden is not on defendant to satisfy the jury that he acted in self-defense, but rather the people have the burden of showing facts that would convince a jury beyond a reasonable doubt that defendant did not act in self-defense.").

[27] *Lukity*, 460 Mich at 495-496.

the jury sua sponte about "the necessity defense" to being a felon in possession from federal law, the trial court rescinded that instruction and gave the jury a modified instruction on the now defunct momentary innocent possession defense.[28] Over defense counsel's objection, the trial court instructed the jury that it could find defendant not guilty of being a felon in possession if the jury found the following elements of the momentary innocent possession defense:

> And the elements to that are [first] that the defendant had the gun because he had taken it from someone else who was in wrongful possession of it, or he took it from him because of necessity, because he needed to. Second, that the possession after taking the gun was brief. *And third, that it was the defendant's intention to deliver the gun to the police at the earliest possible time*. [Emphasis added.]

The trial court clarified that this instruction replaced its prior instruction regarding "the necessity defense" to being a felon in possession.

The Court of Appeals majority correctly ruled that the modified jury instruction was not harmless. We presume that the jury followed the trial court's instructions.[29] Under the trial court's modified instruction on the momentary innocent possession defense, the jury had no alternative but to find defendant guilty of being a felon in possession because defendant proffered no evidence that he intended "to deliver the gun to the police at the earliest possible time." To the contrary, defendant testified that he threw the gun from the window of his female companion's vehicle after he was

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[28] See *Hernandez-Garcia*, 477 Mich at 1039-1040 (affirming and adopting the Court of Appeals' holding that the trial court correctly instructed the jury that momentary innocent possession of a concealed weapon is not a defense to a charge of unlawfully carrying a concealed weapon).

[29] See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

some distance from the house. As a result, the modified jury instruction wholly negated defendant's theory of the case in regard to the felon-in-possession charge, namely that his temporary possession of the gun was justified under the circumstances because defendant had seized possession to protect himself during a struggle. "A criminal defendant is entitled to have a properly instructed jury consider the evidence against him."[30] Defendant did not have a properly instructed jury in this regard. After examining the nature of the instructional error in light of the weight and strength of the untainted evidence, it affirmatively appears more probable than not that the error was outcome determinative. Accordingly, defendant is entitled to a new trial on the felon-in-possession charge.

IV. CONCLUSION

Having necessarily limited our analysis to the specific issue properly raised and preserved before the trial court, we conclude that the traditional common law affirmative defense of self-defense is generally available to a defendant charged with being a felon in possession if supported by sufficient evidence. We also conclude that self-defense was available under the facts of this case. Once a defendant satisfies the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist, the prosecution bears the burden of disproving the affirmative defense of self-defense beyond a reasonable doubt. Finally, we hold that the trial court's modified jury instruction on the momentary innocent possession defense to being a felon in possession was not harmless error. Consequently, we

[30] *Riddle*, 467 Mich at 124.

affirm the Court of Appeals' result and remand for further proceedings consistent with this opinion.

WEAVER, YOUNG, MARKMAN, and HATHAWAY, JJ., concurred with CORRIGAN, J.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur in the result only. I agree that common-law self defense is a valid defense to a charge of being a felon in possession of a firearm, MCL 750.224f. I also agree that once a defendant properly raises the defense, the prosecution bears the burden of disproving self-defense beyond a reasonable doubt. Finally, I agree that the trial court's erroneous jury instruction was not harmless error. I write separately because I disagree that the affirmative defense of duress is not properly before this Court. Indeed, the record belies the majority's claim that "[d]efendant did not present evidence that pertained to the affirmative defense of duress . . . ." *Ante* at 703.

To properly raise a duress defense, the defendant bears the burden of producing " 'some evidence from which the jury can conclude that the essential elements of duress are present.' " *People v Lemons*, 454 Mich 234, 246; 562 NW2d 447 (1997) (citation omitted). To satisfy the burden of production, a defendant must produce some evidence from which the jury could conclude the following:

> "A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> "B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> "C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

> "D) The defendant committed the act to avoid the threatened harm." [*Id.* at 247 (citation omitted).]

I agree with the Court of Appeals concurrence that "[a]lthough defendant in the instant case labeled his defense 'self-defense' rather than 'duress,' he unquestionably presented to the jury a scenario entirely consistent with a classic duress defense." *People v Dupree*, 284 Mich App 89, 113; 771 NW2d 470 (2009) (GLEICHER, J., concurring). As the majority acknowledges, defendant testified that Damond Reeves, a 300-pound, highly inebriated man with a gun, pushed defendant and then began wrestling with him. During the struggle, defendant became aware that Reeves possessed a gun, and defendant testified that he feared for his life. Defendant also testified that Reeves reached for his gun during the struggle and that he shot Reeves as they struggled over the gun. Finally, defendant testified that Reeves continued to attempt to take the gun from defendant even after defendant shot Reeves three times, despite the fact that defendant repeatedly told Reeves to "Just stop" and "Let me go." In my view, this account is a textbook example of a factual scenario from which a jury could conclude that the essential elements of duress were present.

Furthermore, I agree with the Court of Appeals concurrence that the trial court essentially instructed the jury on the duress defense when the court stated the following in its initial jury instruction:

> "As to being a felon in possession, [Dupree] claims that the gun was produced in a struggle. And of course, if that's the case that the gun was produced during the course of a struggle and you find that it happened that way, that would be a defense to felon in possession provided you find that he did not keep the gun in his possession any longer than necessary to defend himself." [*Id.* at 114.]

Thus, I disagree with the majority's conclusion that the issues related to the duress defense are not properly before this Court. I nonetheless concur because the result is the same given that the majority correctly holds that defendant is entitled to a new trial.

KELLY, C.J., concurred with CAVANAGH, J.

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Summary Disposition April 2, 2010:

DOE v DOE, No. 139896; Court of Appeals No. 285655. The application for leave to appeal the September 17, 2009, judgment of the Court of Appeals is considered, and it is denied. The application for leave to appeal as cross-appellants is considered and, pursuant to MCR 7.302(H)(1), we vacate that part of the Court of Appeals' judgment concerning the reporting requirements under the child protection law. We remand this case to the Court of Appeals for reconsideration of the reporting requirements under the Child Protection Law, MCL 722.623(1)(a), and the effects of MCL 722.622(f), (t), and (u) on those requirements in this case. In all other respects, the application for leave to appeal as cross-appellant is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We do not retain jurisdiction.

KELLY, C.J., would simply deny leave to appeal.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal April 2, 2010:

MARTIN v LEDINGHAM, No. 138636; reported below: 282 Mich App 158. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. We further direct the clerk to schedule the oral argument in this case for the same future session of this Court when it will hear oral argument on whether to grant the application in *Ykimoff v W.A. Foote Mem Hosp* (Docket No. 139561).

YKIMOFF v W A FOOTE MEMORIAL HOSPITAL, No. 139561; reported below: 285 Mich App 80. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. We further direct the clerk to schedule the oral argument in this case for the same future session of this Court when it will hear oral argument on whether to grant the application in *Martin v Ledingham* (Docket No. 138636).

ROBELIN v SPECTRUM HEALTH HOSPITALS, No. 139860; Court of Appeals No. 279780. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address whether the trial court abused its discretion when it denied the defendants' motion to strike the

testimony of Ronald Gabriel, M.D. In particular, the parties are directed to address whether Dr. Gabriel's proposed testimony meets the criteria of MCL 600.2955 and MRE 702. See *Craig v Oakwood Hosp*, 471 Mich 67 (2004), and *Gilbert v DaimlerChrysler Corp*, 470 Mich 749 (2004). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The Michigan Association for Justice, the Michigan Defense Trial Counsel, and the Michigan State Medical Society are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied April 2, 2010:

PEOPLE v WILMOT MOORE, No. 139310; Court of Appeals No. 290746. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

HATHAWAY, J. (*not participating*). In his application, defendant alleges ineffective assistance of trial counsel. I will not be participating in this case because I have a close personal relationship with defendant's trial counsel and his family.

JENKINS v TRINITY HEALTH CORPORATION, No. 139891; Court of Appeals No. 284659.

MARKMAN, J. (*dissenting*). I dissent from the majority's order denying leave to appeal. Because I agree with the Court of Appeals' dissent that plaintiff has presented no evidence of a "causal connection between the protected activity and the adverse employment action," which is one of the elements of a retaliation claim, I would reverse the Court of Appeals. See *Garg v Macomb Co Community Mental Health Services,* 472 Mich 263, 273 (2005) ("To establish a prima facie case of retaliation, a plaintiff must show [among other things] 'that there was a causal connection between the protected activity and the adverse employment action.' ") (citation omitted).

Plaintiff, a messenger, complained to his supervisor, Hines, about Johnson, a dispatcher, touching him inappropriately. Johnson and several other hospital employees made numerous complaints to Hines about plaintiff's work performance and attitude. Hines and Buehler, the human resources representative for the department, who knew nothing about plaintiff's complaint against Johnson, placed plaintiff on a performance improvement plan (PIP). Hines subsequently received a report that a female hospital employee had accused plaintiff of sexual abuse. Hines turned the matter over to Buehler, and after Buehler investigated the accusation by speaking to the accuser, witnesses, and plaintiff himself, Buehler and his manager agreed that plaintiff should be terminated based on the assault and his failure to successfully perform under the PIP.

Plaintiff filed a civil rights complaint asserting quid pro quo sexual harassment and retaliation. The trial court dismissed the quid pro quo claim, but not the retaliation claim. The jury ruled in plaintiff's favor.

Defendant appealed and plaintiff cross-appealed, and the Court of Appeals affirmed. *Jenkins v Trinity Health Corp,* unpublished opinion per curiam of the Court of Appeals, issued July 28, 2009 (Docket No. 284659). Judge TALBOT agreed with the majority with regards to the quid pro quo claim, but dissented with regards to the retaliation claim. Only defendant has filed an application for leave to appeal with this Court.

Defendant argues that the trial court should have granted its motion for summary disposition with regards to the retaliation claim. Judge TALBOT agreed on the basis that plaintiff had presented no evidence of a causal connection between the protected activity and the adverse employment action. I agree with defendant and with Judge TALBOT.

There is ample evidence that defendant terminated plaintiff based on legitimate reasons wholly unrelated to plaintiff's reports of sexual harassment. First, Buehler, who recommended that plaintiff be placed on the PIP, made this recommendation with absolutely no knowledge that plaintiff had made any complaint of sexual harassment. Second, a number of employees other than Johnson complained about plaintiff's work performance and his bad attitude. Even plaintiff admitted, "And when I look back overall, I need to take ownership of part of my behaviors as not getting along with people." Finally, a female employee complained that plaintiff sexually assaulted her and was verbally demeaning her to other employees. A witness confirmed that plaintiff acknowledged the behavior he was accused of by the female employee and other witnesses concurred that plaintiff was referring to her as a "bitch" and indicating that he would retaliate against her.

While there is ample evidence that plaintiff was terminated for legitimate reasons, there is absolutely no evidence that plaintiff was terminated for illegitimate reasons other than the mere fact that plaintiff engaged in a 'protected activity' ten months before being terminated. This is not enough to sustain a retaliation claim. See *Garg*, 472 Mich at 286 ("[I]n order to show causation in a retaliatory discrimination case, 'plaintiff must show something more than merely a coincidence in time between protected activity and adverse employment action.' ") (citation omitted). For these reasons, I would reverse the Court of Appeals.

CORRIGAN, J., joined the statement of MARKMAN, J.

YOUSIF v CITY OF STERLING HEIGHTS, No. 140164; Court of Appeals No. 288302.

CORRIGAN, J. (*dissenting*). I would reverse the judgment of the Court of Appeals for the reasons stated in Judge MURRAY's dissenting opinion and remand to the circuit court for entry of an order granting defendant's motion for summary disposition. The golf cart-like vehicle involved in plaintiff's accident was not a "motor vehicle" for purposes of the motor vehicle exception to governmental immunity, MCL 691.1405.

While attending a festival in Sterling Heights, plaintiff's 15-year-old son fell from a city-provided passenger trailer being towed by a "Gator" vehicle. Plaintiff filed this lawsuit against the city claiming that negligent driving of the Gator caused her son's injuries. Defendant moved for summary disposition on the basis of governmental immunity, arguing that the Gator was not a "motor vehicle" under the motor vehicle

exception to governmental immunity. The circuit court concluded that the Gator was "comparable to a truck" and thus fell within the exception. The Court of Appeals affirmed in a 2-1 decision.[1]

The motor vehicle exception to governmental immunity, MCL 691.1405, provides: "Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a *motor vehicle* of which the governmental agency is owner . . . ." (Emphasis added.) The exception to immunity thus applies only if the Gator is a "motor vehicle." Although the statute does not define the term "motor vehicle," we have previously addressed its meaning. In *Stanton v City of Battle Creek*, 466 Mich 611, 618 (2002), we held that a motor vehicle is "an automobile, truck, bus, or similar motor-driven conveyance." We concluded that the forklift at issue in *Stanton* did not fall within that definition and thus that the motor vehicle exception did not apply. And in *Overall v Howard*, 480 Mich 896 (2007), we adopted the Court of Appeals dissenting view that a golf cart did not meet the *Stanton* definition of a motor vehicle.

Applying these authorities, I agree with Judge MURRAY's dissenting opinion that the Gator is not an automobile, truck, bus, or similar motor-driven conveyance. The Gator is not intended to be driven on public roads and has limitations in size, capacity, and engineering similar to a golf cart, having only a 10-horsepower engine and a maximum speed of 18 miles per hour. The Gator also looks like a golf cart and is often called a golf cart. Finally, the Gator is not required to be registered with the Secretary of State and has no license plates. These characteristics establish that the Gator is not a motor vehicle as defined in *Stanton* and *Overall*.

Accordingly, the motor vehicle exception to governmental immunity does not apply. I would thus reverse the judgment of the Court of Appeals and remand to the circuit court for entry of an order granting defendant's motion for summary disposition.

YOUNG, J., joined the statement of CORRIGAN, J.

PEOPLE v WESTBROOK, No. 140165; Court of Appeals No. 286463.

ELLIS v DYKEMA GOSSETT PLLC, No. 140545; Court of Appeals No. 294941.

Reconsideration Denied April 2, 2010:

JEWISH ACADEMY OF METROPOLITAN DETROIT v MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, No. 139307; Court of Appeals No. 283885. Leave to appeal denied at 485 Mich 1021.

CAVANAGH, J., would grant reconsideration and, on reconsideration, would remand this case to the Court of Appeals for consideration of the

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[1] Unpublished opinion per curiam, issued October 29, 2009 (Docket No. 288302).

issues briefed by the defendant that the Court of Appeals did not consider because those issues were not included in the defendant's statement of questions involved.

MARKMAN, J. (*dissenting*). In *Communities for Equity v Michigan High School Athletic Association*, 178 F Supp 2d 805 (2001), aff'd 459 F 3rd 676 (CA 6, 2006), the United States District Court for the Western District of Michigan held that defendant, Michigan High School Athletic Association's, scheduling of high school athletic seasons violated the United States Constitution, as well as both federal and state civil rights law, and directed the MHSAA to reconfigure this scheduling. In the instant case, the trial court, concluding that the MHSAA has again violated the United States constitution and state law, as well as the Michigan constitution, now enjoins the MHSAA from maintaining an array of rules that define the conditions under which member schools may participate in interscholastic sports competition, and again requires that defendant's policies be revamped. Thus, in yet one more realm of activity, the decisions of judges have preempted the decisions of those who have been authorized by either contract or the representative processes of government to undertake such decisions.

Perhaps, in the end, such preemption may be required by the law or the constitution, but, if so, it will be no thanks to this Court, or the Court of Appeals, that this will be known. For defendant here has been deprived even of the opportunity to attempt to justify its policies on the grounds that these are in the best interests of hundreds of high schools throughout this state, and in the best interests of hundreds of thousands of high school athletes, as well as their families and friends. Specifically, defendant has been denied the opportunity to seek to justify its policies on the grounds that these policies are in the practical interests of administering statewide tournaments, that these policies minimize the loss of classroom time for student athletes, that these policies effectively manage available athletic facilities, that these policies minimize security concerns, that these policies maximize community involvement, that these policies optimize athletic revenues, that these policies promote consistent and predictable conditions under which schools from widely varying geographic and other circumstances can engage in athletic competition, and that these policies promote competitive equity. Neither the Court of Appeals, nor this Court, will even deign to hear such arguments, and as a result the scope of decision-making of judges will be enhanced and the scope of decision-making of other public and private institutions will be diminished.

Instead, the majority enables the Court of Appeals to affirm the trial court's assertion of authority purely on the grounds that defendant's brief on appeal failed to contain a summary statement setting forth all of the questions involved in the appeal, MCR 7.212(C)(5), and therefore that the omitted issues were waived. To clearly understand, the Court of Appeals does not argue that any issues were not raised and argued in defendant's brief, or that any such issues were not argued thoroughly, or that plaintiff did not equally thoroughly respond to these issues in its own brief, or that any harm inured to plaintiffs as a result of the absent summary. Instead, the Court of Appeals argues only that defendant failed

to set forth a separate summary. Apparently concluding that such a summary-less brief did not "substantially comply" with the court rules, MCR 7.212(I), and that a "supplemental brief" would also not "correct[] the deficiencies," the Court of Appeals effectively dismissed this appeal.

While acknowledgedly a matter within the Court of Appeals' discretion, MCR 7.216(A)(10), I believe that this particular exercise constituted an abuse of discretion. In virtually every previous decision in which an appeal has been effectively dismissed under this rule, there were additional reasons why issues raised in an appellate brief were not considered, such as a failure to support a claim with proper legal authority, that a claim was not presented to or ruled upon by the trial court, or that a claim implicated matters of jurisdiction. Indeed, I am unaware of any previous decision that suggests that an appellate court may refuse to consider fully-briefed issues—issues constituting the principal issues in an appeal—for the sole reason that such issues were inadvertently not included in the appellant's summary statement of questions involved. Moreover, I am unaware of any opinion that suggests that a brief of the instant sort does not "substantially comply" with MCR 7.212. For these reasons, I would grant the motion for reconsideration, and reverse and remand to the Court of Appeals for that court to fully consider the substantive arguments raised by both parties.

PEOPLE V RICHARDSON, No. 139947; Court of Appeals No. 291617. Leave to appeal denied at 485 Mich 1044.

MARKMAN, J. (*dissenting*). I respectfully dissent, and would grant the motion for reconsideration and grant bond pending appeal. Given that: (a) defendant was on bond both prior to trial and prior to sentencing without incident; (b) given that defendant, a 60-year old man, has apparently never been in trouble with the law, either as an adult or as a juvenile; (c) given that defendant has resided at the same home in Detroit for 34 years without prior incident; (d) given the circumstances of defendant's family's heavy reliance upon him; (e) given what I view as significant issues of self-defense and the defense of third persons, specifically his wife and grandchildren, that have been raised on appeal; (f) given the apparent increasing instability of defendant's neighborhood, as represented in this case by drug-abusing neighbors who had recently moved in next door; and (g) given that, at the time of this assault, defendant indisputably was approached on his own property by three of his neighbors, two of whom were under the influence of alcohol and drugs and one of whom was wielding a baseball bat and who had hit defendant's screen door with the bat, I believe that defendant has satisfied the standards of MCL 770.9a for bond pending appeal.

Summary Disposition April 7, 2010:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY V HUDSON, No. 137698; Court of Appeals No. 277300. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the Court of Appeals and we remand this case to the 36th District Court with directions to grant the defendant's motion to set aside the default and the default judgment. We conclude that the district court abused its discretion in allowing substi-

tuted service because the plaintiff did not demonstrate a "diligent inquiry" to ascertain the defendant's present address, as required by MCR 2.105(I)(2). Therefore, the plaintiff failed to show that service of process could not reasonably be made and that substituted service should be permitted.

Because the defendant was not properly served and did not appear in court, the district court lacked jurisdiction over the defendant. See *Turrill v Walker*, 4 Mich 177, 184 (1856); *Kulko v Superior Court of California*, 436 US 84, 91; 98 S Ct 1690; 56 L Ed 2d 132 (1978). Accordingly, the grounds in MCR 2.603(D)(1) for setting aside a default have been met.

DADD v MOUNT HOPE CHURCH, No. 139223; Court of Appeals No. 278861. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the jury verdict for plaintiff.

The trial court properly instructed the jury on false light invasion of privacy, which included an instruction that "plaintiff must prove by a preponderance of the evidence that the defendant must have known or acted in reckless disregard of the falsity of the information and the false light in which the plaintiff would be perceived." The jury found that the defendant acted with malice in making the statements which were the same ones alleged to have been defamatory. Because this finding of malice negates the qualified privilege that may exist in the context of the plaintiff's claims for libel and slander,[1] any error by the trial court in failing to instruct the jury on a qualified privilege for plaintiff's libel and slander claims is harmless. The defendants' remaining claims of error left unaddressed by the Court of Appeals are meritless.

MARKMAN, J. (*concurring in part and dissenting in part*). I concur in the reversal of the judgment of the Court of Appeals with respect to plaintiff's false light claim. However, I dissent from the remainder of the order and would otherwise affirm the Court of Appeals and remand for a new trial. Plaintiff here sued her former church and pastor for negligence over an injury she sustained while engaged in one of the church's religious practices. After the pastor twice communicated his strongly negative views about plaintiff and her lawsuit—at a church leadership rally and in a letter written to a church prayer group—plaintiff again sued the church and pastor, this time bringing claims for defamation. A jury returned a verdict for plaintiff on claims of negligence, slander, libel, and false light. The Court of Appeals unanimously reversed on all but the negligence claim, which claim is not before this Court. The principal issue here is whether the trial court reversibly erred in failing to instruct the jury that defendant-pastor was entitled to a 'qualified privilege' as to his communications with his church. Because I agree with the Court of

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[1] *Van Vliet v Vander Naald*, 290 Mich 365, 371 (1939) ("Where it appears that the occasion is subject to a qualified privilege, the burden is upon the plaintiff to prove the untruth of the statements and actual malice.").

Appeals that the trial court did err, and thereby failed to give proper consideration to the speech interests of defendant, I respectfully dissent.

I. FACTS & HISTORY

Defendant Mount Hope Church is an Assembly of God church in the Lansing area. Defendant David Williams is the church's pastor. In accordance with one of the church's core religious practices, it is customary at services and other gatherings for the pastor to call congregants to the altar to be prayed over. Sometimes, those who are prayed over fall to the ground, a phenomenon referred to as being "slain in the spirit." While there are ushers present at the altar to catch people, church members believe that a person who is "slain" in the Holy Spirit will not be hurt while engaged in this practice.

On July 18, 2002, plaintiff, who was at the time an active member of the church, was "slain in the spirit" and fell backward, injuring her head on the floor. A few months after the fall, when her medical bills began to accumulate, she inquired at the church whether it would pay for bills relating to the fall. Plaintiff was told that the church's insurance would pay only $5,000. Plaintiff then quit the church and filed a complaint seeking damages for negligence and gross negligence against the church and minister.

After the complaint was filed, defendant Williams spoke about plaintiff's lawsuit from the pulpit for about four minutes at a "leadership rally," attended by church "leaders, workers, and members." At this event, defendant aggressively questioned the merits of the lawsuit, as well as plaintiff's moral and spiritual character for bringing the legal action against her church, specifically stating that he thought that plaintiff had apparently "renounced her faith for mammon."

About three months later, defendant sent a letter to members of the "120-prayer group," a fifty-member church organization to whom he sent regular correspondence asking for their prayers on matters of concern to the church. One of the primary requirements of this group was confidentiality. In this letter, defendant again forcefully denounced the lawsuit and plaintiff's moral and spiritual character, referring to her throughout as "the Accuser and Plaintiff," and asserting that he believed that she would be prosecuted for insurance fraud.

Based on defendant's statements, plaintiff filed an amended complaint including new claims for slander, libel, and false light. The trial court subsequently denied plaintiff's motion for partial summary disposition because it found that defendants "arguably" possessed a 'qualified privilege' regarding the challenged communications. Following plaintiff's presentation of her evidence at trial, defendant moved for a directed verdict, reasserting in regard to the defamation claims that a 'qualified privilege' exists. The court denied this motion. Finally, at the close of proofs, the court concluded that no privilege applied and refused defendants' requested instruction. Accordingly, instead of directing the appli-

cation of a malice standard to 'privileged' communications, the court directed the application of a negligence standard to 'unprivileged' communications, stating as follows:

> The plaintiff has the burden of proving that the defendant was negligent in making the statement. When I use the word negligent I mean the failure to do something which a reasonably careful person would do.

This instruction was twice reread to the jury at its request on the second day of deliberations. The jury was also provided with an 11-page verdict form, which asked the jurors to answer 53 questions that had been approved by both parties under defendants' assumption that the trial court would give an instruction on 'qualified privilege.'

The jury returned a verdict for plaintiff on her claims of negligence, slander, libel, and false light. In the verdict form, with respect to the defamation claims, the jury affirmatively answered the question, "Did the defendant have knowledge that the statement was false or did defendant act with reckless disregard as to whether the statement was false?" The judgment reflected a verdict awarding plaintiff $40,000 for her negligence claim, $23,750 for her claim of false light, $50,000 for her claim of slander, and $200,000 for her claim of libel. With costs and fees, plaintiff's judgment totaled $317,255.68.

Defendants appealed as of right, and the Court of Appeals unanimously reversed the jury's verdict on plaintiff's defamation claims after finding that the trial court erred in failing to find that the statements were subject to a 'qualified privilege' and in instructing the jury accordingly. *Dadd v Mount Hope Church,* unpublished opinion of the Court of Appeals, issued April 9, 2009 (Docket No. 278861). The panel further determined that this error was not harmless:

> This Court presumes that the jurors followed the instructions. Here, the jury was instructed to apply a negligence standard in determining liability for defamation claims. Thus, regardless of an additional question on the jury verdict form, this Court must presume that the jury followed the trial court's instructions. Further, the jury should have been instructed that "defendant had a 'qualified privilege' to communicate information." [*Id.* at 23 (citations omitted).]

This Court directed that oral argument be heard on plaintiff's application for leave to appeal, and argument was heard on January 13, 2010.

II. STANDARD OF REVIEW

Defendants sought a 'qualified privilege' jury instruction and objected to the trial court's decision denying this. The issue is thus preserved for appeal. MCR 2.516(C). We review claims of instructional error *de novo*, examining the instructions as a whole to determine whether there is error requiring reversal. *Case v Consumers Power Co,*

463 Mich 1, 6 (2000). We will only reverse for such error where failure to do so would be inconsistent with substantial justice. MCR 2.613(A).

III. ANALYSIS

A. DEFAMATION

To establish a defamation claim in Michigan, a plaintiff must show: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. *Rouch v Enquirer & News II*, 440 Mich 238, 251 (1992). After the United States Supreme Court in *Gertz v Welch*, 418 US 323, 347 (1974), invited states to "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual," this Court adopted negligence as the default standard of liability in Michigan. *Rouch v Enquirer & News I*, 427 Mich 157, 195 (1986).

B. 'QUALIFIED PRIVILEGE'

However, a plaintiff's burden in a defamation claim may be considerably altered once the defendant raises a defense of privilege. Conceptually, this defense should be familiar to any student of tort law, as it relates to "[t]he ultimate problem . . . common to all areas of the law of torts"—"the balancing of one man's interests against another's acts." *Lawrence v Fox*, 357 Mich 134, 136-137 (1959). "The great underlying principle upon which the doctrine of privileged communication stands, is public policy." *Bacon v Michigan Central R Co*, 66 Mich 166, 169 (1887). "The term privilege, then, having such origins, relates to a situation or occasion in which the importance of the criticism uttered by the defendant . . . justifies a modification, or, indeed, a withdrawal, of the protection normally afforded our citizens." *Lawrence,* 357 Mich at 137-138.

In defamation law, there are two classes of privileged communications. "There are communications which are absolutely privileged; and there are communications which have a 'qualified privilege.' " *Trimble v Morrish*, 152 Mich 624, 627 (1908). While an absolute privilege applies only in those situations in which the public interest is at its highest, a class "restricted to narrow and well-defined limits," as *Bacon* stated over a century ago:

> 'Qualified privilege' exists in a much larger number of cases. It extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty. And the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation. [*Bacon*, 66 Mich at 170.]

In deciding whether a qualified privilege exists, courts of this state have consistently applied the rule that "the *occasion* determines the question of privilege . . . ." *Bennett v Stockwell*, 197 Mich 50, 54 (1917) (emphasis added); see also, *Weeren v Evening News Ass'n*, 379 Mich 475, 509 (1967); *Parks v Johnson*, 84 Mich App 162, 172 (1978). Indeed, this Court has repeatedly emphasized, "The question of privilege is to be determined by the occasion and not the language used." *Westerhouse v De Witt*, 215 Mich 295, 299 (1921); see also, *Lawrence*, 357 Mich at 139; *Fortney v Stephan*, 237 Mich 603, 609 (1927).

Church-related occasions have regularly been found to be subject to a 'qualified privilege.' See *Van Vliet v Vander Naald*, 290 Mich 365 (1939) (holding that publishing a church tribunal's findings in the church's official newspaper was a privileged occasion); *Westerhouse*, 215 Mich at 299 (holding that a "special meeting" called to reconcile two church members was a privileged occasion); *Konkle v Haven*, 140 Mich 472 (1905) (holding that church members writing a letter about a former pastor to members of another church was a privileged occasion); and *Howard v Dickie*, 120 Mich 238 (1899) (holding that a conference electing church trustees was a privileged occasion). These occasions were all subject to a 'qualified privilege' because the circumstances were such that the speaker had an interest or duty to communicate otherwise defamatory statements to those having a corresponding interest or duty, whether of a legal, moral or social character.

The defendant has the burden of proving the existence of a 'qualified privilege.' *Lawrence*, 357 Mich at 141. If he carries this burden, he "rebuts the prima facie inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon [the plaintiff] the onus of proving malice in fact." *Bacon*, 66 Mich at 172. The defendant is then entitled to a "presumption . . . that [he] acted in good faith and with proper motive." *Raymond v Croll*, 233 Mich 268, 274 (1925). Thus, the defense of 'qualified privilege' is of considerable value to a defendant because it: (1) rebuts the inference of malice from the defamatory statements, (2) clothes the defendant in a presumption of good faith, and (3) increases the plaintiff's burden by requiring the plaintiff to show that the defendant acted with malice, instead of merely negligence.

However, as its nomenclature suggests, the 'qualified privilege,' while of considerable force, is not absolute; rather, it is subject to a condition, "the condition being its exercise without abuse." *Lawrence*, 357 Mich at 141. Abuse of the privilege is found where the defendant has acted with "actual malice, in the sense of oblique design or bad faith." *Mundy v Hoard*, 216 Mich 478, 492 (1921) (citation omitted). Abuse may also arise "if the extent of the publication be excessive." *Smith v Smith*, 73 Mich 445, 446 (1889). In either case, the privilege is destroyed.

The question of whether the statements were made at a privileged occasion is for the court; the question of whether the privilege was abused is "for the jury, under proper instructions, and with respect to it the plaintiff carries the burden of proof." *Lawrence*, 357 Mich at 144.

In summary, the following principles guide a qualified privilege analysis in Michigan. First, the defense of qualified privilege should be applied where circumstances indicate that the importance of free and uncensored communication outweighs an individual's right in tort. Second, the defense is determined by the particular occasion of the communication and attaches where circumstances indicate that statements were made in good faith between persons who have a shared duty or interest in the subject matter. Third, the significant protections provided to a defendant by the defense are lost if plaintiff proves to the jury that the defendant abused the privilege.

C. APPLICATION OF 'QUALIFIED PRIVILEGE'

When these legal principles are applied to the instant case, I agree with the Court of Appeals that the trial court erred as a matter of law in refusing to instruct the jury that defendant's statements were entitled to a 'qualified privilege.' To begin with, applying a qualified privilege in these circumstances is altogether consistent with the doctrine's underlying purpose of protecting communications that have social value and in which there are significant speech interests. Indeed, the "occasions" here at which defendant spoke are prototypical occasions to which the qualified privilege was intended to apply. The instant circumstances—a pastor communicating with his flock about a lawsuit that questioned the integrity of a religious practice, threatened to harm the church financially, and damaged the pastor's professional reputation—implicate *multiple* important social values, any one of which might well support the application of the privilege.

First, there is social value and a significant speech interest in communications made by a pastor to his congregation. Specifically, there is value in a pastor's passionate communications about his faith both from the pulpit and in a letter to those under his spiritual direction who similarly care deeply about their faith. The importance of this type of religious expression "justifies a modification . . . of the protection normally afforded" an individual. *Lawrence*, 357 Mich at 138. This is not because the individual's interests are not significant, but because the stakes for society are so consequential. That is, the public has an interest in ensuring that its religious leaders can express their spiritual convictions within the context of the church organization freely and vigorously without "[f]ear of large verdicts in damage suits for innocent or merely negligent misstatement, [or] even fear of the expense involved in their defense . . . ." *Time, Inc v Hill*, 385 US 374, 389 (1967). The United States Supreme Court has often referred to this danger of self-censorship as a "chilling effect." *Nike, Inc v Kasky*, 539 US 654, 683 (2003) (Breyer, J, dissenting). Religious leaders are entitled to feel passionately about the values and practices of their churches, and they are entitled to communicate these sentiments to those within their churches who are also passionately committed about these values and practices. Defendant testified to the spiritual implications of plaintiff's lawsuit, explaining that plaintiff "was accusing the Holy Spirit of slaying her, bringing her injury, and she was accusing the members of our church of not showing her care

and concern. That, that would be an issue to the church." While there is no *absolute* privilege for anything that might be said in this environment, there is a *qualified* privilege for statements made on such an occasion, and defendant was entitled to have this privilege clearly communicated and explained to the jury.

Second, there is social value and a significant speech interest in communications made in the context of litigation. Defendant was not just a pastor speaking about matters of significance to his church and his faith, but he, along with his church, had been named as a *defendant* in a lawsuit. Civil defendants, like the pastor here, are entitled to respond passionately to litigation directed toward them and toward institutions to which they are deeply attached. They are entitled to be offended by such litigation and to be offended by persons who bring such litigation, and they are also entitled to communicate these sentiments within appropriate channels and on appropriate "occasions." They are not limited in their responses to finely-crafted, lawyer-like statements. Concomitantly, a civil plaintiff, by undertaking a lawsuit against another, must expect that a defendant's response will be harsh and critical. They must expect that a defendant will take such lawsuit personally. The legal backdrop of this case is an important factor in the balancing of interests that shapes the 'qualified privilege' because everything defendant said was directly and exclusively related to plaintiff's lawsuit, and it was in communicating about this lawsuit in his own idiom that defendant was subjected to even greater liability. The public has an interest in ensuring that parties to litigation can express views about the merits of a lawsuit in good faith and on a proper occasion without fear of exposure to *additional* liability. Moreover, the particular lawsuit in this case carried substantial financial implications for defendant's church, and presumably for defendant's continued association with that church. Defendant was in a position analogous to a CEO of a company subject to a lawsuit, who not only has a legal duty to report liabilities to his shareholders, including exposure to damage awards, but also, to the extent he believes appropriate, to explain and justify his management. See *Hollowell v Career Decisions, Inc*, 100 Mich App 561, 575-576 (1980) (defendant-corporate officer "was entitled to a 'qualified privilege' in the statement made at the board meeting regarding the performance of [the company]"). Once again, while there is no *absolute* privilege for anything that might be said in this environment, there is a *qualified* privilege for statements made on such an occasion, and defendant was entitled to have this privilege clearly communicated and explained to the jury.

Third, there is social value and significant speech interests in communications meant to defend one's professional reputation. This is particularly true for a member of a profession, such as is defendant, which is dependent on a person's moral standing and integrity within the community. Plaintiff's lawsuit directly called into question defendant's professional prerequisites to be the pastor of his church. Thus, it seems entirely appropriate for defendant to try to defend his reputation by forcefully presenting his side of the story to those in the church who are essentially his employers. Yet again, while there is no *absolute* privilege for anything that might be said in this environment, there is a *qualified*

privilege for statements made on such an occasion, and defendant was entitled to have this privilege clearly communicated and explained to the jury.

I emphasize that the two "occasions" on which the statements in controversy were made here are exactly those contemplated as justifying the 'qualified privilege' in the first place. On the first of these "occasions," defendant spoke from the pulpit at a "leadership rally" that was a regularly scheduled event attended by the lay leadership of his church. On the second "occasion," he wrote a letter to a church prayer group for the purpose of eliciting prayers for the church. These "occasions" consisted of regular and ordinary occurrences in the life of the church. Defendant did not invent these forums for the purpose of making defamatory statements about plaintiff, and there is nothing surrounding these circumstances to suggest that his statements were not sincerely-felt and made in good faith. Moreover, at these "occasions," the interests of the speaker and of the audience were perfectly aligned. That is, defendant did not make his statements to passers-by on the street, or to the Lansing State Journal, or a television program watched by people having no direct interest in the lawsuit. Rather, he communicated only with people who shared a deep commitment to the church's religious practices, its financial well-being, and its standing in the community. When we apply the governing rule that the privilege is determined "by the occasion and not the language used," *Westerhouse*, 215 Mich at 299, it is incomprehensible how these two events could not be deemed occasions subject to a 'qualified privilege.'

The trial court did not reach this same conclusion because it did not engage in a proper analysis of whether the "occasions" at issue were privileged by considering the totality of the circumstances, the whole "stage" as it were. *Lawrence*, 357 Mich at 139. Instead, it was distracted by inquiries concerning the audience, specifically treating as dispositive whether the audience included *only* church members, and whether these members were all truly "decision makers." While the nature of the audience constitutes an important consideration in determining the existence of a 'qualified privilege,' none of the cases in which this privilege has been recognized in a church-related setting has engaged in these kind of inquiries. See e.g., *Van Vliet*, 290 Mich at 367 (statements subject to 'qualified privilege' even though they were disseminated beyond local church members and beyond church "decision makers"). I respectfully believe the trial court erred as a matter of law in concluding that the privilege did not apply and in failing to instruct the jury on this defense.

D. INSTRUCTIONAL ERROR

The majority concludes that any failure by the trial court to instruct the jury on a 'qualified privilege,' even if error, is "harmless" in light of the fact that the jury was instructed to apply an "actual malice" standard to plaintiff's false light claim and found defendant liable for the same statements that were alleged to be defamatory. I respectfully disagree.

First, the Court of Appeals correctly noted that, as to the defamation claims, the jury was instructed to apply a negligence standard, one that

establishes a significantly lower threshold than the malice standard that applies to the 'qualified privilege.' As the Court of Appeals stated, "there is a clear difference between proving 'something which a reasonably careful person would do' and proving 'defendant had knowledge that the statement was false, or that the defendant acted with reckless disregard as to whether the statement was false.' " *Dadd*, slip op at 22-23. The Court of Appeals also observed that the jury twice asked for reinstruction on this issue and thus heard the negligence instruction three times. *Id.* Presuming that jurors follow their instructions, *Dep't of Transportation v Haggerty Corridor Partners*, 473 Mich 124, 178-179 (2005), the Court of Appeals concluded that the jury determined defendants' liability by applying a negligence standard, not the malice standard they should have applied. *Dadd,* slip op at 24.

Second, because defendants were entitled to a 'qualified privilege,' "the presumption [was] that the defendant [had] acted in good faith and with a proper motive." *Raymond*, 233 Mich at 274. As *Raymond* explained, this presumption affords significant protection to a defendant.

> To overcome the presumption of good faith the circumstances must be such as to show that the defendant was actuated by a bad motive, which led him to take advantage of the occasion to injure the plaintiff. The court should not permit dishonesty of purpose to be lightly inferred from acts which are just as consistent with good faith as with bad faith. If the circumstances relied on as showing malice are as consistent with its nonexistence as with its existence, the plaintiff has not overcome the presumption of good faith, and there is nothing for the jury. [*Id.* at 275-276.]

Thus, this presumption in favor of defendant throws on plaintiff a heavy burden *to even reach the jury*. While the false light instruction at least correctly mentioned that plaintiff bore the burden on the malice standard in the context of that claim—something that the verdict form did not do on the defamation claim—this instruction does not cure the primary error brought about by the trial court's conclusion that the 'qualified privilege' was inapplicable. That is, in ruling on defendants' motion for directed verdict, the trial court should have viewed the evidence with a strong presumption of good faith in favor of defendants in determining whether plaintiff had met her burden to maintain the defamation claims. The trial court should have been mindful that "a plaintiff does not sustain the burden of proof which is cast upon him by merely giving evidence which is equally consistent with either view of the matter in issue [i.e., malice]." *Id.*

In this analysis, the following questions would have been relevant: Was defendant's reason for taking to the pulpit at the leadership rally and writing his regular, confidential letter to a leadership prayer group to defame plaintiff? Or, were there other equally plausible purposes for his statements at these occasions—for instance, his interest in his reputation and that of his church, his duty to inform members about matters of financial concern to the church, or his duty to reinforce the spiritual commitments of those under his guidance to church practices that had

been called into question by the lawsuit? If the trial court had found that defendant's acts were "just as consistent with good faith as with bad faith," then plaintiff would not have carried her burden. However, because of its threshold error in determining that the 'qualified privilege' did not apply, the trial court never engaged in *any* such analysis. Defendants simply did not receive the very substantial benefit of the doubt afforded to them by the presumption of good faith attached to the 'qualified privilege.'

Third, even assuming, that plaintiff *did* meet her burden and that the defamation claims *were* properly before the jury, the false light instruction on the definition of "actual malice" did not cure the trial court's error as to the defamation instructions. The United States Supreme Court has defined "actual malice" as acting "with knowledge that [a defamatory statement] was false or with reckless disregard of whether it was false or not." *New York Times v Sullivan*, 376 US 254, 280 (1964). The malice standard applicable in cases of 'qualified privilege' under Michigan law has been variously defined as: "actual malice, in the sense of oblique design or bad faith;" *Mundy*, 216 Mich at 492 (citation omitted); or a "showing [of] *mala fides* in the defendant—that is, that the occasion was made use of colorably, as a pretext for wantonly injuring the plaintiff." *Howard*, 120 Mich at 239 (citation omitted). Under the proper malice instruction, the jury should have been instructed as to these standards, and directed to consider "whether the defendant used the occasion for the sole reason and purpose which conferred the privilege upon his statement [in the first place]." *Mundy*, 216 Mich at 492.

The jury here was not so instructed. Indeed, it never even heard the term "malice," as it was not used in either the instruction on false light or in the verdict form on defamation. This error was not rendered harmless where the jury was instructed on a general definition of "malice" in the context of a different claim, and where it never heard the term, much less what it meant, in the particular context of 'qualified privilege.' Moreover, the refused instruction did not present the only opportunity to apprise the jury of the purpose and effect of the 'qualified privilege,' which was arguably dispositive here. "[I]t remains for the court to instruct the jury as to the nature and legal effect of the 'qualified privilege' and its bearing upon their consideration of the facts in issue." *Bolton v Walker*, 197 Mich 699, 706 (1917). Because the trial court's error in this regard, the jury was supplied with no guidance as to the relevance of the contextual background for defendant's communications, defense counsel was prevented from offering closing arguments in which he could have sought to explain this relevance, and plaintiff's counsel was able thereby to avoid responding to defendant's arguments, thus signaling to the jury that such context was of considerable significance in resolving this case. Simply put,the jury never heard why the "occasions" at issue were privileged, what "malice" requires where the 'qualified privilege' obtains, and where the burden of proof lies in such cases.

Finally, these considerations only begin to suggest what was lost to defendants because of the trial court's error in not instructing on the 'qualified privilege.' In the jury's eyes, defendant was effectively placed "upon the same footing as a libeler publishing some private gossip, scandal,

or personal abuse," *Madill v Currie*, 168 Mich 546, 559 (1912), even though the circumstances surrounding his statements present something very different. Because this case falls so squarely within the 'qualified privilege,' implicating social values and speech interests that are at the core of the privilege, the costs of denying defendant its protections are so substantial. Defendant truly required the protections of the 'qualified privilege,' because the difference in the way the jury would perceive his conduct with and without the privilege was so very different. By refusing to instruct on this privilege, the trial court effectively communicated to the jury that defendant's interests in defending, passionately, the tenets and practices of his faith and of his church, in responding to a lawsuit that called his own integrity and that of his church into question, in defending his management and leadership of a church whose financial stability had been threatened, all to a limited audience that almost exactly shared these concerns, did not matter, that none of this mattered in assessing defendant's liability for defamation. However, all of this does matter, and it matters greatly, under the law of this state. Defendant was entitled as a matter of law to be viewed by the jury as someone other than the equivalent of a person uttering "private gossip, scandal, or personal abuse." He was entitled to bring context to bear in defending himself, and he was not allowed to do this.

IV. CONCLUSION

The trial court erred as a matter of law when it determined that the two church-related occasions on which defendant made statements concerning plaintiff and her lawsuit were not subject to a 'qualified privilege.' Furthermore, where the trial court never informed the jury that defendant possessed a 'qualified privilege' to communicate the information in controversy; where the purpose and legal effect of the 'qualified privilege' was never explained to the jury and allowed to supply context for defendant's communications; where defendant was deprived of the presumption of good faith that attaches to the 'qualified privilege'; where the operative standard of "malice" and its meaning in this specific context was never shared with the jury; where the jury was never instructed on the correct burden of proof to apply in cases involving the 'qualified privilege'; and where the jury was repeatedly instructed to apply an incorrect, and lesser, standard for discerning liability, I am unable to conclude that the trial court's error was "harmless." If a properly-instructed jury had returned this same verdict, such a verdict could not be disturbed. However, to allow this verdict to stand on plaintiff's defamation claims in light of this error is, in my judgment, "inconsistent with substantial justice." MCR 2.613(A).

For these reasons, I would affirm that part of the Court of Appeals' decision that reversed the jury's verdict on plaintiff's claims of slander and libel, and remand for a new trial on these claims.

CORRIGAN, J., joined the statement of MARKMAN, J.

ENGELHARDT v ST JOHN HEALTH SYSTEM-DETROIT-MACOMB CAMPUS, No. 139832; Court of Appeals No. 292143. Pursuant to MCR 7.302(H)(1), in

lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

VINSON v ABN AMRO MORTGAGE GROUP, INCORPORATED, No. 140001; Court of Appeals No. 292579. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v MERRIMAN, No. 140070; Court of Appeals No. 292281. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal April 7, 2010:

HORVATH v JOHNSON, Nos. 139996 and 139997; Court of Appeals Nos. 283931 and 284842. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied April 7, 2010:

PEOPLE v LEON DAVIS, No. 138270; Court of Appeals No. 287574.

PEOPLE v WILLIE JACKSON, No. 138883; Court of Appeals No. 281681.

TMW ENTERPRISES v DEPARTMENT OF TREASURY, No. 139612; reported below: 285 Mich App 167.

HARDMAN v CITY OF DETROIT, No. 139817; Court of Appeals No. 284252.
KELLY, C.J., and HATHAWAY, J., would grant leave to appeal.

RUDOLPH v GUARDIAN PROTECTIVE SERVICES, INCORPORATED, No. 139920; Court of Appeals No. 279433.
KELLY, C.J., and CAVANAGH, J., would grant leave to appeal.

PEOPLE v SELLERS, No. 140032; Court of Appeals No. 293625.

PEOPLE v CRAFT, No. 140084; Court of Appeals No. 294355.

EDWARDS v DEPARTMENT OF CORRECTIONS, No. 140112; Court of Appeals No. 292907.

PEOPLE v ROWLAND, No. 140196; Court of Appeals No. 287377.

Summary Disposition April 9, 2010:

KAYL v ALLSTATE INSURANCE COMPANY, No. 139767; Court of Appeals No. 284752. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. Although we do not

interpret defense counsel's remarks at the summary disposition hearing in the same manner indicated in the Court of Appeals dissenting opinion, the transcript of plaintiff's deposition that the defendant filed in support of its motion for summary disposition contradicted defense counsel's claim that the plaintiff had submitted no billings to the defendant, and supported the claim of the plaintiff's counsel that such billings had been submitted to the defendant, thereby establishing the existence of a genuine issue of material fact. We remand this case to the Wayne Circuit Court for further proceedings.

We do not retain jurisdiction.

Leave to Appeal Granted April 9, 2010:

GREAT WOLF LODGE OF TRAVERSE CITY LLC v MICHIGAN PUBLIC SERVICE COMMISSION, Nos. 139541, 139542, 139544 and 139545; reported below: 285 Mich App 26. The parties shall include among the issues to be briefed: (1) whether Cherryland Electric Cooperative is entitled to provide any component of electric service to Great Wolf Lodge of Traverse City or its buildings and facilities, (2) whether the Michigan Public Service Commission must impose interest on the refund it ordered Cherryland Electric Cooperative to pay, and (3) whether the Michigan Public Service Commission must levy a fine, under MCL 460.558, on Cherryland Electric Cooperative.

The motion of Michigan Electric Cooperative Association for leave to file a brief amicus curiae is granted. The Association of Businesses Advocating Tariff Equity and the Electric Consumers Resource Council are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied April 9, 2010:

DEPARTMENT OF HUMAN SERVICES v ABBOTT (*In re* ABBOTT), No. 140806; Court of Appeals No. 294372.

Reconsideration Denied April 9, 2010:

GALLAGHER-MCCARTHY v MCCARTHY, No. 140306; Court of Appeals No. 292514. Leave to appeal denied at 485 Mich 1104.

DEPARTMENT OF HUMAN SERVICES v FOSTER (*In re* FOSTER), Nos. 140443 and 140444; Court of Appeals Nos. 291004 and 291005. Leave to appeal denied at 485 Mich 1104.

Summary Disposition April 16, 2010:

GADIGIAN v CITY OF TAYLOR, No. 138323; reported below: 282 Mich App 179.* Leave to appeal having been granted and the briefs of the parties

* Amended by order entered May 28, 2010, 486 Mich 936—REPORTER.

having been considered, we vacate our order of November 19, 2009. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we affirm the result reached by the Court of Appeals in light of our decision in *Robinson v City of Lansing*, 486 Mich 1 (2010), which held that the "two-inch rule" of MCL 691.1402a only applies to "county" highways. The parties to this case do not dispute that the road at issue is not a "county" highway and that the two-inch rule does not apply. We thus vacate the opinion of the Court of Appeals because its analysis is dictum given our determination in *Robinson* that MCL 691.1402a applies only to "county" highways. We remand this case to the Wayne Circuit Court for further proceedings consistent with this order and *Robinson*.

We do not retain jurisdiction.

Leave to Appeal Granted April 16, 2010:

WILCOX V STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 138602; Court of Appeals No. 290515. By order of October 26, 2009, the application for leave to appeal the July 1, 2009 order of the Court of Appeals was held in abeyance pending the decision in *Hoover v Michigan Mutual Ins Co* (Docket No. 138018). On order of the Court, the application for leave to appeal in *Hoover* having been dismissed on January 15, 2010, 485 Mich 1036 (2010), the application is again considered, and it is granted. The parties shall include among the issues to be briefed whether, or to what extent, the defendant is obligated to pay the plaintiffs personal protection insurance benefits under the no-fault act, MCL 500.3101 *et seq.*, for housing expenses, modifications, and accommodations associated with the care of the plaintiffs' son, Isaac Wilcox, and whether *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521 (2005), was correctly decided. The motion for leave to participate as amicus curiae filed by the Coalition Protecting Auto No-Fault is granted. We further order that the stay entered by this Court on October 26, 2009 remains in effect until completion of this appeal.

YOUNG, J. (*dissenting*).

I respectfully dissent from the order in this case and instead would deny leave to appeal. The order directs the parties to discuss whether *Griffith v State Farm Mut Automobile Ins Co*[1] was correctly decided. I believe it was correctly decided. While it is certainly the prerogative of the Court to reconsider this case, this order is another instance where the majority seems to retreat from its previously stated fidelity to stare decisis.[2]

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[1] 472 Mich 521 (2005).

[2] See, e.g., *Pohutski v City of Allen Park*, 465 Mich 675, 712 (2002) (KELLY, J., dissenting) ("[I]f each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable."); *People v Hawkins*, 468 Mich 488, 517-518 (2003) (CAVANAGH, J., dissenting) ("We have overruled our precedents

Since the shift in the Court's philosophical majority in January 2009, the majority has pointedly sought out precedents only recently decided[3]

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when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.' . . . Absent those changes or compelling evidence bearing on Congress' original intent . . . our system demands that we adhere to our prior interpretations of statutes."), quoting *Patterson v McLean Credit Union*, 491 US 164, 173; 109 S Ct 2363; 105 L Ed 2d 132 (1989) and *Neal v United States*, 516 US 284, 295; 116 S Ct 763; 133 L Ed 2d 709 (1996); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 278 (CAVANAGH, J., dissenting) (" 'Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed.' "), quoting *People v Jamieson*, 436 Mich 61, 79 (1990); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 622 (2005) (WEAVER, J., dissenting) ("Correction for correction's sake does not make sense. The case has not been made why the Court should not adhere to the doctrine of stare decisis in this case."); Todd C. Berg, *Hathaway attacks*, Michigan Lawyers Weekly, October 27, 2008 (" 'People need to know what the law is,' Hathaway said. 'I believe in stare decisis. Something must be drastically wrong for the court to overrule.' "); Lawyers' election guide: Judge Diane Marie Hathaway, Michigan Lawyers Weekly, October 30, 2006, in which Justice HATHAWAY, then running for a position on the Court of Appeals, was quoted as saying: "[t]oo many appellate decisions are being decided by judicial activists who are overturning precedent."

[3] See, e.g., *University of Michigan Regents v Titan Ins Co*, 484 Mich 852 (2009) (directing the parties to consider whether *Cameron v ACIA*, 476 Mich 55 [2006], was correctly decided); *McCormick v Carrier*, 485 Mich 851 (2009) (granting leave to consider the plaintiff's request to overrule *Kreiner v Fischer*, 471 Mich 109 [2004]); *Lenawee Co Bd of Rd Comm'rs v State Auto Prop & Cas Ins Co*, 485 Mich 853 (2009) (directing the parties to consider whether *Miller v Chapman Contracting*, 477 Mich 102 [2007], was correctly decided); *Edry v Adelman*, 485 Mich 901 (2009) (directing the parties to consider whether *Wickens v Oakwood Healthcare Sys*, 465 Mich 53 [2001], was correctly decided); *Hoover v Michigan Mut Ins Co*, 485 Mich 881 (2009) (directing the parties to consider whether *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521 [2005], was correctly decided); *Lansing Schools Education Ass'n v Lansing Bd of Ed,* 485 Mich 966 (2009) (directing the parties to consider whether *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 [2001], was correctly decided); *Anglers of the AuSable v Dep't of Environmental Quality*, 485 Mich 1067 (2010) (directing the parties to consider whether *Michigan Citizens for Water Conservation v*

and has failed to give effect to other recent precedents of this Court.[4] Today, the Court again orders reconsideration of a case that was decided just five years ago. It should be obvious to all but the most casual observer of the Court that a pattern is being established: the new majority is intent on "revisiting" (overruling) the decisions of the last ten years. Ironically, its consistent signals to the Bar that the jurisprudence of the last decade is in play seems an unnecessary prod to those who would eagerly return to the days when "judicial policy," rather than the language of the statute, ruled.

Other than the change in the composition of this Court in 2009, nothing in the law of this State or the rationale of that decision has changed in this short time. Accordingly, as I have in other similar orders,[5] I respectfully dissent from this order.

CORRIGAN, J., joined the statement of YOUNG, J.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal April 16, 2010:

CALDERON v AUTO-OWNERS INSURANCE COMPANY, No. 138805; Court of Appeals No. 283313. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR

Nestlé Waters North America Inc, 479 Mich 280 [2007], and *Preserve the Dunes v Dep't of Environmental Quality*, 471 Mich 511 [2004], were correctly decided); *Colaianni v Stuart Frankel Development Corp*, 485 Mich 1070 (2010) (granting to consider whether *Trentadue v Buckler Automatic Lawn Sprinkler*, 479 Mich 378 [2007], was correctly decided).

[4] See, e.g., *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009), where the majority failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), where it failed to follow *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606 (1940), and *Camburn v Northwest School Dist*, 459 Mich 471 (1999); *Vanslembrouck v Halperin*, 483 Mich 965 (2009), where it failed to follow *Vega v Lakeland Hosps*, 479 Mich 243, 244 (2007); *Juarez v Holbrook*, 483 Mich 970 (2009), where it failed to follow *Smith v Khouri*, 481 Mich 519 (2008); *Beasley v Michigan*, 483 Mich 1025 (2009), *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009), and *Ward v Michigan State Univ*, 485 Mich 917 (2009), where it failed to follow *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007); and *Scott v State Farm Automobile Ins Co*, 483 Mich 1032 (2009), where it failed to follow *Thornton v Allstate Ins Co*, 425 Mich 643 (1986), and *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626 (1997).

[5] See, e.g., *University of Michigan Regents*, 484 Mich at 853; *Lenawee Co Bd of Rd Comm'rs*, *supra*, 485 Mich at 855; *Hoover*, 485 Mich at 882; *Lansing Schools Education Ass'n*, 485 Mich at 966; *Anglers*, 485 Mich at 1067; *Colaianni*, 485 Mich at 1070.

7.302(H)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied April 16, 2010:

POWERS v PIONEER RESOURCES INCORPORATED, No. 139980; Court of Appeals No. 291934.

GRIEVANCE ADMINISTRATOR v MILLER, Nos. 140079 and 140081.

WEAVER, J., would grant the applications for leave to appeal.

CORRIGAN, J. (*dissenting*). I dissent from this Court's denial of leave to appeal the order of the Attorney Discipline Board (ADB) vacating the hearing panel's order of reprimand. The hearing panel determined that respondent Sheldon L. Miller violated MRPC 1.4(b) by failing to inform complainants, his clients, who primarily asserted that they had been wrongfully discharged, that the trial court had recently dismissed one of the plaintiffs' claims, a ruling that was adverse to the clients' interests. Despite the three-member panel's unanimous determination[1] that Miller's conduct warrants disciplinary action and the Grievance Administrator's persuasive argument that Miller committed serious misconduct, this Court cannot muster a majority in favor of reviewing the ADB's decision to vacate the panel's order of reprimand. In so doing, this Court allows Miller's major ethical failures to escape punishment. Because serious misconduct apparently occurred, I would grant the applications for leave to appeal.

I. INTRODUCTION

During the 1980s, Miller represented numerous individual plaintiffs in a lawsuit against Auto Club Insurance Association (AAA). The plaintiffs included both current and former AAA employees. The lawsuit included a claim on behalf of all plaintiffs that AAA improperly changed the method of compensation from a seven percent commission system to a unit-based system. It also asserted wrongful discharge on behalf of some former employees. Miller filed several amended complaints, each adding additional plaintiffs, until the total reached 150-200 plaintiffs. The Grievance Administrator's complaint against Miller alleged misconduct in Miller's representation of the complainants, Richard Martin (now deceased), Wayne Alarie, Donald Durecki, and James Dziadziola, who were part of a smaller group of former employees. The complaint alleged that Miller failed to inform complainants of an adverse ruling just before they joined the lawsuit, agreed to stay the wrongful discharge claims without their knowledge, and essentially prioritized the seven percent compensation claim while continuously failing to provide the complainants with sufficient information to allow them to make informed deci-

[1] The panel consisted of attorneys Samuel I. Bernstein, Thomas C. Simpson, and David F. Zuppke.

sions about the representation. The complaint alleged that this conduct violated several provisions of the Michigan Rules of Professional Responsibility.

This Court does complainants, the hearing panel, and the public a major disservice by failing to review this matter further and allowing Miller to escape without any sanction. The record reveals that Miller failed to inform the complainants of the earlier adverse ruling because he believed it was not important to do so. Miller unquestionably prioritized the seven percent commission claim over the wrongful discharge claim. Complainants maintain that Miller knew that they were more concerned about pursuing their wrongful discharge claims. Complainants believed for years that Miller was pursuing their wrongful discharge claims when those claims had been stayed. Miller gave inconsistent answers in response to his clients' repeated requests for information about the lawsuit. Indeed, Miller apparently forgot that the lawsuit ever included wrongful discharge claims. After listening to hours of testimony and posing questions to the witnesses, the hearing panel concluded that Miller's conduct warranted a reprimand.

The ADB's decision to vacate the panel's order of reprimand is highly questionable because an attorney's duty to communicate with clients clearly existed before MRPC 1.4(b) was enacted in 1988. In dismissing on this ground, the ADB erroneously relied on criminal procedure standards instead of notice standards governing civil cases.

Moreover, the record warrants this Court's plenary consideration of the Grievance Administrator's allegations that Miller's post-1988 conduct violated MRPC 1.4(b) and additional provisions of the Michigan Rules of Professional Responsibility.

II. THE UNDERLYING LAWSUIT AND THE MALPRACTICE ACTIONS

Miller filed the initial complaint in *Dumas et al v Auto Club Ins Ass'n*, Wayne Circuit Court No. 83-316603-CK[2] in 1983 with three plaintiffs: Richard Dumas, Lynn McBride, and Eugene Pasko. The complaint included several counts including breach of contract and violation of the

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[2] The lengthy procedural history of the underlying *Dumas* case is set forth in detail in *Dumas v Auto Club Ins Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued April 14, 2000 (Docket No. 208617). In the recent case of *Dumas v Miller*, unpublished opinion per curiam of the Court of Appeals, issued March 30, 2010 (Docket Nos. 279149, 286342, 286343, 286344, 287143), the Court of Appeals resolved the only remaining issue in the *Dumas* case: a fee dispute between Miller and attorney Theodore S. Andris, who later substituted for Miller in representing some of the plaintiffs. The Court of Appeals also addressed several consolidated legal malpractice actions arising out of Miller's representation of current and former AAA employees. It affirmed the trial court's grant of summary disposition in favor of defendants (Miller, his law firm and in Docket No. 286344 David Ravid, Miller's former

Elliot Larsen Civil Rights Act. Plaintiffs alleged that AAA breached its employment contract with the plaintiffs by changing the system of compensation, including replacing the previous guarantee of a seven percent commission for renewal policies, and instituting new minimum production standards ("quotas") for new policies. The Elliot Larsen claim alleged that the change in the compensation system had a disparate impact on older employees and was intentionally designed to force older employees to terminate their employment with AAA, accept employment with AAA at a lower salary, "or become discharged," and that the plaintiffs "actually were either discharged, terminated their own employments, or accepted employment with [AAA] at their lower yearly salary." Most of the plaintiffs were still employed by AAA and were pursuing claims related to the compensation system. A smaller group of plaintiffs, including complainants, were no longer employed by AAA. These plaintiffs were also claiming wrongful discharge. Although Miller initially contemplated a class action, the action was not certified. Instead, individual plaintiffs were added by several amended complaints. According to testimony before the panel, Miller eventually represented as many as 150 to 200 plaintiffs.

In January 1984, before the complainants joined the lawsuit, Wayne Circuit Judge John Hausner dismissed a portion of the complaint pertaining to the breach of contract claims. Neither Miller nor his associates told complainants about this partial dismissal before they joined the lawsuit.

In 1985, Miller and his associates and the attorneys for AAA agreed to proceed with the seven percent commission claims and to stay the issues relating to production standards, which included the wrongful discharge claims. On May 8, 1985, the court entered an "Order Regarding Plaintiffs' Motion to Establish Manageable Parameters for Complex Litigation," which bifurcated any trial on the issues of liability and damages for the claims pertaining to the changes in the commission system, including claims for breach of contract and unjust enrichment under *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579 (1980), and stayed "in their entirety" plaintiffs' claims regarding the quota production standards, which included claims of age discrimination and wrongful discharge.

Complainants claim that they were never informed about the stay of proceedings. Although proceedings including several appeals to the Court

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associate) in Docket Nos. 286343, 286344, and 286342, and reversed the trial court's denial of defendants' motion for summary disposition in Docket No. 287143.

Docket No. 279149 concerns essentially the same allegations of misconduct that were presented to the ADB. The Court of Appeals relied in part on the decision of the ADB in concluding that the trial court did not err in finding, after conducting an evidentiary hearing, that Miller did not engage in disciplinable misconduct with respect to his representation of the *Dumas* plaintiffs.

of Appeals and this Court continued in the *Dumas* case over the next several years, the wrongful discharge claims remained subject to the stay.

In 1986, the trial court granted AAA's motion for summary disposition and dismissed the seven percent commission issue from the lawsuit. The order was designated as a "final" order even though it did not dispose of the wrongful discharge claims and the case was removed from the circuit court's docket. Appeals followed. During this time, the complainants believed their wrongful discharge claims were pending and sought information from Miller on several occasions. In 1988, Miller won partial reversal of the trial court's summary disposition order in the Court of Appeals, *Dumas v Auto Club Ins Ass'n*, 168 Mich App 619 (1988), but in *Dumas v Auto Club Ins Ass'n*, 437 Mich 521 (1991), this Court reversed the Court of Appeals decision that plaintiffs could maintain their action for breach of contract and unjust enrichment against AAA. In November 1991, Miller held a meeting to inform his clients of this Court's decision.

After some of Miller's clients retained attorneys to file legal malpractice actions against Miller, Miller began seeking to have *Dumas* reinstated for the clients who were claiming wrongful discharge because it did not appear that this Court's 1991 decision specifically addressed that claim. Then, in a 1993 discovery deposition of one of Miller's former associates, the 1985 stay came to light. The stay thereafter became the basis of Miller's efforts to reinstate the wrongful discharge claim.

In 1991, Martin and Alarie retained attorney Theodore S. Andris to explore the possibility of suing Miller for legal malpractice. Miller offered to allow Andris to substitute as attorney for Martin and Alarie. Andris declined. He wanted Miller to first succeed in having his clients' wrongful discharge claims reinstated. Miller apparently contended that the claims of Martin and Alarie had no merit and that any malpractice claim against him would be frivolous. In 1992, Andris filed a malpractice action against Miller on behalf of Martin and Alarie. Attorney John Mason filed a malpractice action against Miller on Durecki's behalf.

In October 1992, Andris filed a limited appearance in the *Dumas* lawsuit for the purpose of determining the status of the case. Attorney Roger Wardle, Miller's attorney in the malpractice action, concurred in the motion. Judge Hauser initially determined that all of the issues in the case had been resolved, and ruled on remand that although the 1986 order granting summary disposition did not dispose of the plaintiffs' " 'quota' age discrimination claims," plaintiffs had abandoned those claims.

In 1996, the *Dumas* case was reassigned to Wayne Circuit Judge William Giovan, who handled further trial court proceedings on whether to grant a scheduling order for proceedings on the quota age discrimination claim or enter an order disposing of the case. Judge Giovan concluded that no court or person intended for the case to be dismissed, and granted the motion for entry of a scheduling order on April 25, 1996. The order noted that the court's ruling "also necessarily contemplates that the stay of proceedings entered . . . on May 8, 1985, is hereby dissolved." More appeals ensued, but Judge Giovan's decision to allow the wrongful discharge claims to proceed was ultimately upheld.

Miller's representation of Martin and Alarie in the *Dumas* case continued until Andris entered a substitution of counsel on their behalf in 2002. AAA settled with Martin and Alarie for $300,000 each. Attorney John Mason took over representation of some of the other *Dumas* plaintiffs, including complainant Durecki. Mason took his clients' claims to trial and, in 2002, a jury returned a verdict of no-cause of action. Several of the original plaintiffs, including complainant Dziadziola, continued to be represented by Miller. Dziadziola ultimately accepted AAA's offer to settle for $30,000. In 2004, Andris filed a malpractice action against Miller on behalf of Dziadziola and three other plaintiffs who accepted similar settlement offers. As noted, the Court of Appeals recently addressed the consolidated malpractice actions. *Dumas v Miller*, unpublished opinion per curiam of the Court of Appeals, issued March 30, 2010 (Docket Nos. 279149, 286342, 286343, 286344, 287143).

III. PROCEEDINGS BEFORE TRI-COUNTY HEARING PANEL #64

Complainants also sought disciplinary action against Miller. In 2006, the Grievance Administrator filed a complaint before the Attorney Discipline Board alleging that Miller's agreement to stay the wrongful discharge claims while proceeding with the claims related to the compensation system effectively prioritized the claims of the plaintiffs who were still employed by AAA without the knowledge of the plaintiffs who had been discharged. The complaint alleged that Miller failed to obtain authority or approval from complainants to stay their wrongful discharge claim and failed to inform them of the stay. It alleged that in response to complainants' repeated inquiries about the status of the case, Miller misrepresented to them that their claims were on appeal, even though the wrongful discharge claim had been stayed. The Grievance Administrator alleged violations of several sections of the Michigan Rules of Professional Conduct.

The panel held a three-day hearing on June 25, 2007, November 6, 2007, and March 5, 2008, and issued its report on April 8, 2008. The panel unanimously found that that the Grievance Administrator had proven by a preponderance of the evidence that Miller had failed to explain a matter to the extent reasonably necessary to permit his clients to make informed decisions in violation of MRPC 1.4(b). In particular, the panel found that Miller was obligated to explain to complainants the implications of joining the "large group" action instead of initiating independent actions. It also found that, by failing to inform complainants of the adverse ruling that occurred just before they joined the lawsuit, Miller deprived them "of the opportunity to file an independent action which likely would have been assigned to a different Judge where a different ruling of the dismissed legal issues might have occurred." The panel concluded that the Grievance Administrator had not proven by a preponderance of the evidence that Miller violated other sections of the MRPCs. The panel thereafter unanimously concluded that Miller should be reprimanded and issued an order of reprimand.

IV. THE ATTORNEY DISCIPLINE BOARD'S RULING

Complainants appealed to the ADB. The ADB granted Miller's motion to consider his delayed cross-petition for review. In his cross-petition, Miller argued for the first time that MRPC 1.4(b) did not come into effect until 1988 and that the Grievance Administrator had not pleaded a violation of the Code of Professional Responsibility which was in effect in 1984 and 1985. After a hearing, the ADB issued an order on October 30, 2009, vacating the panel's order of reprimand. The ADB affirmed the panel's findings of fact, but vacated the order of reprimand. It reasoned that Miller's conduct during the relevant period 1984 through 1985 was not in violation of MRPC 1.4(b) as alleged in the complaint because MRPC 1.4(b) did not become effective until October 1, 1988, and the complaint did not charge any violation under Michigan's former Code of Professional Responsibility.

V. AN ATTORNEY'S DUTY TO COMMUNICATE WITH CLIENTS

I would grant complainants and the Grievance Administrator leave to appeal the ADB's decision. An attorney's duty to communicate with clients plainly existed before MRPC 1.4(b) was enacted. "[T]he failure to disclose all relevant facts and information known by an attorney to his or her client has traditionally been regarded as breach of an attorney's ethical obligation." *State Bar Grievance Administrator v Estes*, 390 Mich 585, 600 (1973), citing *Kukla v Perry*, 361 Mich 311, 317 (1960); *Storm v Eldridge*, 336 Mich 424, 435 (1953). In *Joos v Auto Owners Ins Co*, 94 Mich App 419, 424 (1979), the Court of Appeals held that "an attorney has, as a matter of law, a duty to disclose and discuss with his or her client good faith offers to settle." Moreover, the duty of reasonable communication imposed by MRPC 1.4(b) was embodied in the Michigan Code of Professional Responsibility. DR 6-101(A)(3) provided that "[a] lawyer shall not . . . [n]eglect a legal matter entrusted to him." DR 7-101(A)(2) and (3) provided that "[a] lawyer shall not intentionally . . . [f]ail to carry out a contract of employment entered into with a client for professional services . . ." or "[p]rejudice or damage his client during the course of the professional relationship . . ."

VI. SUFFICIENCY OF THE COMPLAINT

Moreover, the complaint contained sufficient factual details to notify Miller of the nature of the allegations against him. While Miller likens a proceeding before the ADB to a criminal proceeding, the Grievance Administrator points out that, in general, "the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel." MCR 9.115(A). "Pleadings must conform as nearly as practicable to the requirements of subchapter 2.100." *Id*. Under the general rules of pleading in a civil action, a pleading must contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary

reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend" and "[a] demand for judgment for the relief that the pleader seeks." MCR 2.111(B)(1), (2). The purpose of a complaint in a civil action is to state a cause of action and to allege facts with " 'sufficient particularity to reasonably inform the defendant of the nature of the cause of action.' " *Steed v Covey*, 355 Mich. 504, 510 (1959), quoting 19 Michigan Law and Practice, Pleading § 8, p 12. " 'In general, the complaint or petition is sufficient if its allegations state facts upon which the plaintiff relies for a recovery, and if it adequately advises the defendant of the charge so as to enable him to prepare his defense.' " *Id*. at 511, quoting 41 Am Jur, Pleading, § 77, pp 343-345.

Moreover, MCR 9.115(B), which applies specifically to disciplinary proceedings further provides that, "Except as provided by MCR 9.120,[3] a complaint setting forth the *facts* of the alleged misconduct begins proceedings before a hearing panel." (Emphasis added.) In contrast, the rules of criminal procedure define the complaint as "a written accusation that a named or described person has committed *a specified criminal offense*" and require the complaint to "include the substance of the accusation against the accused and *the name and statutory citation of the offense*." MCR 6.101(A). And, unlike in a criminal case, "[a] default, with the same effect as a default in a civil action, may enter against a respondent [in a disciplinary proceeding] who fails within the time permitted to file an answer admitting, denying, or explaining the complaint, or asserting the grounds for failing to do so." MCR 9.115(D)(2).

Because the rules of civil procedure apply to pleadings in a disciplinary action, and because the complaint thoroughly set forth the facts of the alleged misconduct, I believe we should grant leave to consider the correctness of the ADB's decision to vacate the panel's reprimand order on the sole basis of the Grievance Administrator's failure to plead a violation of the former Michigan Code of Professional Responsibility.

VII. ADDITIONAL ALLEGED VIOLATIONS OF THE MICHIGAN RULES OF PROFESSIONAL RESPONSIBILITY

In addition to disputing the correctness of the ADB's decision because an attorney's duty to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation predated the enactment of MRPC 1.4(b) in 1988, the Grievance Administrator points out that Miller's duty to keep his clients informed continued until at least 1991, and until 2002 with respect to Dziadziola. I believe the record, as discussed below, supports the Grievance Administrator's position. In addition, the Grievance Administrator argues that the record supports additional findings of misconduct. Specifically, the

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[3] MCR 9.120 applies when the attorney has been convicted of a criminal offense. It requires, among other things, that the Grievance Administrator be notified of the conviction within 14 days.

Grievance Administrator alleges that Miller handled a legal matter that he was not competent to handle in violation of MRPC 1.1(a); neglected a legal matter entrusted to him in violation of MRPC 1.1(c); failed to seek the complainants' lawful objectives in violation of MRPC 1.2(a); limited the objectives of the representation without complainants' consent in violation of MRPC 1.2.(b); failed to act with reasonable diligence in violation of MRPC 1.3; failed to make reasonable efforts to expedite litigation in violation of MRPC 3.2; failed to keep complainants reasonably informed about the status of the matter and to promptly comply with reasonable requests for information in violation of MRPC 1.4(a); materially limited his representation of complainants by also representing the larger group of plaintiffs in violation of MRPC 1.7(b); and engaged in misrepresentation in violation of MCPC 8.4(b) by repeatedly misrepresenting to Martin and Alarie that they did not have wrongful discharge claims. The Grievance Administrator also claims that this alleged misrepresentation was conduct that exposed the legal profession to obloquy, contempt, censure, or reproach in violation of MCR 9.104(A)(2), and was conduct that was contrary to justice, ethics, or honesty in violation of MCR 9.104(A)(3).

VIII. RECORD SUPPORT FOR THE ALLEGATIONS OF MISCONDUCT

In my view, the record supports the Grievance Administrator's and the complainants' argument that significant misconduct occurred. Miller's apparent failures began at the time complainants decided to retain Miller with his failure to inform them of the earlier adverse ruling and to explain to them the implications of joining a larger group of plaintiffs who were still employed by AAA. Miller admitted that when the complainants first approached him in 1984, the breach of contract claims for both minimum production standards and the change in compensation had been dismissed. Transcript of Panel Hearing, March 5, 2008, at 691. Miller testified that members of his staff probably first interviewed complainants but agreed that no one would have told them about the dismissal. Miller felt it was not important to tell them because the most important part of the case was the seven percent compensation issue and because he had a right to appeal the trial court's decision. *Id*. at 688, 695.

Miller's questionable conduct continued when he agreed to stay part of the case yet allegedly failed to inform complainants of the stay at the time it was entered. Miller apparently agreed to the stay for strategic reasons. He believed that resolution of the seven percent claims first would benefit even those plaintiffs who no longer worked at AAA. Complainants, however, maintained that they made it clear to Miller that their priority was the wrongful discharge claims. At the time the stay was entered and in the years that followed, Miller seemingly failed to appropriately communicate with the smaller group of plaintiffs who had been discharged, despite their repeated requests for information.

Miller testified before the panel that he and AAA's counsel had agreed that the case should be bifurcated and part of the case stayed. *Id*. at 726. AAA apparently refused to discuss settlement until the issue regarding the change in the compensation system had been resolved. *Id*.

at 724. Miller testified that his rationale behind agreeing to the stay was that the seven percent issue should be pursued first because the most important issue for the plaintiffs who had lost their jobs was the amount of damages to which they would be entitled. *Id*. at 720. Miller believed that he would be able to get a larger amount in damages for both the plaintiffs who were still employed by AAA and those who had lost their jobs if he was able to prevail on the seven percent issue because AAA had cut pay by as much as 40 percent. *Id*. at 720-721. Miller's former associate David Ravid likewise testified that the attorneys for both sides agreed that the "biggest single issue and the only common issue" was the seven percent compensation claim, so they agreed to the stay in an effort to "streamline" the case. Transcript of Panel Hearing, November 6, 2007, at 533-534. Miller acknowledged at the hearing that, at the time he agreed to the stay, he had no information about the amount of the complainants' compensation under the old versus new compensation systems, so he did not actually know how much greater their damages would have been if the seven percent compensation claim were proven. Transcript of Panel Hearing, March 5, 2008, at 731-732. Miller was also asked what he would have done if any of the plaintiffs who no longer worked at AAA approached him and indicated that they were more concerned about having lost their jobs and agreed to damages calculated using the new compensation system. *Id*. at 730. Miller replied, "If somebody came and told me that specifically and I was sure that they understood they would be putting in damages at a substantially lower level, absolutely, I would have done what they wanted." *Id*. at 730-731.

Yet according to the complainants, their primary concern, which they made clear to Miller and his staff, was pursuing the constructive discharge claims. Alarie testified that he and Martin met with Miller and Bill Stevenson of the Miller law firm. Transcript of Panel Hearing, June 25, 2007, at 62. Alarie said that he went to see Miller because he felt he had been forced out of AAA because of their practices. *Id*. at 62-63. Alarie testified, "once I presented my case to him, he said that I had a classic case of constructive discharge and that he would add us, add me to the case he already had, and that would expedite my case coming to light." *Id*. at 63. Alarie said that he understood that the *Dumas* case was about the seven percent commission claim and that he agreed that Miller could make that claim for him too "[i]f it was going to expedite our case." *Id*. at 65. Alarie testified that he reiterated to Miller that he was not currently employed with AAA. He believed Miller understood that his primary purpose in retaining Miller was to pursue a constructive discharge claim. *Id*. at 65-66. Dziadziola similarly testified that his primary concern, which he communicated to Miller, was that he "had planned on staying with [AAA] all my career, and now it was taken away." *Id*. at 173. He said that Miller advised joining the lawsuit that was already underway. *Id*. at 171-174. Durecki testified that he retained Miller because Miller "agreed to represent me for what he told me was wrongful discharge due to age." *Id*. at 275. Durecki testified he wanted his job back and that Miller knew that because Durecki asked him about it at every meeting. *Id*. 283-284.

Given the complainants' apparent focus on their wrongful discharge claims, they should have been informed about the stay. Miller testified

that while he had no recollection of informing his clients about the stay, he held a meeting with all of the clients after every major ruling, and that he was confident he held a meeting after the stay was entered. Transcript of Panel Hearing, March 5, 2008, at 727-728. It is undisputed that Miller and his associates held several meetings for all of the plaintiffs to inform them of developments in the lawsuit. Ravid also did not recall informing the plaintiffs of the stay, but was "quite confident" that they were told about the stay. Transcript of Panel Hearing, November 6, 2007, at 536-537. Miller acknowledged, however, that he did not write, telephone or meet separately with the clients most directly affected by the stay. Transcript of Panel Hearing, March 5, 2008, at 729-730. It is also not clear whether any provision was made for informing those clients who could not attend the meetings. Miller testified that "[a]s far as I could tell without taking attendance, I thought just about everybody attended every meeting," but acknowledged the possibility that some clients may have never attended a meeting. *Id*. at 882-883. Panelist Bernstein then asked, "Can I ask you why you didn't every three or four or five or six months didn't just write a mass letter to everyone indicating what was transpiring?" *Id*. at 883. Miller responded:

> Most of the time nothing was going on. We did write letters when there were settlement proposals, which was of importance to them, "Please come in." Everyone came in personally, I discussed their case and the offer the AAA made to their case.
>
> Other than that, they got personal letters telling them to attend the meetings. I would assume that if they couldn't attend the meetings—maybe I'm wrong—if [sic] I could assume that if they don't attend the meeting and they want to know what's going on, they pick up the phone, okay? Nobody ever called me and said, "What's going on that I don't know, or anything like that. So as far as I knew, everybody was fully informed of everything. [*Id*.]

The complainants insisted that they never learned of the stay, either at the meetings or by other means. Transcript of Panel Hearing, June 25, 2007, at 73-76, 180-181, 183-185, 284, 290. Durecki testified that he attended every meeting about which he received a notice. *Id*. at 290-291. Durecki would sometimes ask Miller about the wrongful discharge claims at the large group meetings but that he never learned of the stay until sometime in the 1990s when attorney John Mason told him about it. *Id*. at 291. Fran Stocker, who was one of the Dumas plaintiffs still employed by AAA during the lawsuit, also testified that she attended most of the meetings and did not recall any discussion of any part of the case being stayed. Transcript of Panel Hearing November 6, 2007 at 426-427.

Over several years, complainants requested information about the lawsuit. In a February 17, 1985, letter, Martin wrote to Miller that he had called Miller's office twice in November 1984 and left a message asking Miller to return his calls. Miller did not respond. Martin hoped for answers to his questions. Martin continued:

> In reading an article in the Grand Rapids paper about Bruce Farrell's lawsuit and his award, I find that you were quoted as saying that all of your clients are still employed at AAA. Mr. Miller, you have three clients in Bay City who are not employees of AAA. Are we not still part of your lawsuit?
>
> Could you please give me a brief synopsis of our suit as to where it stands presently? What does the award in Grand Rapids mean to our case? Are we still sometime from a trial? Has the company (AAA) offered any type of settlement? [Complainant's Amended Brief in Support of Petition for Review of Order of Tri-County Hearing Panel #64, Exhibit B.]

Attorney David Ravid apparently responded on Miller's behalf that the Farrell case had little meaning to the Dumas case but also stated that all plaintiffs named in the suit continued to be a part of the suit whether or not they were currently employed by AAA. Transcript of Panel Hearing, March 5, 2008, at 715.

On August 30, 1990, Martin wrote to Miller stating that he had previously declined to accept AAA's settlement offer. Martin stated that he had "no intention of accepting such a ridiculous amount." Martin wrote that Miller's reply to his earlier correspondence did not address his "concern as to why I would not receive a settlement based on the merits of the whole suit and not just the unit difference." Martin continued:

> Again, I ask if you have approached AAA for a settlement on the whole case? Can I file a suit individually or must I remain part of the Dumas case? What is the status of our case with the courts, including the Michigan Supreme Court?
>
> The reason for my concern is that there are individuals from this area that are with other attorneys that have reached settlement with AAA. [Complainants' Application, Exhibit CC, Petitioners' Exhibit 30.]

Miller's September 5, 1990, response acknowledged that Martin had a wrongful discharge claim. The letter stated that negotiations between Miller and AAA had "hit into a brick wall," but explained that they had previously attempted to agree on a damages formula. "However, in a case such as yours, where there is a claim for wrongful discharge, the formula would not be fair, as it would be applied to you." Miller explained that if they were able to prove wrongful discharge, "the amount of damage you would have suffered would be far, far greater than the amount AAA would be willing to pay voluntarily." Complainant's Amended Brief in Support of Petition for Review of Order of Tri-County Hearing Panel #64, Exhibit I.

An internal memorandum dated January 11, 1991, from attorney Richard Shaw to Miller responded to Miller's January 10, 1991, query whether the firm was pursuing a cause of action in connection with the discharge of several of the *Dumas* plaintiffs. Shaw wrote, "It is most unclear to me whether issues such as quotas, demotion, and discharge are still alive in the trial court. . . . If they are, we should be actively

adjudicating those claims." Complainant's Amended Brief in Support of Petition for Review of Order of Tri-County Hearing Panel #64, Exhibit J. At the hearing, Miller admitted he did nothing in response to this memorandum, but said "I was in the Supreme Court. What could I do? . . . You can't just take away the case and bring it back." Miller testified that he knew the case was "still alive" on the wrongful discharge claims all along and knew that part of the case had not gone forward, but admitted that he may have forgotten about the actual stay order. Transcript of Panel Hearing, March 5, 2008, at 757-759.

In a January 30, 1991, letter signed by both, Martin and Alarie reiterated their rejection of AAA's settlement offer: "we reject any settlement of this nature based on the unit discrepancy and wish our settlement to be based on the merits of the whole case. We do not understand how the direction of our case has been narrowed to the point of unit pay." Martin and Alarie asked, "Why is AAA eager to settle for much larger amounts with other former employees?" Complainants' Application, Exhibit DD, Petitioners' Exhibit 33.

In a March 22, 1991, letter, Miller advised Martin and Alarie that "our lawsuit which was filed in 1983 did allege age discrimination and breach of the employment contract as they pertained to the payment of 7% commissioners on new and renewal business. . . . That lawsuit does not contain any claim that anybody was wrongfully discharged." Complainant's Amended Brief in Support of Petition for Review of Order of Tri-County Hearing Panel #64, Exhibit K. At the hearing, Miller testified concerning this letter, "I made a mistake in my wording." Transcript of Panel Hearing March 5, 2008, at 755-756. He admitted that the mistake had never been corrected because he was not aware of it until later. *Id*. at 756. Referring to the plaintiffs, Miller said, "They had copies of the lawsuit, so they knew what the lawsuit said." *Id*.

In November 1991, Miller held a meeting to discuss this Court's 1991 decision reinstating Judge Hausner's summary disposition order. The dialogue at the meeting suggests that Miller had forgotten about the wrongful discharge claims or that he had at least failed to keep the plaintiffs informed about the status of those claims. At the meeting, a plaintiff identified only as "Pasko" asked Miller what happened to the age discrimination claims. Miller replied that age discrimination "didn't apply" in *Dumas*:

> *Miller*: . . . It didn't apply because the discrimination was not for anybody losing their job. Had you been fired, had you been fired, and they replaced you with a younger person, that would have at least been a claim for age discrimination.
>
> *Pasko*: But that's exactly what happened.
>
> *Miller*: Oh, wait, I'm not talk—I, no, wait . . . so we understand, I'm not talking about your individual, I'm talking about the Dumas case that was filed as a 7% commission case.
>
> *Pasko*: Because I'm one of the originals, and I was the, was one of the one's forced out for early retirement and you said you had me covered. And that's age discrimination. That's unlawful discharge, harassment, whatever you want to call it.

Miller: We sued for 7, for the breach of the 7% commissions.

Pasko: That's what you were suing for?

Miller: Yeah. That's what we were suing for. Everybody there read the Complaint, everybody there has been to a hundred meetings, this is a 7% commission suit.

Pasko: Why through the years have you been telling me I've got a case then?

Miller: I told everybody that I thought they had a case. I didn't tell anybody I didn't think they had a case. What do you think I spent all my time with it for? Do you think I did it because I liked it? I did it because we thought we had a case. And until the Supreme Court changed the law we did have a case.

Pasko: That 7% that you're talking about didn't mean I thing to me, and I left in '83.

Miller: I understand.

Pasko: I was a full discharge. And you knew that. And you told me for the last 8 years that you had me protected.

Miller: Okay.

* * *

Pasko: And I think there's guys in here that know about how many times I've asked you that in these meetings. [Complainant's Amended Brief in Support of Petition for Review of Order of Tri-County Hearing Panel #64, Exhibit L.]

Later, however, Miller did say that "[t]he only hope is for the 20 people," by which it is possible that he meant the smaller group of plaintiffs who were pursuing wrongful discharge claims. *Id*.

IX. CONCLUSION

In my view, the record at least creates a question about whether Miller failed to fulfill his duties to the complainants as members of a smaller group of plaintiffs who sought to pursue wrongful discharge claims. The Grievance Administrator raises significant questions about the correctness of the ABD's decision to vacate the panel's order of reprimand, and persuasively argues that Miller violated a duty to communicate with his clients that pre-dated MRPC 1.4(b) and violated additional provisions of the Michigan Rules of Professional Misconduct. I also consider it significant that the panelists unanimously determined that Miller's conduct warranted a reprimand. The ADB found no flaw in the panel's factual determinations, but vacated the order of reprimand on the basis of what is, in my view, a very questionable legal conclusion. I would grant leave to consider the correctness of that ruling and to consider complainants' and the Grievance Administrator's argument that Miller engaged in additional misconduct.

MARKMAN, J., joined the statement of CORRIGAN, J.

YOUNG, J., not participating, because he was general counsel for AAA when a portion of the underlying litigation was pending.

HARRIS v GENERAL MOTORS CORPORATION, No. 140241; Court of Appeals No. 285426.

KELLY, C.J. (*dissenting*). I would grant plaintiff's application for leave to appeal. Plaintiff makes a potentially meritorious distinction between different types of workplace falls. The distinction could determine whether she is entitled to worker's compensation benefits.

Plaintiff's decedent fell in a bathroom at his place of employment. He died four days later from his injuries. Plaintiff, his widow, filed a claim for benefits under the Worker's Disability Compensation Act (WDCA).[1] At trial, there was conflicting testimony about whether decedent's fall occurred while he was moving or whether he simply fainted, then fell. The parties also disputed whether decedent's medical problems caused the fall.

The magistrate denied plaintiff's claim, concluding that she had failed to establish any work connection for decedent's injury. Consequently, the magistrate determined that plaintiff's claim was barred under the Court of Appeals decisions in *Ledbetter v Michigan Carton Co*[2] and *McClain v Chrysler Corp*.[3]

The Workers' Compensation Appellate Commission (WCAC) affirmed the magistrate's decision in a divided opinion. The majority found factual mistakes in the magistrate's opinion, but concluded that they were harmless.

The dissent disagreed that the magistrate's errors were harmless. It noted the distinction between "idiopathic" falls and "unexplained" falls. The dissent believed that the former are purely personal to the employee and therefore non-compensable, whereas the latter are falls of unknown origin and are generally compensable. The dissent cited precedents from this Court where the cause of a workplace fall was unexplained and there was no evidence that the employee had a medical problem causing the fall.[4] In those cases, this Court unanimously concluded that the unexplained nature of the fall gave rise to a presumption that plaintiff's injuries arose out of the course of his employment.[5] The dissent would

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[1] MCL 418.101 *et seq*.

[2] *Ledbetter v Michigan Carton Co*, 74 Mich App 330 (1977).

[3] *McClain v Chrysler Corp*, 138 Mich App 723 (1984).

[4] See, e.g., *Dulyea v Shaw-Walker Co*, 292 Mich 570, 574 (1940) ("It is also undisputed that the deceased had worked for defendant company for a period of 11 years, had lost no time from his work because of sickness, was not subject to dizzy spells, and on the morning of the accident had been performing his usual duties except for the time taken to see the company doctor. It is also a fact that deceased was not suffering from any disease which might cause him to collapse while going down stairs.").

[5] *Woodburn v Oliver Machinery Co*, 257 Mich 109, 111 (1932) ("The fact he left home uninjured, went to defendant's factory, was engaged in his

have remanded the case to the magistrate to explain why he concluded that the fall was idiopathic, rather than unexplained.

The Court of Appeals affirmed the WCAC, ignoring the distinction drawn by the dissent. The court conflated the two types of falls, holding that "[a]n injury of unknown or idiopathic origin is not compensable simply because it occurred while the employee was in the course of employment on the employer's premises."[6]

Notably, neither the WCAC majority nor the Court of Appeals addressed the cases cited by the WCAC dissent. *Ledbetter* and *McClain* also ignored *Dulyea*, *Woodburn*, and the other cases cited by the WCAC dissent. The Court of Appeals majority in *McClain* simply announced, without citation, that unexplained falls were not compensable.[7]

I am not convinced that *Ledbetter* and *McClain* can be reconciled with *Dulyea* and *Woodburn*. I would grant leave to appeal to consider whether a legal distinction exists between "unexplained" and "idiopathic" falls, and if so, whether that distinction is dispositive of entitlement to benefits under the WDCA.

CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

Statements on Denial of Motion to Disqualify April 22, 2010:

PEOPLE v ACEVAL, No. 138577; reported below: 282 Mich App 379.

HATHAWAY, J. Defendant has brought this motion seeking my recusal on his motion for rehearing of this Court's denial of his application for leave to appeal. Because I do not believe that grounds supporting recusal exist, I deny defendant's motion.

The relevant underlying facts and proceedings are as follows: Defendant was charged with delivery of more than 1,000 grams of cocaine and conspiracy to do the same. The original trial was conducted in Wayne County Circuit Court before Judge Mary Waterstone. Defendant's trial resulted in a mistrial because of a hung jury. Defendant's subsequent

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usual and ordinary occupation therein, was found at the factory, at the foot of the stairs, in the line of travel where the discharge of his duties usually and ordinarily took him, severely injured about the head, from which injuries it is probable he died, is, we think, sufficient to raise a presumption the injuries to deceased rose out of and in the course of his employment.").

[6] *Harris v Gen Motors Corp*, unpublished opinion per curiam of the Court of Appeals, issued November 24, 2009 (Docket No. 285426) at 4.

[7] *McClain*, 138 Mich App at 730-732 ("We are not persuaded that Michigan has adopted a rule requiring compensation to be paid simply because the injury occurred at the workplace, where the nature of the cause is unknown. . . . We do not find that the WCAB erred by failing to devise a more specific standard relating to idiopathic falls. Plaintiffs' arguments for compensation for injuries of unknown causal relationship to their employment have merit, but are not a recognized theory in this state.").

retrial was held before Judge Vera Massey Jones.[1] During the retrial, defendant pled guilty to the charge of possession with intent to deliver more than 1,000 grams of cocaine. The trial judge accepted the plea and imposed the agreed-upon sentence. Subsequent appeals ensued. The present appeal arises from the Court of Appeals decision affirming defendant's guilty plea.[2] Defendant filed an application for leave to appeal to this Court, and on September 2, 2009, this Court denied defendant's application because a majority of participating justices were not persuaded of the need for further review.[3] Defendant has now filed a motion for rehearing along with this motion for my disqualification.

Defendant's motion for disqualification generally asserts that I am actually biased against him and/or that there is an appearance of impropriety presented by my participation in this case given the applicable facts and circumstances. Defendant's accompanying affidavit ostensibly setting forth the grounds and factual basis for disqualification is difficult to decipher and almost incoherent. As best as I can determine, defendant is basing this motion on unsubstantiated assertions and opinions of his counsel to the effect that there is widespread corruption and/or cronyism throughout the entire Wayne County Circuit Court and the Wayne County Prosecutor's Office. However, defendant fails to set forth any facts that would support these personal opinions. Aside from defendant's frivolous insult to the integrity of the entire Third Circuit Bench and Prosecutor's Office, he has alleged nothing to suggest that I am personally biased or that there is any appearance of impropriety.

This Court's newly amended rules for recusal[4] address the standards for actual bias and appearance of impropriety. Motions for recusal based on these grounds implicate two provisions within MCR 2.003.[5] These provisions require disqualification of a judge if there is actual bias or when there are objective and reasonable perceptions of the appearance of impropriety. The pertinent sections of the rule provide:

> (1) Disqualification of a judge is warranted for reasons that include, but are not limited to the following:
>
> (a) The judge is biased or prejudiced for or against a party or attorney.

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[1] This matter was transferred to Judge Vera Massey Jones as a result of allegations of misconduct by Judge Waterstone. Because the allegations of misconduct are the subject matter of a pending case, I am precluded from addressing any aspect of the allegations in this statement.

[2] *People v Aceval*, 282 Mich App 379 (2009).

[3] Justice CORRIGAN did not participate. The remaining justices were evenly divided. *People v Aceval*, order of the Michigan Supreme Court, entered September 25, 2009 (Docket No. 138577).

[4] MCR 2.003.

[5] MCR 2.003(C)(1)(a) and (b).

(b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v A T Massey Coal Co, Inc*, 556 US ___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. [MCR 2.003(C)(1).]

Thus, the first inquiry is whether I am actually biased against the defendant or his attorney. I have carefully reviewed this matter and I find that I have had no involvement in defendant's case as a trial court judge or as a former member of the Wayne County Circuit Court bench. I did not have any actual knowledge of defendant during my time on the Wayne County bench. Further, I am not personally acquainted with defendant, or counsel for the defendant, and accordingly harbor no bias or prejudice against either of them. Defendant alleges nothing other than attenuated allegations to support his claim that I am actually biased and, accordingly, this is not a basis to recuse myself.

The next inquiry is whether there is an appearance of impropriety. This inquiry is generally twofold: first, whether defendant's due process rights, as enunciated in *Caperton*, would be impaired by my participation in this case, and second, whether there was an appearance of impropriety as set forth in Canon 2 of the Michigan Code of Judicial Conduct that would require my recusal. Defendant does not allege that his due process rights are at stake, so I will not address this facet of the analysis. Defendant alleges only that there is an appearance of impropriety. The test for determining whether there is an appearance of impropriety is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Caperton*, *supra* at 2255. I conclude that defense counsel's unsubstantiated opinions and allegations do not support my recusal on this ground.

Defendant essentially alleges that I cannot be impartial in this appeal because I was a member of the Wayne County bench at the time of his conviction and am acquainted with the other members of that bench. However, the mere fact that I was a member of the same trial bench clearly does not support recusal in and of itself. Justices of the Supreme Court and Judges of the Court of Appeals who have previously served on a trial bench must routinely review their former colleagues' decisions and actions. Circuit Court judges review matters by members of district courts where they formerly served. There is no appearance of impropriety in doing so and defendant cites no authority to support such a proposition. Defendant has failed to allege any instances of my personal conduct that would require recusal on this basis.

Defendant's challenge to my ability to be impartial in this appeal is also based on the unsupportable and fictitious premise that there is widespread corruption and cronyism among Wayne County judges and prosecutors. This bold assertion is supported only by numerous disjointed and bizarre allegations and opinions of his counsel. Defendant also makes similar allegations against Oakland County government

officials, claiming they are all part of this same pattern or scheme. Yet, Oakland County had nothing to do with this prosecution or appeal. He further challenges my ability to be impartial based on my former marriage to Richard Hathaway, (former Wayne County Circuit Judge) currently a Wayne County prosecutor. However, I have been divorced from Richard Hathaway for over fifteen years, we do not share any common financial or business interests, and I do not harbor any bias or prejudice for or against him. Moreover, I am unaware of what specific role Richard Hathaway has played in this prosecution, or its relevance to any issue in this case, and defendant has failed to provide any details in this motion. Defendant's motion merely states that we were formerly married. However, the fact that my former husband, from whom I have been divorced from for over 15 years, is currently a Chief Assistant Prosecutor for Wayne County has no bearing whatsoever on my decision in this case. None of these allegations presents an appearance of impropriety based on objective and reasonable perceptions, and accordingly I find no basis for recusal on this ground.

Defendant has failed to substantiate any basis for my recusal. I have no actual bias and there is no appearance of impropriety. Therefore, I deny defendant's motion to disqualify.[6]

MARKMAN, J. I write separately only to observe that this Court adheres to a different procedure in the present motion for disqualification than it did with regard to the recent motion for disqualification in *Pellegrino v AMPCO*, #137111, and that this change in procedure has significant consequences for the new disqualification process. In *Pellegrino*, this Court allowed other justices an immediate opportunity to respond to my statement to deny the disqualification motion directed toward me. In the instant case, justices are not to be afforded a similar opportunity until after, and unless, the *attorney* who initially moved the disqualification motion against Justice HATHAWAY has requested that her decision be reviewed by the full court.[1]

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[6] I do not agree that we are following a different procedure in this case than we did in *Pellegrino v AMPCO*, #137111. We conducted full court de novo review in *Pellegrino* in response to plaintiff's motion requesting the same. While plaintiff's motion for full court review in *Pellegrino* was filed too early, we chose not to require the plaintiff to refile a motion that was already pending before us because there were no time limitations in the rule at that time. As of March 16, 2010, time limitations were adopted as part of the procedure and we expect litigants to follow the newly amended procedure.

[1] In justifying this disparity, Justice HATHAWAY finds it significant that counsel in *Pellegrino* expressly moved for full court review of my disqualification decision. However, counsel's motion preceded even my response to his original motion for disqualification, and therefore was untimely under the new court rules. Counsel cannot unilaterally alter the rules of this Court. That is, although these rules clearly contemplate a motion for full court review only after the targeted justice has denied a

Thus, one procedure *entitles* justices to review the disqualification decisions of other justices, while the other procedure allows such review *only* if sought by the attorney. Although I do not personally favor any procedure that involves justices in the review of the disqualification decisions of other justices, if there is to *be* such a procedure, I am troubled that it can apparently only be invoked at the request of an attorney, and not also at the request of another justice. Such a procedure regrettably seems of a kind with this Court's rejection of my proposed amendment to the new rules allowing justices on their own motion to raise conflict of interests and 'appearance of impropriety' concerns.

In short, I do not believe that attorneys should be granted a monopoly of authority to invoke full court review of the disqualification decisions of individual justices. I see no reason why justices themselves should not have some equivalent role in this process. It was my understanding of the new disqualification rules that their purpose was to strengthen the ability of this Court to avoid conflicts of interest and 'appearances of impropriety' by involving *all* the justices in what until then had been the determination of a single justice. If that is so, there is no obvious reason why full court review should be contingent upon whether the attorney himself has decided to seek review. It is hard to fathom why justices, now having been authorized to police the disqualification decisions of other justices, should *only* be allowed to do so where an attorney has chosen to trigger this process. What if *another* justice questions a justice's participation under our new rules? Is there nothing that justice can do to secure full court review, unless 'empowered' to act by an interested attorney? If a more active oversight role by justices is warranted as to the disqualification decisions of other justices, why is this now only true where we have the authorization of an attorney? Why does the key to full court review belong only to the attorney and not also to other justices?[2]

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disqualification motion, this Court did not wait for such a motion before responding to my statement. By contrast, the absence of a timely motion seeking full court review in the instant case now dictates that such review may not occur at all unless there is a motion to that effect by the defendant. Justice HATHAWAY also apparently finds it significant that, at the time the motion in *Pellegrino* was denied, there were no time limitations in the rule, but now there are. However, that counsel now knows exactly how much time he has within which to request full court review does nothing to alter the fact that both before and after the new time limitations, the rules only contemplated full court review after the targeted justice had denied the disqualification motion. To be clear, I had no objections to this Court reviewing my disqualification decision in *Pellegrino* in the manner it did—at least, apart from my fundamental objection to the new disqualification rules themselves. However, given that this was the approach this Court utilized in *Pellegrino*, I would not now adopt a different approach in the instant case.

[2] Relevant to the instant procedure is that the motion for disqualification here was filed on October 16, 2009. Now, more than six months later,

Summary Disposition April 23, 2010:

FIRST INDUSTRIAL LP v DEPARTMENT OF TREASURY, No. 139748; Court of Appeals No. 282742. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the decision of the Court of Claims. The Treasury Department's interpretation of MCL 208.23b does not conflict with the statute's plain meaning. The Court of Appeals failed to give respectful consideration to the long-standing policy of the Department of Treasury and failed to give cogent reasons for reversal. *In re Rovas Complaint*, 482 Mich 90, 103 (2008); *Boyer-Campbell v Fry*, 271 Mich 282, 296-297 (1935). 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.

Leave to Appeal Denied April 23, 2010:

ESSELMAN v GARDEN CITY HOSPITAL, Nos. 139273 and 139288; reported below: 284 Mich App 209.

KELLY, C.J. (*concurring*). I concur in the Court's order denying defendant's application for leave to appeal. I write separately in response to Justice YOUNG's dissenting statement.

Justice YOUNG claims that this case represents another instance "where members of the Court's new philosophical majority seem to retreat from its previously stated fidelity to stare decisis." Justice YOUNG has repeated this claim on numerous occasions over the last year with the same string of citations.[1] A review of the cases in the string citation

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a denial and an accompanying statement have been issued, and yet the process may still not be close to an end. Defense counsel will now be entitled to respond to the targeted justice, the targeted justice will then be allowed to respond to defense counsel, the other six justices will then assess these ongoing exchanges between the lawyer and the justice, these other justices are then obligated to respond with their own statements explaining their decisions as to whether the targeted justice can participate in the case, and then finally the targeted justice will be entitled to a responsive or dissenting statement if he or she disagrees with the court majority. Thus, an entire term of this Court will likely have passed and there will have been no resolution of the dispute that has brought this criminal appeal to the Michigan Supreme Court in the first place. Not only then does the instant procedure improperly confer a monopoly upon lawyers in triggering full Court review of disqualification decisions, but it extends the disqualification process to unreasonable lengths to the detriment of justice. The tail now wags the dog where a disqualification motion has been made, and it is quite certain that some number of such motions will be incentivized in order to delay rather than to facilitate justice.

[1] See, e.g., *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 485 Mich 1067 (2010) (YOUNG, J., dissenting); compare *Potter v*

serves to illustrate that the claim is inaccurate.[2] Had other justices been in the majority in some of the decisions complained about, they might well have extended existing precedent. But the refusal of those in the majority to extend precedent is quite different from a refusal on their part to apply it to a case on point. This is a distinction that Justice YOUNG would do well to concede.

Here, plaintiff sent a notice of intent (NOI) as required by MCL 600.2912b to eighteen potential medical malpractice defendants, including doctors, nurses, professional corporations, and the hospital at which plaintiff was treated. Plaintiff's subsequent complaint named some of those defendants. After discovery, defendants moved for summary disposition on the ground that plaintiff's NOI was deficient. The trial court denied the motion. The Court of Appeals affirmed the denial.[3]

Defendants claim that the NOI was deficient because it does not properly state the standard of care applicable to each potential defendant. However, MCL 600.2912b does not require a plaintiff's NOI to explicitly line up particularized standards of care with individual defendants. Rather, as we held in *Roberts v Mecosta Co Hosp*,[4] an NOI must provide a defendant with notice sufficient to allow it to discern the general nature of the cause of action to be launched against it.[5]

Plaintiff's NOI satisfied the statutory requirements and *Roberts*. It named all of the potential defendants. At several points throughout its factual statement, it pointed out why surgery should have been performed well before it was actually performed. It also included a lengthy

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McLeary, 484 Mich 397, 426-427 (2009) (KELLY, C.J., concurring), with *Potter*, 484 Mich at 450 n 43 (YOUNG, J., concurring in part and dissenting in part).

[2] In those cases, Justice YOUNG opined that a case was controlled by existing precedent. He was entitled to that opinion then and is assuredly entitled to it in this case. But as evidenced by this case, his opinion may not be shared by others on the Court. This is especially true in cases involving factual scenarios significantly different from those involved in the precedent Justice YOUNG seeks to apply.

[3] *Esselman v Garden City Hosp*, 284 Mich App 209 (2009).

[4] *Roberts v Mecosta Co Hosp*, 470 Mich 679 (2004).

[5] More specifically, *Roberts* held that the plaintiff's NOI was deficient because it failed to indicate whether plaintiff was alleging vicarious or direct liability. While the complaint appeared to allege vicarious liability for the negligence of the hospital's agents, "the [NOI] implied that plaintiff alleged direct negligence against these defendants for negligently hiring or negligently granting staff privileges to the individual defendants." *Id*. at 693. Thus, as the Court of Appeals in this case correctly opined, under *Roberts*, an NOI "does not need to contain any explicit statement of whether a corporate defendant is directly or vicariously liable; rather, it only needs to serve adequate notice to the defendants whether plaintiff intends to proceed against them on a vicarious liability theory." *Esselman*, 284 Mich App at 218.

narrative identifying the potential defendants and alleging what they did or did not do and how their behavior was negligent and breached the standard of care.

Thus, there is no basis for Justice YOUNG's claim that we failed to apply the requirements of § 2912b and *Roberts*, let alone that we have abandoned precedent. Perhaps Justice YOUNG would prefer to extend *Roberts* beyond its reach, but surely we are under no duty to do so in this case or in any other.

Finally, assuming arguendo that plaintiff's NOI was deficient, Justice YOUNG ignores the fact that this case has progressed through the filing of a complaint with affidavits of merit, discovery, and settlement efforts. Therefore, there is no practical value to amending or curing plaintiff's *pre*suit notice, especially in light of our decision in *Bush v Shabahang*.[6]

For these reasons, I concur with the Court's order denying defendant's application for leave to appeal.

MARKMAN, J. (*concurring*). I concur in the order denying defendant's application for leave to appeal. I do so because, while plaintiff's notice of intent (NOI) could have been written in a far better structured manner, it nonetheless satisfies the requirements of the NOI statute, MCL 600.2912b(4), and the standards of *Roberts v Mecosta Co Hosp*, 470 Mich 679 (2004).

MCL 600.2912b(4) sets forth the requirements with which a NOI must comply. The statute requires, *inter alia*, that the NOI contain the applicable standard of care, the manner in which the standard of care was breached, and the actions that should have been taken to achieve compliance with the alleged standard of care. *Id.* In *Roberts*, this Court stated that a claimant is required to "make a good-faith effort to aver the specific standard of care that she is *claiming* to be applicable to each particular professional or facility that is named in the notice." 470 Mich at 692. *Roberts* specifically explained, however, that "nothing in § 2912b(4) requires that the notice be in any particular format." *Id.* at 696. Rather, as *Roberts* recognized, what a NOI must do is "identify, in a readily ascertainable manner, the specific information mandated by § 2912b(4)."[1] *Id.*

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[6] *Bush v Shabahang*, 484 Mich 156 (2009) (holding that defects in an NOI can be disregarded under MCL 600.2301).

[1] I respectfully disagree with Justice YOUNG that the Court of Appeals' statement that the plaintiffs need not "line particularized standards up to individual defendants," *Esselman v Garden City Hospital*, 284 Mich App 209, 217 (2009) (emphasis added), contradicts the rule in *Roberts*. Whether a NOI "lines up" standards of care to individual defendants is essentially a matter of format, and *Roberts* expressly does not require that a NOI be in any "particular format." 470 Mich at 696. Therefore, I do not agree that the Court of Appeals adopted a "revision of the *Roberts* legal standard." As Justice YOUNG himself recognizes, what Roberts requires is that a plaintiff include "the particular standard of practice or

The NOI at issue here meets the requirements of MCL 600.2912b(4) as explicated by *Roberts*. The notice's seven-page "factual basis" section provided a detailed narrative that named each defendant and described what each did or did not do. Thereafter, in the "standard of care" section, plaintiff set forth the applicable standards employing similar language as in the "factual basis" section, even in many instances identifying to whom a particular standard applies by referring to the "physicians," "nursing staff," or "anesthesiologist." When viewed in combination with the lengthy factual narrative—which *did* name the individual defendants and describe what each did or did not do—defendants could, in my judgment, "readily ascertain" which standards of care were applicable to them. Importantly, this is also true of the hospital-defendants because the NOI identified residents and nurses by name, and specified their alleged breaches, so that a corporate entity would know which employees and which agents were allegedly negligent.

In sum, by carefully reading the NOI in its entirety, potential defendants were able to "identify, in a readily ascertainable manner, the specific information mandated by § 2912b(4)."[2] *Roberts*, 470 Mich at 696. A different, and better, format could have more clearly matched each defendant with their respective standard of care, but this NOI—when viewed in its entirety—sufficiently provided this same information.

WEAVER, J., would grant leave to appeal.

YOUNG, J. (*dissenting*). I dissent from the majority's denial of leave because the plaintiff's Notice of Intent (NOI) was defective. Accordingly, I would vacate the Court of Appeals majority decision for the reasons stated in Judge SAAD's dissenting opinion and, because current Michigan law so requires, remand this case for further proceedings consistent with *Bush v Shabahang*.[1] The majority's failure to do so indicates its unwill-

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care applicable to each of the various defendants." Id. at 690. This, plaintiff did do, albeit with less clarity than he might have.

[2] Because this NOI satisfied the requirements of § 2912b(4) and *Roberts*, I respectfully disagree with Justice YOUNG that this case evidences disregard for precedent. Further, although I join Chief Justice KELLY in concurring with the instant order, I do not share her interpretation of *Roberts*, which she suggests merely requires that a NOI "provide a defendant with notice sufficient to allow it to discern the general nature of the cause of action to be launched against it." (Emphasis added.) In my judgment, *Roberts* require considerably more and, as Justice YOUNG correctly asserts, *Roberts* remains the binding law of this state. Under *Roberts*, a claimant is "required to . . . provide details that are responsive to the information sought by the statute and that are as particularized as is consistent with the early notice stage of the proceedings." 470 Mich at 701.

[1] 484 Mich 156 (2009). I continue to adhere to my position that *Bush* was wrongly decided, for the reasons stated in my dissent. Nevertheless,

ingness to apply the requirements of the NOI statute and *Roberts v Mecosta Co Gen Hosp (After Remand)*.[2]

Plaintiff sent an NOI to multiple defendants, including doctors, nurses, professional corporations, and the hospital that treated plaintiff. Although the standard of care applicable to some of these defendants is not the same one applicable to others, in responding to the statutory duty to describe the standard of care applicable to the potential defendants, the plaintiff provided a laundry list of thirteen requirements, many of which failed to differentiate between the different standards of care owed by different defendants. Similarly, the plaintiff's articulation of the manner in which the standard of care was breached, and of the actions that should have been taken to comply with the standard of care, failed to differentiate between the defendants. Defendants Garden City Hospital and Dr. David Fertel moved for, inter alia, summary disposition on the basis of this alleged deficiency in the NOI. The trial court denied summary disposition, and the Court of Appeals affirmed, in a divided, published opinion.[3]

The goal of the NOI enterprise is to give defendants accused of medical malpractice reasonable notice of the nature of the claim and how the plaintiff contends they breached the relevant standard of care. This represents a significant legislative change in the medical malpractice regime, in which practitioners previously found out the nature of the claims lodged against them only after a complaint had been filed and during discovery. As such, the NOI procedure should not be diminished as the Court of Appeals has done here with the complicity of this Court. This Court of Appeals decision reintroduces the gamesmanship that the Legislature sought to end by introducing the NOI step in the litigation process.

As this Court stated in *Roberts*, the NOI must refer to "the particular standard of practice or care applicable to each of the various defendants."[4] The plaintiff is therefore required "to make good-faith averments that provide details that are responsive to the information sought by the statute and that are as particularized as is consistent with the early notice stage of the proceedings."[5] This Court's decision in *Bush v Shabahang* controls only the effect of a defective notice of intent and therefore leaves intact the Roberts requirements which describe how to determine whether an NOI is defective.

Here, the Court of Appeals majority ignored the *Roberts* requirements, merely stating that the instant NOI provided greater detail than the "tautologies" that the *Roberts* NOI stated.[6] Moreover, the Court of

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I recognize that its validity is not at issue in this case and that it remains the binding precedent of this Court until it is overturned.

[2] 470 Mich 679 (2004).

[3] 284 Mich App 209 (2009).

[4] *Roberts*, 470 Mich at 690 (emphasis added).

[5] *Id*. at 701 (emphasis in original).

[6] *Esselman*, 284 Mich App at 217.

Appeals majority's statement that the plaintiffs need not "line particularized standards up to individual defendants,"[7] contradicts the rule of law that this Court articulated in *Roberts*, requiring plaintiffs to include "the particular standard of practice or care applicable to each of the various defendants."[8] This statement has been made in a published Court of Appeals decision that this Court is allowing to stand, even though it plainly contradicts *Roberts*.[9] In contrast, Judge SAAD's dissent correctly applied the *Roberts* standard:

> [W]hile plaintiff set forth a recitation of facts about his hospitalization, he made no effort to provide notice of which standard of care applied to or was breached by each named health professional or facility, a list that includes medical practices and professionals of varying types, training, and specialties.[10]

Judge SAAD did not have the benefit of this Court's recent decision in *Bush v Shabahang*, which, as stated, details the effect of a deficient NOI. Under *Bush*, defendants are not necessarily entitled to summary disposition, as Judge SAAD's dissenting opinion would have held. Nevertheless, Judge SAAD applied *Roberts* correctly to conclude that the plaintiff filed a deficient NOI.

This denial order is another instance where members of the Court's new philosophical majority seem to retreat from its previously stated fidelity to stare decisis.[11] Since the shift in the Court's philosophical majority in January 2009, the new majority has pointedly sought out

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[7] *Id*. at 216.

[8] *Roberts*, 470 Mich at 690.

[9] Having signed the *Roberts* opinion, Justice MARKMAN, I assume, does not agree with this Court of Appeals revision of the *Roberts* legal standard.

[10] *Id*. at 228 (SAAD, J., dissenting).

[11] See, e.g., *Pohutski v City of Allen Park*, 465 Mich 675, 712 (2002) (KELLY, J., dissenting) ("[I]f each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable."); *People v Hawkins*, 468 Mich 488, 517-518 (2003) (CAVANAGH, J., dissenting) ("We have overruled our precedents when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.' Absent those changes or compelling evidence bearing on Congress' original intent . . . our system demands that we adhere to our prior interpretations of statutes."), quoting *Patterson v McLean Credit Union*, 491 US 164, 173 (1989) and *Neal v United States*, 516 US 284, 295 (1996); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 278 (2007) (CAVANAGH, J., dissenting) (" 'Under the doctrine of stare decisis, principles of law

precedents only recently decided[12] and has failed to give effect to other recent precedents of this Court.[13] Today, the Court again fails to give

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deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed.' "), quoting *People v Jamieson*, 436 Mich 61, 79 (1990); *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365 (1996) ("Absent the rarest circumstances, we should remain faithful to established precedent."); Todd C. Berg, *Hathaway attacks*, Michigan Lawyers Weekly, October 27, 2008 (" 'People need to know what the law is,' Hathaway said. 'I believe in stare decisis. Something must be drastically wrong for the court to overrule.' "); *Lawyers' election guide: Judge Diane Marie Hathaway*, Michigan Lawyers Weekly, October 30, 2006, in which Justice HATHAWAY, then running for a position on the Court of Appeals, was quoted as saying: "[t]oo many appellate decisions are being decided by judicial activists who are overturning precedent."

[12] See, e.g., *University of Michigan Regents v Titan Ins Co*, 484 Mich 852 (2009) (directing the parties to consider whether *Cameron v ACIA*, 476 Mich 55 (2006), was correctly decided); *McCormick v Carrier*, 485 Mich 851 (2009) (granting leave to consider the plaintiff's request to overrule *Kreiner v Fischer*, 471 Mich 109 [2004]); *Lenawee Co Bd of Rd Comm'rs v State Auto Prop & Cas Ins Co*, 485 Mich 853 (2009) (directing the parties to consider whether *Miller v Chapman Contracting*, 477 Mich 102 [2007], was correctly decided); *Edry v Adelman*, 485 Mich 901 (2009) (directing the parties to consider whether *Wickens v Oakwood Healthcare Sys*, 465 Mich 53 [2001], was correctly decided); *Hoover v Michigan Mut Ins Co*, 485 Mich 881 (2009) (directing the parties to consider whether *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521 [2005], was correctly decided); *Lansing Schools Education Ass'n v Lansing Bd of Ed*, 485 Mich 966 (2009) (directing the parties to consider whether *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 [2001], was correctly decided); *Anglers of the AuSable v Dep't of Environmental Quality*, 485 Mich 1076 (2010) (directing the parties to consider whether *Michigan Citizens for Water Conservation v Nestlé Waters North America*, 479 Mich 280 [2007], and *Preserve the Dunes v Dep't of Environmental Quality*, 471 Mich 508 [2004], were correctly decided); *Colaianni v Stuart Frankel Development Corp*, 485 Mich 1070 (2010) (granting to consider whether *Trentadue v Buckler Automatic Lawn Sprinkler*, 479 Mich 378 [2007], was correctly decided).

[13] See, e.g., *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009), where the majority failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), where it failed to follow *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606 (1940), and *Camburn v Northwest School Dist*, 459 Mich 471 (1999); *Vanslembrouck v Halperin*, 483 Mich 965 (2009), where it failed to follow *Vega v Lakeland Hosps*, 479 Mich 243, 244 (2007); *Juarez v Holbrook*, 483 Mich 970 (2009), where it failed to follow *Smith v Khouri*,

effect to a recent precedent of this Court and, in so doing, fails to give meaning to the medical malpractice reforms enacted by our Legislature.

Consistent with the requirements of the NOI provisions of MCL 600.2912b and this Court's binding precedent in *Roberts*, I would vacate the Court of Appeals majority opinion for the reasons stated in Judge SAAD's dissent and remand this case to the trial court for further proceedings consistent with *Bush*.

CORRIGAN, J., joined the statement of YOUNG, J.

Summary Disposition April 27, 2010:

PEOPLE v JOHNNY TAYBRON, No. 140388; Court of Appeals No. 294643. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the trial court for correction of the judgment of sentence. The defendant's sentence for carrying a dangerous weapon with unlawful intent should not be made consecutive to the felony-firearm sentence because that offense was not a predicate felony for the charged felony-firearm offense. *People v Clark,* 463 Mich 459 (2000). Further, sentence credit should be applied to the defendant's sentence for carrying a dangerous weapon with unlawful intent. 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.

Leave to Appeal Denied April 27, 2010:

TODD v COUNTRYWIDE HOME LOANS, No. 138284; Court of Appeals No. 287710.

DALBY v US FINANCIAL LIFE INSURANCE COMPANY, No. 139159; Court of Appeals No. 289990.

PEOPLE v MALCOLM REED, No. 139362; Court of Appeals No. 283218.

MARK CHABAN PC v MANGANO, No. 139616; Court of Appeals No. 289568.

PEOPLE v BRANDOW, No. 139671; Court of Appeals No. 292533. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v THOMAS MOORE, No. 139686; Court of Appeals No. 292271. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

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481 Mich 519 (2008); *Beasley v Michigan*, 483 Mich 1025 (2009), *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009), and *Ward v Michigan State Univ*, 485 Mich 917 (2009), where it failed to follow *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007); and *Scott v State Farm Automobile Ins Co*, 483 Mich 1032 (2009), where it failed to follow *Thornton v Allstate Ins Co*, 425 Mich 643 (1986), and *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626 (1997).

PEOPLE v VANDIVER, No. 139700; Court of Appeals No. 290504. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

FRANSISCO v SEVERANCE, No. 139706; Court of Appeals No. 279839.

PEOPLE v ALFORD, No. 139754; Court of Appeals No. 291644. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v HALE, No. 139761; Court of Appeals No. 290829. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BRAVO, No. 139926; Court of Appeals No. 284274.

PEOPLE v HANDSEN, No. 139939; Court of Appeals No. 292007.Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ANTHONY WILLIAMS, No. 139944; Court of Appeals No. 292177. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ARMIJO, No. 139979; Court of Appeals No. 282301.

In re CONTEMPT OF BLACK (BUILTE v BUILTE), No. 140022; Court of Appeals No. 285330.

PEOPLE v MCINTOSH, No. 140025; Court of Appeals No. 293820. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ASLINGER, No. 140037; Court of Appeals No. 286822.

PEOPLE v WARNER, No. 140055; Court of Appeals No. 293274.

PEOPLE v GREEN, No. 140061; Court of Appeals No. 293790.

PEOPLE v DEKEYZER, No. 140144; Court of Appeals No. 281207.

PEOPLE v BENCHECK, Nos. 140157 and 140171; Court of Appeals Nos. 285299 and 285298.

PEOPLE v TRACI JACKSON, No. 140181; Court of Appeals No. 293624. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CORDNEY SMITH, No. 140185; Court of Appeals No. 285030.

PEOPLE v PINEDA, No. 140195; Court of Appeals No. 286267.

PEOPLE v ROBINSON, No. 140200; Court of Appeals No. 285416.

PEOPLE v ASHMON, No. 140201; Court of Appeals No. 293162. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v MANN, No. 140205; Court of Appeals No. 281673.

PEOPLE v RHEA, No. 140207; Court of Appeals No. 285730.

PEOPLE v KALVIEN DAVIS, No. 140209; Court of Appeals No. 287951.

PEOPLE v ANZURES, No. 140211; Court of Appeals No. 294284. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DRIVER, Nos. 140223 and 140225; Court of Appeals Nos. 294374 and 294437.

PEOPLE v WRIGHT, No. 140228; Court of Appeals No. 292257. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

CHAMBERS v CHAMBERS, No. 140231; Court of Appeals No. 293422.

PEOPLE v GLADDING, No. 140243; Court of Appeals No. 285295.

PEOPLE v GETSCHER, No. 140244; Court of Appeals No. 293089. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CLYDE WHITE, No. 140247; Court of Appeals No. 293829. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

AVOLIO v HOGAN, No. 140249; Court of Appeals No. 2287684.

PEOPLE v THOMAS BUTLER, No. 140251; Court of Appeals No. 281674.

PEOPLE v DESJARDINS, No. 140258; Court of Appeals No. 286617.

PEOPLE v WOODS, No. 140265; Court of Appeals No. 285960.

HOWE v PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, No. 140269; Court of Appeals No. 294084.

PEOPLE v MCCLELLAN, No. 140277; Court of Appeals No. 294455.

PEOPLE v MAYZE, No. 140278; Court of Appeals No. 288257.

PEOPLE v CHRISTOPHER BURNELL THOMPSON, No. 140285; Court of Appeals No. 287737.

PEOPLE v COLE, No. 140289; Court of Appeals No. 286408.

ABONMARCHE CONSULTANTS, INCORPORATED v MACATAWA BANK MORTGAGE COMPANY and DAN VOS CONSTRUCTION COMPANY v MACATAWA BANK MORTGAGE COMPANY, Nos. 140291 and 140292; Court of Appeals Nos. 285281 and 285283.

BETTISON v PAROLE BOARD, No. 140298; Court of Appeals No. 293823.

PEOPLE v MARQUIS TAYLOR, No. 140311; Court of Appeals No. 285889.

ZAPCZYNSKI v ZAPCZYNSKI, No. 140318; Court of Appeals No. 285982.

ZALEWSKI v COOGAN, No. 140323; Court of Appeals No. 286083.

PEOPLE v HAYDEN, No. 140327; Court of Appeals No. 294820. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v MCDONALD, No. 140331; Court of Appeals No. 286326.

PEOPLE v TATMAN, No. 140337; Court of Appeals No. 286549.

PEOPLE v STOBAUGH, No. 140338; Court of Appeals No. 293848.

PEOPLE v DEANGELO BENNETT, No. 140342; Court of Appeals No. 284887.

PEOPLE v HORTON, No. 140343; Court of Appeals No. 287232.

PEOPLE v FREDRICKS SMITH, No. 140350; Court of Appeals No. 286409.

JAGHAB v MERZ, No. 140352; Court of Appeals No. 285280.

PEOPLE v ROBERT SMITH, No. 140357; Court of Appeals No. 294512.

PEOPLE v CLEMENS, No. 140358; Court of Appeals No. 288217.

PEOPLE v RONNELL JOHNSON, No. 140362; Court of Appeals No. 286096.

PEOPLE v SHANE EDWARDS, No. 140364; Court of Appeals No. 287953.

PEOPLE v DURRELL MOORE, No. 140365; Court of Appeals No. 286211.

PEOPLE v CONNER, No. 140366; Court of Appeals No. 288670.

PEOPLE v MOGG, No. 140368; Court of Appeals No. 285636.

PEOPLE v POWE, No. 140369; Court of Appeals No. 286175.

MOSS v WAYNE STATE UNIVERSITY, No. 140370; Court of Appeals No. 286034.

PEOPLE v DEQUAVIOUS JOHNSON, No. 140375; Court of Appeals No. 285888.

PEOPLE v FLIPPIN, No. 140379; Court of Appeals No. 294272.

PEOPLE v CARGILL, No. 140380; Court of Appeals No. 284893.

PEOPLE v PERSON, No. 140383; Court of Appeals No. 286057.

KNOX v AUTO CLUB GROUP INSURANCE COMPANY, No. 140387; Court of Appeals No. 287084.

PEOPLE v JOHNNY TAYBRON, Nos. 140390, 140392, and 140394; Court of Appeals Nos. 294646, 294648, and 294649.

PEOPLE v CLIFTON, No. 140395; Court of Appeals No. 284712.

PEOPLE v REMPP, No. 140396; Court of Appeals No. 285698.

PEOPLE v WELLS, No. 140397; Court of Appeals No. 286213.

PEOPLE v AARON MILLER, No. 140399; Court Appeals No. 285797.

NEWARK MORNING LEDGER COMPANY v DEPARTMENT OF TREASURY, No. 140402; Court of Appeals No. 283723.

BEECHLER v GENERAL MOTORS CORPORATION, No. 140406; Court of Appeals No. 294100.

PEOPLE v ROQUE, No. 140407; Court of Appeals No. 286212.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v BALDWIN, No. 140408; Court of Appeals No. 284892.

PEOPLE v CHARLES PORTER, No. 140410; Court of Appeals No. 287141.

PEOPLE v LAY, No. 140411; Court of Appeals No. 294712.

PEOPLE v BROOKS, No. 140417; Court of Appeals No. 286959.

PEOPLE v HOGAN, No. 140418; Court of Appeals No. 286421.

PEOPLE v WILLIE JOHNSON, No. 140421; Court of Appeals No. 285482.

PEOPLE v REGINALD JOHNSON, No. 140427; Court of Appeals No. 285026.

PEOPLE v MCNEES, No. 140428; Court of Appeals No. 286462.

GOULD v DEPARTMENT OF CORRECTIONS, No. 140429; Court of Appeals No. 293432.

PEOPLE v BEIRUTI, No. 140435; Court of Appeals No. 294603.

PEOPLE v ALDRIDGE, No. 140437; Court of Appeals No. 285566.

PEOPLE v SULLIVAN, No. 140439; Court of Appeals No. 289287.

PEOPLE v FAIRFIELD, No. 140440; Court of Appeals No. 287087.

PEOPLE v MCCLAIN, No. 140451; Court of Appeals No. 286952.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v CHANEY, No. 140454; Court of Appeals No. 294606.

PEOPLE v SYLVESTER PARKER, No. 140456; Court of Appeals No. 287202.

PEOPLE v IVORY CRAWFORD, No. 140458; Court of Appeals No. 286956.

PEOPLE v QUINSHUN WHITE, No. 140459; Court of Appeals No. 284711.

MANNING v IRON HORSE COUNTRY STORE LLC, No. 140460; Court of Appeals No. 286787.

WHITE v CITY OF DETROIT, No. 140467; Court of Appeals No. 286572.

PEOPLE v JAMES WILSON, No. 140472; Court of Appeals No. 294338.

PEOPLE v GUILLEN, No. 140497; Court of Appeals No. 294514.

OROZCO v CITY OF SAGINAW, No. 140508; Court of Appeals No. 294276.

PEOPLE v LIVELY, No. 140525; Court of Appeals No. 284525.

PEOPLE v WERSTEIN, No. 140528; Court of Appeals No. 287471.

EASLEY v ATTORNEY GENERAL, No. 140538; Court of Appeals No. 293628.

PEOPLE v SUMMITT, No. 140554; Court of Appeals No. 288408.

OLIVARES v WORKERS COMPENSATION MAGISTRATE, No. 140561; Court of Appeals No. 294722.

PEOPLE v DARRELL PHILLIPS, No. 140565; Court of Appeals No. 295260.

HARKEN v GENERAL MOTORS CORPORATION, No. 140592; Court of Appeals No. 287490.

PEOPLE v BOLDEN, No. 140620; Court of Appeals No. 294285. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

Superintending Control Denied April 27, 2010:

TERRY v ATTORNEY GRIEVANCE COMMISSION, No. 139467.

Reconsideration Denied April 27, 2010:

PEOPLE v DAVID HUDSON, No. 139122; Court of Appeals No. 288872. Leave to appeal denied at 485 Mich 1074.

PEOPLE v CHRISTOPHER DAVID THOMPSON, No. 139353; Court of Appeals No. 289555. Leave to appeal denied at 485 Mich 1075.

PEOPLE v DARNELL MITCHELL, No. 139360; Court of Appeals No. 289735. Leave to appeal denied at 485 Mich 1075.

ASLANI v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 139788. Leave to appeal denied at 485 Mich 1044.

PEOPLE v MARK DALTON, No. 139885; Court of Appeals No. 293337. Leave to appeal denied at 485 Mich 1081.

PEOPLE v PEARSON, No. 139989; Court of Appeals No. 284708. Leave to appeal denied at 485 Mich 1082.

PEOPLE v THOMAS WALLACE, No. 140082; Court of Appeals No. 292500. Leave to appeal denied at 485 Mich 1083.

Summary Disposition April 28, 2010:

PEOPLE v JAMES TAYLOR, No. 140187; Court of Appeals No. 284983. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Tuscola Circuit Court and we

remand this case to the trial court for resentencing. For the reasons stated in the Court of Appeals dissenting opinion, the trial court erred in the scoring of OV 10. 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.

Leave to Appeal Denied April 28, 2010:

PEOPLE v BOBBY HODGES, No. 138938; Court of Appeals No. 280077.

KELLY, C.J., would grant leave to appeal.

AUTO-OWNERS INSURANCE CO v MARTIN, No. 139710; reported below: 284 Mich App 427.

PEOPLE v MICHAEL ALONZO THOMPSON, No. 139741; Court of Appeals No. 292400.

DUPON v NORTHWEST AIRLINES, INCORPORATED, No. 139768; Court of Appeals No. 292520.

SIDHU v HANSEN, No. 140194; Court of Appeals No. 276930.

CAVANAGH, J., not participating due to a familial relationship with counsel of record.

PEOPLE v BOYKINS, No. 140235; Court of Appeals No. 285476.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

AUTO-OWNERS INSURANCE COMPANY v LARGE, No. 140752; Court of Appeals No. 288530.

Reconsideration Denied April 28, 2010:

BERKEYPILE v WESTFIELD INSURANCE COMPANY, No. 137353; Court of Appeals No. 274177. Summary disposition at 485 Mich 1115.

Order Denying Motion April 28, 2010:

PEOPLE v HOLDEN, No. 140356; Court of Appeals No. 284830. On order of the Court, the defendant's motion to exceed the 50-page limit for his application for leave to appeal the November 19, 2009 judgment of the Court of Appeals is denied. The defendant failed to provide extraordinary and compelling reasons in support of the submission of an application with 72 pages of substantive argument (including 13 pages of text numbered by Roman Numerals and incorrectly labeled a "Statement of Jurisdiction"). Applications for leave to appeal must conform to MCR 7.302(1) and 7.212(B). The only exceptions to the 50-page limit provided

at MCR 7.212(B) are for tables, indexes, and appendices. The defendant shall have 14 days from the date of this order to submit an application that conforms to the court rules.

Summary Disposition April 30, 2010:

DUNCAN v STATE OF MICHIGAN, Nos. 139345, 139346 and 139347; reported below: 284 Mich App 246. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we hereby vacate the trial court's order granting the plaintiffs' motion for class certification and remand this case to the Ingham Circuit Court for consideration of the plaintiffs' motion for class certification in light of this Court's opinion in *Henry v Dow Chemical Co*, 484 Mich 483 (2009).

As to the defendants' appeal of the decision on their motion for summary disposition, we hereby affirm the result only of the Court of Appeals majority for different reasons. This case is at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues. Accordingly, the defendants are not entitled to summary disposition at this time.

We do not retain jurisdiction.

ALDERMAN v J C DEVELOPMENT COMMUNITIES, INCORPORATED, No. 140051; Court of Appeals No. 285744. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we reinstate the Oakland Circuit Court's May 16, 2008 order granting summary disposition. The Court of Appeals erred by holding that the common-work-area doctrine applies to this case. The risk of injury at issue here was the risk of electrocution from a subcontractor's crane coming into contact with power lines above the construction site. The only employees exposed to the risk of electrocution were two to six employees of one subcontractor, including the plaintiff, and therefore there was not a high degree of risk to a significant number of workers. *Ormsby v Capital Welding, Inc*, 471 Mich 45 (2004).

KELLY, C.J., and HATHAWAY, J., would deny leave to appeal.

PEOPLE v BUCKNER, No. 140530; Court of Appeals No. 281384. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The evidence, when taken in the light most favorable to the prosecution, showed that the defendant did not act in self-defense when he fired a series of deadly shots at the victim. Whether the victim was armed with a gun was a factual issue during the trial. A reviewing court must resolve all reasonable inferences and facts in favor of the verdict. *People v Nowack*, 462 Mich 392 (2000). Hence, the Court of Appeals should have considered whether the defendant's use of deadly force was justified where the victim was unarmed. We remand this case to the Court of Appeals for consideration of the other issues raised by the defendant but not addressed by that court during its initial review of the case.

KELLY, C.J., would grant leave to appeal.

Leave to Appeal Granted April 30, 2010:

PEOPLE v FACKELMAN, No. 139856; Court of Appeals No. 284512. The parties shall include among the issues to be briefed: (1) whether the content of the psychiatric evaluation report of Dr. Shahid as referenced by expert witnesses at trial was testimonial in nature, within the rule of *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004); (2) whether the introduction of Dr. Shahid's opinion regarding the defendant's mental state constituted impermissible hearsay; and (3) if the answer to either question (1) or (2) is in the affirmative, whether either error was harmless.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal April 30, 2010:

PEOPLE v JOHN VINCENT JONES, No. 139833; Court of Appeals No. 284670. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). For the benefit of *amici*, we note that the parties understand that the issues include: (1) whether the defendant, who had absconded on bond pending appeal after being sentenced, is entitled to credit for all time served in federal custody after federal authorities arrested him on the outstanding Michigan warrant in this case; and (2) whether this case is controlled by *People v Gallagher*, 404 Mich 429 (1979), and *In re Carey*, 372 Mich 378 (1964). The parties shall submit supplemental briefs within 42 days of the date of this order addressing, in light of the concurrent nature of the federal and state sentences, why the amount of credit the defendant receives in this case should or should not depend on (1) whether the defendant has been sentenced for the federal offense; and (2) whether the defendant has received or might receive credit toward his federal sentence from the federal courts.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v BONILLA-MACHADO, No. 140510; Court of Appeals No. 287605. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied April 30, 2010:

MAWRI v CITY OF DEARBORN, No. 139647; Court of Appeals No. 283893. Leave to appeal granted at 485 Mich 1003. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of December 18, 2009. The application for leave to appeal the August 6, 2009, judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court.

HATHAWAY, J. (*dissenting*). I respectfully dissent from the majority's order vacating leave to appeal. I believe that the Court of Appeals erred in its decision and that this case warrants review by this Court.

This case arises out of injuries sustained in a fall on a sidewalk under the jurisdiction of the city of Dearborn. Plaintiff fell and injured his hip on March 2, 2006 as a result of an alleged defect in the sidewalk. Plaintiff's attorney sent a letter notifying the city of the defect and the injury within the 120-day time period provided in MCL 691.1404(1). The letter, however, refers to the location of the defect as being "*in the area of 5034 Middlesex*" rather than stating 5026 Middlesex, a location, which according to the city of Dearborn's Department of Public Works inspection report is a mere 15 feet away. The parties do not dispute that the actual location of the defect was 5026 Middlesex and that the plaintiff was injured at 5026 Middlesex. Moreover, no one disputes that the city of Dearborn had *actual* notice of the defect and recognized and repaired the defect *before* receipt of plaintiff's timely notice. Thus, plaintiff's notice ostensibly contains a minor technical error.[1] The Court of Appeals held that because plaintiff's pre-suit notice contained this error the notice did not meet the requirements of MCL 691.1404(1), and accordingly remanded plaintiff's case to the trial court for entry of summary disposition in favor of the defendant.

I believe the Court of Appeals erred in its decision. Under the facts of this case, the city of Dearborn had sufficient notice of the defect to satisfy the purposes of the notice requirement contained in MCL 691.1404(1).

The primary purpose of any notice statute is to provide timely notice to a defendant prior to suit.[2] That objective was met in this case. The opinion of the Court of Appeals focuses on form rather than on the meaningful substantive requirements of MCL 691.1404(1). We recently addressed a similar pre-suit notice requirement in *Bush v Shabahang*, 484 Mich 156 (2009), and held that defects in a statutorily mandated pre-suit notice of intent in medical malpractice cases can be disregarded or cured by amendment under MCL 600.2301 as long as the plaintiff makes a good-faith attempt to comply with the notice provision.

MCL 600.2301 provides:

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[1] I have a difficult time understanding why a location a mere 15 feet away is not, as the plaintiff's letter states, "in the area of 5034 Middlesex."

[2] *Bush v Shabahang*, 484 Mich 156 (2009).

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding *shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties*. [Emphasis added.]

I see no reason why MCL 600.2301 should not apply to the notice requirement in the present case for the same reasons expressed in *Bush*. Here the plaintiff made a good-faith attempt to notify the defendant in a timely manner but the notice contained an ostensible defect. The defendant, however, had actual notice of the defect on a timely basis and accordingly no substantial right of any party was affected. Because § 2301 mandates that the court "*shall* disregard any error or defect in the proceedings which do not affect the substantial rights of the parties," the Court of Appeals was required to disregard this minor technical defect.

Accordingly, I would vacate the decision of the Court of Appeals and remand this case to the trial court for further proceedings.

KELLY, C.J., joined the statement of HATHAWAY, J.

PEOPLE v CLAPPER, No. 140142; Court of Appeals No. 285287.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her dissenting statement in *People v Xiong*, 483 Mich 951 (2009).

CAVANAGH, J., would grant leave to appeal to consider the *McDougall v Schanz*, 461 Mich 15 (1999), issue.

In re MKK (LINDEN v MATTSON), Nos. 140483 and 140487; Court of Appeals No. 292065.

Reconsideration Granted April 30, 2011:

PEOPLE v MICHAEL WADE, No. 139327; Court of Appeals No. 281566. Summary disposition at 485 Mich 986. On order of the Court, the motion for reconsideration of this Court's December 2, 2009, order is considered, and it is granted. We vacate our order dated December 2, 2009. On reconsideration, the application for leave to appeal the April 21, 2009, judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court. The motion for bond pending appeal is denied as moot because this order ends the appeal.

Leave to Appeal Denied May 6, 2010:

AMIN v MARINO S PAPALAS TRUST, No. 139974; Court of Appeals No. 286502.

NIXON v FARM BUREAU GENERAL INSURANCE COMPANY, No. 139983; Court of Appeals No. 285343.

MARSHALL v FARM BUREAU GENERAL INSURANCE COMPANY, No. 140215; Court of Appeals No. 289602.

PEOPLE v BREN BUTLER, No. 140219; Court of Appeals No. 287177.

PEOPLE v DANIEL MABIN, No. 140245; Court of Appeals No. 286269.

ESCANABA PAPER CO v DEPARTMENT OF TREASURY, No. 140302; Court of Appeals No. 286144.

WILLFORD v THORINGTON, No. 140344; Court of Appeals No. 287909.

Summary Disposition May 7, 2010:

BROOKS v STARR COMMONWEALTH, No. 139144; Court of Appeals No. 277469. On order of the Court, leave to appeal having been granted, and the briefs and oral argument of the parties having been considered by the Court, we reverse that part of the judgment of the Court of Appeals that reversed in part the summary disposition order of the Oakland Circuit Court and we reinstate the summary disposition order of the Oakland Circuit Court. Generally, a person has no duty to protect another from the dangerous or criminal conduct of a third person. *Murdock v Higgins*, 454 Mich 46, 54 (1997); *Graves v Warner Bros*, 253 Mich App 486, 493 (2002), lv den 469 Mich 853 (2003). There is no special relationship here that creates an exception to this general rule. MCL 803.306a, which is part of the youth rehabilitation services act, MCL 803.301 *et seq*., and which requires a facility to immediately notify a police agency of a public ward's escape and requires the notified police agency to enter that information on the law enforcement information network without undue delay, does not create an actionable duty in favor of the general public. The principal purpose of the act is to provide for public wards. Further, as the circuit court concluded, under the facts of this case there is no proximate cause, and only speculation, that links the delay in reporting the escape of the public ward and the ward's intentional killing of the decedent 11 days later.

CAVANAGH, J. (*dissenting*). I would affirm the Court of Appeals result because, on the facts of this case, the evidence of Starr Commonwealth's violation of MCL 803.306a was sufficient to create a rebuttable presumption of negligence under *Klanseck v Anderson Sales & Service, Inc*, 426 Mich 78; 393 NW2d 356 (1986). The issue of proximate cause should be submitted to a jury. See *id*. at 90 and *McMillan v State Hwy Comm*, 426 Mich 46, 63 n 8; 393 NW2d 332 (1986).

KELLY, C.J., and HATHAWAY, J., joined the statement of CAVANAGH, J.

Leave to Appeal Granted May 7, 2010:

TUS v HURT, No. 139769; Court of Appeals No. 281007. The parties shall include among the issues to be briefed the effect, if any, on this case of *Brydges v Emmendorfer*, 311 Mich 274, 279 (1945) (holding that "[t]he statute of limitations does not control the question of laches in equitable actions") and *Stokes v Millen Roofing Co*, 466 Mich 660, 671-672 (2002)

(concluding that courts should not avoid the application of a statute under the guise of equity because a statutory penalty is excessively punitive or harsh).

The State Bar of Michigan Real Property Law Section, the Michigan Association of Mortgage Professionals, the Michigan Mortgage Lenders Association, the Michigan Association of Realtors, the Michigan Association of Community Bankers, the Michigan Bankers Association, the American Civil Liberties Union of Michigan, the State Bar of Michigan Consumer Law Section, the University of Michigan Law School General Clinic, and the Michigan Association for Justice are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 7, 2010:

In re BERTRAND (DEPARTMENT OF HUMAN SERVICES V BERTRAND), No. 140918; Court of Appeals No. 292398.

Statement on Motion to Participate May 7, 2010:

GRIEVANCE ADMINISTRATOR V MILLER, No. 140081.

Denying Appellants' Motion to Participate:

YOUNG, J. I harbor no bias for or against any of the parties in this grievance matter. Moreover, as the Appellants correctly note, I had no direct contact with the *Dumas v AAA* case which led to the grievance matter that is now before this Court. My *only* (and attenuated) connection was that during my tenure as General Counsel of AAA Michigan, the *Dumas* case was pending: I was not counsel of record in *Dumas*, and AAA retained outside counsel who were, in turn, supervised by lawyers on my staff.

Obviously, as General Counsel, I was kept apprised of the progress of all litigation in which the company was involved. However, as Appellants also accurately note, I certainly had no knowledge of any counsel/client relationship issues that comprise the actual subject matter before the Court today—the grievance filed against Mr. Miller by his former clients. ***Most significant, AAA is not a party to this grievance*, which is the only matter before this Court. Therefore, even my tenuous connection to the *Dumas* case has no relevance to the matter pending here.**

In a rational world where the legitimate concern is that only judges who can impartially hear cases participate in them, the recited facts would not lead to a decision to recuse. However, last November, a majority of my colleagues created a different world—one in which it is impossible to determine in advance what standards apply to disqualification decisions—where a clear rule was replaced by a vague one. As I said at the time our new disqualification rule was adopted, the majority was weaponizing the disqualification process by inserting the "appear-

ance of impropriety" as a controlling standard of disqualification. Moreover, now such a determination is made post hoc by a majority of this Court.

I believe that no basis exists for my disqualification in this case, but I chose the safest course under the new amorphous disqualification rule by voluntarily declining to participate in order to avoid a strategic or politically motivated motion to disqualify me, followed by the second guessing of my colleagues. Unfortunately, this is a direct product of the new "ethical" order established by Chief Justice KELLY and Justices CAVANAGH, WEAVER, and HATHAWAY.

Accordingly, because no one can now predict what will constitute an "appearance of impropriety" in the minds of my colleagues, I decline Appellants' request that I participate. I do so with extreme reluctance because my nonparticipation has resulted in an evenly divided court such that the propriety of the decision reached below cannot be decided by this State's senior court.

Leave to Appeal Denied May 14, 2010:

VOLLMAR v GIBRALTAR SCHOOL DISTRICT, Nos. 139777 and 139778; Court of Appeals Nos. 282125 and 285606.

SPECTRUM HEALTH v TITAN INSURANCE COMPANY, No. 140109; Court of Appeals No. 285104.

MARKMAN, J. (dissenting). I respectfully dissent from this Court's order denying defendant's application for leave to appeal for the reasons set forth in my dissent from the order denying defendant's motion for reconsideration of our earlier order denying leave to appeal in *Detroit Med Ctr v Titan Ins Co*, 485 Mich 1008 (2009) (reported below: 284 Mich App 490 [2009]), recon den 486 Mich 912, 912-913 (2010).

CORRIGAN, J., joined the statement of MARKMAN, J.

ZOERMAN v TITAN INSURANCE COMPANY, No. 140111; Court of Appeals No. 285105.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying defendant's application for leave to appeal for the reasons set forth in my dissent from the order denying defendant's motion for reconsideration of our earlier order denying leave to appeal in *Detroit Med Ctr v Titan Ins Co*, 485 Mich 1008 (2009) (reported below: 284 Mich App 490 [2009]), recon den 486 Mich 912, 912-913 (2010).

CORRIGAN, J., joined the statement of MARKMAN, J.

Reconsideration Denied May 14, 2010:

DETROIT MEDICAL CENTER v TITAN INSURANCE COMPANY, No. 138869; leave to appeal denied at 485 Mich 1008. Reported below: 284 Mich App 490.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying defendant's motion for reconsideration and instead would grant leave to appeal in this case and in *Spectrum v Titan Ins*, 486 Mich 912 (2010). These cases both raise the significant question of when a spouse or live-in companion of a registered owner of an uninsured motor vehicle will

be deemed an "owner" of that vehicle, notwithstanding that their name is not on the title to the vehicle. MCL 500.3101(2)(h)(i), defines "owner" to include "a person renting a motor vehicle or *having the use thereof*, under a lease or otherwise, for a period that is greater than 30 days." (Emphasis added.) Being deemed an "owner" carries significant consequences because MCL 500.3113(b) bars an owner from no-fault benefits "for accidental bodily injury if at the time of the accident . . . [t]he person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the [insurance] required by [MCL 500.3101 or MCL 500.3103] was not in effect."

In this case, Maria Jimenez was injured while driving an uninsured vehicle titled in the name of her live-in companion, Jose Gonzales. She estimated that she had driven the van four times over the previous four months since the vehicle was purchased. In *Spectrum*, Kevin Zoerman was injured in a motor vehicle accident while driving an uninsured vehicle titled in the name of his wife, Brandy Zoerman. Mr. Zoerman had driven the vehicle an estimated 3-5 times over the previous 14 months.

Defendant argued in each case that no-fault coverage was precluded because Mr. Zoerman and Ms. Jimenez were each an "owner" pursuant to MCL 500.3101(2)(h)(i), i.e., they had "the use" of the vehicle for a period greater than 30 days. The trial court and the Court of Appeals ruled to the contrary, arguing that neither of these persons enjoyed "regular" or "exclusive" use of the vehicle.

I would grant leave to appeal to consider defendant's argument that the Court of Appeals has engrafted a "regular" or "exclusive" use requirement onto the statutory definition of "owner," and that such requirement is nowhere found in the statute. Rather, defendant argues, the focus must be upon whether a person had a "right to use" a vehicle. I would also grant leave generally to assess the circumstances under which a person may avoid an "owner" designation under MCL 500.3101(2)(h)(i) by the expedient of titling an uninsured vehicle in the name of a family member living in the same household. The financial implications of the questions posed in this case are considerable for all automobile policy holders in this state.

CORRIGAN, J., joined the statement of MARKMAN, J.

In re CV (CUNNINGHAM v DEPARTMENT OF HUMAN SERVICES), No. 140216. Leave to appeal denied at 485 Mich 1120. Court of Appeals No. 290439.

Summary Disposition May 21, 2010:

KACHUDAS v INVADERS SELF AUTO WASH, No. 139794; Court of Appeals No. 281411. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the Genesee Circuit Court's September 6, 2007 order granting summary disposition to the defendant. The Court of Appeals erred by reversing the circuit court's ruling on the basis that the plaintiff's claim sounded in ordinary negligence. The plaintiff, who was allegedly injured by slipping on the icy surface of the defendant's premises, claimed that he was injured by a condition of the land, and as such, the claim was one for premises liability, as the circuit court

correctly recognized. *James v Alberts*, 464 Mich 12, 18-19 (2001). Although an injured person may pursue a claim in ordinary negligence for the overt acts of a premises owner on his or her premises, *Laier v Kitchen*, 266 Mich App 482 (2005), the plaintiff in this case is alleging injury by a condition of the land, and as such, his claim sounds exclusively in premises liability. In addition, the circuit court properly ruled that the alleged hazardous condition was open and obvious, because a reasonably prudent average user of ordinary intelligence spraying water outdoors in a temperature range of 11 to 24 degrees would anticipate the likelihood of freezing and the resulting danger therefrom. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 330 (2004); *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478-479 (2008).

CAVANAGH, J. (*dissenting*). I would affirm the Court of Appeals result. I agree with the order's conclusion that plaintiff's claim sounds in premises liability, and the Court of Appeals erred by reversing the circuit court's ruling on the basis that it sounds in ordinary negligence. See *James v Alberts*, 464 Mich 12, 18-19 (2001), and *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-611 (1995). I would nonetheless affirm the Court of Appeals result because, on the facts of this case, summary disposition was improper. Plaintiff has raised a genuine issue of material fact regarding the open and obvious doctrine, and the issue should be submitted to a jury. See, generally, *Bertrand*, 449 Mich at 617-618.

KELLY, C.J., joined the statement of CAVANAGH, J.

HATHAWAY, J. (*dissenting*). I respectfully dissent from the order of this Court which reverses the Court of Appeals and reinstates the Genesee County Circuit Court's order granting summary disposition to the defendant. I believe the trial court's grant of summary disposition was in error and that the Court of Appeals properly reversed that decision. Accordingly, I would affirm the Court of Appeals.

PEOPLE v CAMP, No. 139984; Court of Appeals No. 285101. In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals because the trial court did not clearly err in finding that the defendant consented to the mistrial declared by the court. Where a defendant consents to a mistrial, double jeopardy considerations do not apply. *United States v Dinitz*, 424 US 600, 607; 96 S Ct 1075; 47 L Ed 2d 267 (1976). We remand this case to the Court of Appeals for consideration of the issues raised by the defendant but not addressed by that court during its initial review of the case. We do not retain jurisdiction.

PEOPLE v PERREAULT, No. 140630; Court of Appeals No. 288540. Reported below 287 Mich App 168. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion. In addition, we are not persuaded by the defendant's separate argument, made in the Court of Appeals, that the conduct of the police rendered this a police search, subject to the probable cause standard, rather than a school search, subject to the reasonable suspicion standard. We reinstate the defendant's conviction and sentence.

MARKMAN, J. (*concurring*). I write separately only to explain why the search in this case did not violate defendant's Fourth Amendment rights.

In my judgment, the anonymous tip in this case provided "sufficient indicia of reliability to support reasonable suspicion" that defendant was selling marijuana on school grounds. *People v Faucett*, 442 Mich 153, 169 (1993). Thus, the search conducted by school officials of defendant's vehicle that was parked on school grounds was a valid search.

While police may search a vehicle without a warrant only if they have probable cause to believe that there is evidence of a crime in the vehicle, *People v Kazmierczak*, 461 Mich 411, 418-419 (2000), school officials may search a student or a student's property on school grounds under the lesser standard of 'reasonable suspicion.' *New Jersey v TLO*, 469 US 325, 341-342 (1985). "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *People v Champion*, 452 Mich 92, 98 (1996), citing *United States v Sokolow*, 490 US 1 (1989). In cases involving an anonymous tip, the test to determine whether there is reasonable suspicion is based on "the *totality of the circumstances* with a view to the question whether the tip carries with it *sufficient indicia of reliability* to support a *reasonable suspicion* of criminal activity." *Faucett*, 442 Mich at 169, citing *Alabama v White*, 496 US 325 (1990). An anonymous tip that provides sufficient detail may provide reasonable suspicion of criminal activity, especially, though not necessarily, when there is independent corroboration of relevant facts. *Faucett*, 442 Mich at 170-172.

Here, the search of defendant's vehicle was prompted by an anonymous tip received by the Grand Rapids Silent Observer, a local 'crime-stopper's' organization, concerning the sale of illegal drugs at a Traverse City high school. The tip identified four students who were selling drugs on school grounds, one of whom was defendant. The tip indicated that the tipster himself had been involved in the drug activity with one of the students and that he had seen all four students selling drugs. Although greater detail was provided regarding one of these students, the tipster provided identifying details of each of the four students, including their names, grades at school, the vehicles they drove, the drugs that were being sold, and how they were being sold. In particular, the tipster asserted that defendant had been selling drugs from his truck on school grounds. This tip was forwarded to the school and a police officer acting as a liaison officer at the school verified that the vehicles identified by the tipster were registered to the students. The assistant principal knew that defendant drove a truck, and was also aware of defendant's association with some drug-related problems at a local junior high school. Thus, there was corroborating information to indicate that the tipster's information was reliable. In my judgment, the tip and the corroborating information were sufficient for school officials to form a particularized suspicion that defendant was, in fact, selling drugs from his truck in the school's parking lot. Therefore, the search of defendant's vehicle conducted by school officials on school property did not violate defendant's constitutional rights. Rather, it was an entirely reasonable search under the Fourth Amendment.

WEAVER, CORRIGAN, and YOUNG, JJ., joined the statement of MARKMAN, J.

KELLY, C.J. (*dissenting*). I would not take peremptory action in this case, but would instead grant leave to appeal. Unlike the majority, I think that this case presents a close call regarding whether reasonable suspicion existed to warrant the search of defendant's truck.

CAVANAGH, J., joined the statement of KELLY, C.J.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal May 21, 2010:

IDALSKI v SCHWEDT, No. 139960; Court of Appeals No. 287279. At oral argument, the parties shall address whether *Rory v Continental Ins Co*, 473 Mich 457 (2005), should be reconsidered. They may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

KELLY, C.J. (*concurring*). I agree with the order granting oral argument on whether to grant the application or take other peremptory action in this case. I write merely to point out that once again Justice Young inaccurately characterizes recent decisions of this Court as overturning binding precedent and as representing a retreat from the doctrine of stare decisis.[1] In addition, he quotes a statement I made over two years ago and applies it in an altogether different context to incorrectly divine my motivation in voting to enter the order in this case.

YOUNG, J. (*dissenting*). I respectfully dissent from the order granting oral argument in this case and instead would deny leave to appeal. The order directs the parties to discuss whether *Rory v Continental Ins Co*[1] should be reconsidered. I believe it was correctly decided. While it is certainly the prerogative of the Court to reconsider this case, this order is another instance where the majority seems to retreat from its previously stated fidelity to stare decisis.[2]

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[1] See, e.g., *Colaianni v Stuart Frankel Dev Corp*, 485 Mich 1070 (2010); See also, *Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032, 1035 (2009) (KELLY, C.J., *concurring*) (undertaking a case-by-case analysis to refute the dissent's accusation that this Court was ignoring precedent).

[1] 473 Mich 457 (2005).

[2] See, e.g., *Pohutski v City of Allen Park*, 465 Mich 675, 712; 641 NW2d 219 (2002) (KELLY, J., dissenting) ("[I]f each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable."); *People v Hawkins*, 468 Mich 488, 517-518; 668 NW2d 602 (2003) (CAVANAGH, J., dissenting) ("We have overruled our precedents when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.' . . . Absent those changes or compelling evidence bearing on Congress' original intent . . . our system demands that we adhere to our prior interpretations of statutes."), quoting *Patterson v*

Since the shift in the Court's philosophical majority in January 2009, the majority has pointedly sought out precedents only recently decided[3]

McLean Credit Union, 491 US 164, 173; 109 S Ct 2363; 105 L Ed 2d 132 (1989) and *Neal v United States*, 516 US 284, 295; 116 S Ct 763; 133 L Ed 2d 709 (1996); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 278; 731 NW2d 41 (2007) (CAVANAGH, J., dissenting) (" 'Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed.' "), quoting *People v Jamieson*, 436 Mich 61, 79; 461 NW2d 884 (1990); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 622; 702 NW2d 539 (2005) (WEAVER, J., dissenting) ("Correction for correction's sake does not make sense. The case has not been made why the Court should not adhere to the doctrine of stare decisis in this case."); Todd C. Berg, *Hathaway attacks*, Michigan Lawyers Weekly, October 27, 2008 (" 'People need to know what the law is,' Hathaway said. 'I believe in stare decisis. Something must be drastically wrong for the court to overrule.' "); *Lawyers' election guide: Judge Diane Marie Hathaway*, Michigan Lawyers Weekly, October 30, 2006, in which Justice HATHAWAY, then running for a position on the Court of Appeals, was quoted as saying: "[t]oo many appellate decisions are being decided by judicial activists who are overturning precedent."

[3] See, e.g., *Univ of Mich Regents v Titan Ins Co*, 484 Mich 852 (2009) (directing the parties to consider whether *Cameron v ACIA*, 476 Mich 55 (2006), was correctly decided); *McCormick v Carrier*, 485 Mich 851 (2009) (granting leave to consider the plaintiff's request to overrule *Kreiner v Fischer*, 471 Mich 109 [2004]); *Lenawee Co Bd of Rd Comm'rs v State Auto Prop & Cas Ins Co*, 485 Mich 853 (2009) (directing the parties to consider whether *Miller v Chapman Contracting*, 477 Mich 102 [2007], was correctly decided); *Edry v Adelman*, 485 Mich 901 (2009) (directing the parties to consider whether *Wickens v Oakwood Healthcare Sys*, 465 Mich 53 [2001], was correctly decided); *Hoover v Mich Mut Ins Co*, 485 Mich 881 (2009) (directing the parties to consider whether *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521 [2005], was correctly decided); *Lansing School Ed Ass'n v Lansing Bd of Ed*, 485 Mich 966 (2009) (directing the parties to consider whether *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 [2001], was correctly decided); *Anglers of the AuSable v Dep't of Environmental Quality*, 485 Mich 1067 (2010) (directing the parties to consider whether *Michigan Citizens for Water Conservation v Nestlé Waters North America*, 479 Mich 280 [2007], and *Preserve the Dunes v Dep't of Environmental Quality*, 471 Mich 508 [2004], were correctly decided); *Colaianni v Stuart Frankel Dev Corp*, 485 Mich 1070 (2010) (granting to consider whether *Trentadue v Buckler Automatic Lawn Sprinkler*, 479 Mich 378 [2007], was correctly decided).

and has failed to give effect to other recent precedents of this Court.[4] I can only assume that the majority is making good on our Chief Justice's pledge she made shortly after the 2008 election that caused a shift in the Court's philosophical majority:

> We the new majority will get the ship off the shoals and back on course, and we will undo a great deal of the damage that the Republican-dominated court has done. Not only will we not neglect our duties, we will not sleep on the bench.[5]

Today, the Court again orders reconsideration of a case that was decided just five years ago. Nothing in the law of this State or the rationale of that decision has changed in this short time. Accordingly, as I have in other similar orders,[6] I respectfully dissent from this order.

CORRIGAN, J., joined the statement of YOUNG, J.

AHOLA v GENESEE CHRISTIAN SCHOOL, No. 140447; Court of Appeals No. 283576. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied May 21, 2010:

SCHOOLEY v CONSOLIDATED ROADHOUSE OF TAYLOR, LLC, No. 139294; Court of Appeals No. 291284.

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[4] See, e.g., *Hardacre v Saginaw Vascular Servs*, 483 Mich 918 (2009), where the majority failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), where it failed to follow *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606 (1940), and *Camburn v Northwest School Dist*, 459 Mich 471 (1999); *Vanslembrouck v Halperin*, 483 Mich 965 (2009), where it failed to follow *Vega v Lakeland Hosps*, 479 Mich 243, 244 (2007); *Juarez v Holbrook*, 483 Mich 970 (2009), where it failed to follow *Smith v Khouri*, 481 Mich 519 (2008); *Beasley v Michigan*, 483 Mich 1025 (2009), *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009), and *Ward v Mich State Univ*, 485 Mich 917 (2009), where it failed to follow *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007); *Scott v State Farm Auto Ins Co*, 483 Mich 1032 (2009), where it failed to follow *Thornton v Allstate Ins Co*, 425 Mich 643 (1986), and *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626 (1997); and *Esselman v Garden City Hosp*, 486 Mich 892 (2010).

[5] *She Said*, Detroit Free Press, December 10, 2008.

[6] See, e.g., *Univ of Mich Regents*, 484 Mich at 853; *Lenawee Co Bd of Rd Comm'rs*, 485 Mich at 855; *Hoover*, 485 Mich at 882; *Lansing School Ed Ass'n*, 485 Mich at 966; *Anglers*, 485 Mich at 1067; *Colaianni*, 485 Mich at 1070.

KELLY, C.J. (*concurring*). I concur with the order denying defendant's application for leave to appeal. The deposition testimony of defendant's general manager established that, before plaintiff was injured, defendant had actual notice that its toilet paper dispensers at times were not properly latched. I agree with the trial court that a reasonable jury could conclude that defendant should have discovered that this defect was dangerous and posed an unreasonable risk of harm.[1] The fact that an unlatched dispenser in the restaurant may not have caused injuries in the past is not dispositive.[2]

I also disagree with Justice MARKMAN's conclusion that "defendant fulfilled its duty to inspect the premises for this 'hazard' at regular 15-30 minute intervals." The general manager specifically testified that checking whether the dispensers were in the "locked" position was not part of defendant's routine restroom inspections. Thus, its inspections would not have satisfied its duty to inspect the dispensers and warn patrons of the danger they posed.

It is certainly possible to conclude, as Justice MARKMAN does, that this case involves a "fluke" accident. However it is equally possible that a trier of fact could reasonably conclude that defendant should have discovered the defect and its dangerous character. Hence, I agree that the trial court properly denied defendant's motion for summary disposition and concur with the order denying defendant's application for leave to appeal.

MARKMAN, J. (*dissenting*). I dissent from this Court's denial of leave to appeal because plaintiff, in my judgment, has not set forth sufficient evidence to sustain her premises liability action. Specifically, she has not shown that an ordinary toilet-paper dispenser constitutes a "dangerous condition" causing "an unreasonable risk of harm," *Lugo v Ameritech Corp*, 464 Mich 512, 516 (2001), or that defendant did not fulfill its duty to inspect its premises and warn its patrons of any such dangerous condition. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597 (2000). Accordingly, I would reverse the trial court's denial of defendant's summary disposition motion.

Plaintiff was a patron of a Texas Roadhouse restaurant owned and operated by defendant, where she alleges that, while she was using the restroom, a plastic toilet-paper dispenser fell open onto her, causing a broken hand. After the incident, she returned to her table and finished her dinner, and subsequently returned to the restaurant on several occasions before filing suit nearly a year later. Her complaint alleges that defendant was negligent in failing to maintain the premises in a manner

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[1] "Constructive notice may arise not only from the passage of time itself, but also from the type of condition involved, or from a combination of the two elements." *Banks v Exxon Mobil Corp*, 477 Mich 983, 983-984 (2007), citing *Kroll v Katz*, 374 Mich 364, 372 (1965).

[2] "[I]t would not be competent to prove an absence of accidents as tending to show an absence of negligence." *Larned v Vanderlinde*, 165 Mich 464, 468 (1911).

fit for intended use; failing to warn plaintiff of the danger posed by the defective dispenser; and failing to adequately inspect the premises for dangerous conditions.

The trial court denied defendant's motion for summary disposition, in which Texas Roadhouse argued that it had received no notice of any defects concerning the toilet-paper dispensers and that bathrooms were regularly inspected at 15-30 minute intervals, and the Court of Appeals denied defendant's application for immediate review.

I agree with Judge MURRAY, who would have granted leave to appeal in the Court of Appeals, that no evidence was presented here that defendant knew that an unreasonable risk of harm created by a dangerous condition existed on the premises. A premises owner "owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo*, 464 Mich at 516. This duty "requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any *discovered* hazards." *Stitt*, 462 Mich at 597 (emphasis added). The duty arises when the landowner has actual or constructive notice of the condition. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609 (1995).

Defendant's general manager testified that in his twenty years of restaurant experience he had never heard of anyone injuring herself by a toilet-paper dispenser. While there was also testimony that, once every three to four years, a dispenser is found in an unlocked position, this does not establish that defendant had notice that an open dispenser constituted a "dangerous condition" presenting an "unreasonable risk of harm." The Chief Justice contends that a reasonable jury could find that defendant "should have discovered" that this defect was both "dangerous" and posed an "unreasonable risk of harm." However, she does not indicate *how* a business or premises owner is to discover such a "danger." Past experience had not led to this discovery, and neither had the exercise of reasonable diligence and common sense. Even assuming this to be a "dangerous condition," defendant fulfilled its duty to inspect the premises for this "hazard" at regular 15-30 minute intervals. Thus, as to its duty to warn, how could defendant warn plaintiff of anything when it had discovered no hazard?

The trial court's ruling requires a business to do the impossible—to predict that a customer might injure herself in a fluke accident caused by an object such as a toilet-paper dispenser, and then warn customers of such a "hazard" despite the fact that its reasonable inspection efforts have disclosed no hazard at all. In sustaining this decision, it is hard to interpret the actions of the majority as anything other than a step toward the imposition of strict liability upon businesses or premises owners for accidents occurring upon their property. The law of this state has never imposed such an unreasonable obligation.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

PEOPLE v RAYMOND JONES, No. 140020; Court of Appeals No. 276690.

MARKMAN, J. (*concurring*). I fully concur in this Court's order denying leave to appeal. I write only to respond to the dissenting statement.

Following a jury trial, defendant was convicted of first-degree CSC based on an allegation that he had forced his five-year-old cousin to perform fellatio on him. The Court of Appeals reversed. *People v Jones*, unpublished per curiam opinion of the Court of Appeals, issued August 12, 2008 (Docket No. 276690). The lead opinion concluded that defendant's trial counsel had been ineffective when he elicited evidence that a different cousin had previously accused defendant of sexually assaulting her, and that the trial court had improperly allowed the prosecutor to amend the information, after the prosecutor had rested, in order to expand the offense date from the "Year of 2003" to "2003 through June 2004."

This Court reversed the Court of Appeals on the ineffective assistance of counsel claim and remanded to the Court of Appeals for it to address whether the mid-trial amendment of the information entitled defendant to a new trial. 483 Mich 899 (2009). On remand, the Court of Appeals held that the trial court had not abused its discretion in this regard, and thus affirmed defendant's conviction. *People v Jones (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2009 (Docket No. 276690).

MCR 6.112(H) provides, "The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." The instant amendment should not have "unfairly surprised" defendant because at the preliminary examination, and at the trial, complainant consistently testified that he was born in February of 1998 and that the alleged criminal incident had occurred in March of the year that he was in kindergarten when he was five years old. Defendant knew that the complainant was in kindergarten, and that he was five years old, in March of 2004, both from the complainant's testimony at the preliminary examination and at trial, and because defendant was the complainant's cousin and next-door neighbor, and knew when the complainant had attended kindergarten and when he had turned five years old. Indeed, defendant testified that the complainant started kindergarten in the fall of 2003, which meant that he knew that the complainant was in kindergarten in March of 2004.

Defendant was further not "prejudiced" by the amendment because his only defense was not that he could not have picked complainant up by himself in March of 2003 because he did not have a driver's license at the time; he also presented evidence that, even after he obtained his driver's license, he was not allowed to pick up the complainant by himself. Defendant simply has not established that he would have done anything differently if the information had contained the correct date in the first place, and thus has not established that he was prejudiced by the amendment of the information.

Because I agree with the Court of Appeals that the trial court did not abuse its discretion in granting the prosecutor's motion to amend the information, I concur in this Court's order denying leave to appeal.

CORRIGAN, J., joined the statement of MARKMAN, J.

KELLY, C.J. (*dissenting*). I dissent from the order denying leave to appeal. I would grant leave to consider defendant's argument that the trial court's amendment of the information near the conclusion of trial was improper.

Defendant was convicted of first-degree criminal sexual conduct involving a person under the age of 13.[1] A divided panel of the Court of Appeals reversed the conviction because defendant had received ineffective assistance of counsel (*Jones I*).[2] This Court reversed that decision and remanded the case to the Court of Appeals for consideration of whether the midtrial amendment of the information entitled defendant to a new trial.[3] On remand, a divided panel of the Court of Appeals held that defendant had not demonstrated that the amendment unfairly surprised or prejudiced him (*Jones II*).[4]

The claim is that defendant molested his cousin. The offense date was "Year of 2003." The prosecutor theorized that the offense occurred in March or May 2003. At the preliminary examination, complainant, then eight-years-old, testified that defendant had assaulted him when defendant drove him home from a kindergarten class when complainant was five-years-old. He testified that the incident had occurred in March of 2003. The complainant also testified he began attending school in 2003.

The lead opinion in *Jones I* points out the difficulties presented by the offense date that the prosecution listed:

In this case, the information listed the date of the offense as "Year of 2003." Only complainant testified at the May 9, 2006, preliminary examination. He testified that he was eight years old, that the incident occurred three years earlier (than the preliminary examination, i.e., in 2003), that the incident occurred in March of 2003, and that he was in kindergarten at Burton School and five years old at the time. He also testified, however, that he started at Burton School in 2003, i.e., September 2003. The prosecution was apprised as of the preliminary examination that complainant was born in February 1998, and maintained that the incident occurred when he was in kindergarten. By simple math, the prosecution would have realized complainant was in kindergarten from September 2003 through June 2004, and that if the incident occurred in March, it must have been in 2004. [*Jones I*, at 6.]

This discrepancy was not resolved through the proofs presented at trial:

> At trial, in January 2007, complainant testified that he was in the third grade, and that he was in kindergarten and five years old

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[1] MCL 750.520b(1)(a).

[2] *People v Jones*, unpublished per curiam opinion of the Court of Appeals, issued August 12, 2008 (Docket No. 276690).

[3] *People v Jones*, 483 Mich 899 (2009). Justice CAVANAGH and myself were shown on the order as voting to deny leave to appeal.

[4] *People v Jones (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2009 (Docket No. 276690).

> when defendant assaulted him. Complainant's mother testified that complainant told her that the incident happened in May of 2003. Complainant testified that the incident occurred in March of 2003, but later testified that his grandfather had died before the incident. Several witnesses testified that complainant's grandfather died in January 2004. Complainant later testified that he started kindergarten in September 2003, and that the incident occurred in March of 2004. On the third and final day of trial, after all prosecution witnesses had testified and two of the four defense witnesses had testified, the prosecutor moved to amend the information to include the first six months of 2004. [*Jones I*, at 6.]

In arguing in support of the amendment, the prosecutor claimed that the charged date was an "oversight." The trial court permitted the amendment over defense objection.

A prosecutor must file an information stating the "time of the offense as near as may be."[5] A trial court may not permit the prosecutor to amend the information if it would "unfairly surprise or prejudice" the defendant.[6] Whether an amendment under MCR 6.112(H) prejudices a defendant depends both on the substance of the amendment and its timing.[7]

The Court of Appeals dissent found that the timing of the offense was a significant factor in the defense actually pursued, and therefore defendant had been prejudiced by the amendment to the information:

At trial, defendant's trial counsel presented a traditional innocence defense: he argued that the accusation against his client was false. In order to give substance to that defense, defendant's trial counsel sought to elicit testimony on cross-examination of the prosecution's witnesses that demonstrated the implausibility of the complainant's story. Specifically, defendant's trial counsel sought to show that the complainant's testimony about the timing of the alleged assault was inconsistent with evidence that defendant could not drive during that time period. By permitting the prosecution to amend the information to include a time period within which defendant could drive, the trial court significantly undermined defendant's trial counsel's efforts to attack the complainant's credibility based on the alleged timing of the offense. Because the trial court's decision to permit the amendment occurred after defendant's trial counsel had already pursued a defense based on the time specified in the original information, the amendment prejudiced defendant. Therefore, the trial court abused its discretion when it permitted the amendment. MCR 6.112(H). Further, given that this case was largely depended on the credibility of the complainant, I cannot conclude that the error was harmless. [*Jones II*, at 1 (M. J. KELLY, J., *dissenting*).]

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[5] MCL 767.45(1)(b).

[6] MCR 6.112(H).

[7] See *People v Martin*, 482 Mich 851, 852 n 4 (2008) (KELLY, J., *concurring*).

I agree with the dissenting Judge. The prosecutor's witnesses consistently maintained that the offense occurred in March or May of 2003 when defendant drove complainant home from kindergarten. However, defendant demonstrated that the alleged assault could not have occurred in March or May of 2003. He did not have an ability to drive until the fall of 2003, well after the alleged incident took place. Furthermore, complainant did not start kindergarten until the fall of 2003.

The timing of the amendment to the information is especially troublesome in this case. The trial court allowed the information to be amended after all of the prosecution's witnesses and two of the four defense witnesses had testified. By then, the prosecution had closed its proofs and defendant was unable to cross-examine its witnesses. As the lead opinion in *Jones I* observed: "[There is] no question that the trial would have proceeded differently had the amendment been made timely." *Jones I* at 7. Had the information originally included the first six months of 2004, defendant would have had an opportunity to prepare and present a defense to include this time period.

Accordingly, I agree with the Court of Appeals dissenting opinion that the trial judge abused his discretion by allowing the challenged amendment to the information near the conclusion of the trial. I would grant leave to appeal.

CAVANAGH, J., would grant leave to appeal.

ONDRUS v CITIZENS INSURANCE COMPANY, No. 140359; Court of Appeals No. 293373.

KELLY, C.J. (*concurring*) I concur with the Court's order denying defendant's interlocutory application for leave to appeal. I write separately to briefly address Justice MARKMAN's dissenting statement.

Justice MARKMAN believes that "the trial court's analysis was based exclusively upon plaintiff's claims and assertions without any independent determination concerning whether class certification prerequisites were met." Yet, Judge Maceroni noted in his opinion, not once but *twice*, that he had reviewed both parties' arguments regarding class certification. He stated: "The Court has reviewed the parties' arguments, pro and con for class certification. Both parties raise meritable [sic] arguments in support of their respective positions."

Judge Maceroni subsequently analyzed each of the requirements for class certification set forth in MCR 3.501. He noted that the burden is on the plaintiff to show that the requirements for class certification are met. After thoroughly analyzing each of the requirements, Judge Maceroni concluded, "In sum, although both parties have submitted well-prepared briefs to support their positions, the Court finds Plaintiff's arguments persuasive. Plaintiff has established that all burdens under MCR 3.501 are met satisfactorily for class action certification."

Unlike Justice MARKMAN, I believe that Judge Maceroni's opinion explicitly and independently analyzed whether the prerequisites for class certification were satisfied, and he used the appropriate legal rubric. Therefore, I cannot see a reason to remand this case to the trial court for further proceedings as suggested by Justice MARKMAN.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's denial of leave to appeal in this class action because the class was not certified in accordance with *Henry v Dow Chemical Co*, 484 Mich 483 (2009). In *Henry*, this Court held that "[a] court may base its decision on the pleadings alone *only if* the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met." *Id*. at 502. In the instant case, although Chief Justice Kelly places much weight on the fact that the parties prepared briefs that the trial court considered, the fact remains that, contrary to *Henry*, the trial court stated that it was "required to accept the allegations made in support of the request for certification as true," and it appears that the trial court's analysis was based exclusively upon plaintiff's claims and assertions without any independent determination concerning whether class certification prerequisites were met. Therefore, I would remand this case to the trial court for class certification proceedings consistent with *Henry*.

CORRIGAN and YOUNG, JJ., join the statement of MARKMAN, J.

In re STEWART (DEPARTMENT OF HUMAN SERVICES v STEWART), No. 141024; Court of Appeals No. 293495.

Summary Disposition May 25, 2010:

PEOPLE v TATE, No. 139914; Court of Appeals No. 291123.* Pursuant to MCR 7.302(H)(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 as on leave granted of the issues raised in the application filed in Court of Appeals No. 291123. We do not retain jurisdiction.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

Leave to Appeal Denied May 25, 2010:

PEOPLE v BAXTER, No. 137940; Court of Appeals No. 286238.

PEOPLE v NELSON, No. 138787; Court of Appeals No. 290680.

PEOPLE v RONALD TAYLOR, No. 139085; Court of Appeals No. 280228.

PEOPLE v EDDELMAN, No. 139283; Court of Appeals No. 291795.

PEOPLE v FREEMAN MITCHELL, No. 139325; Court of Appeals No. 291635.

PEOPLE v HARRIS, No. 139368; Court of Appeals No. 283670.

PEOPLE v PAYNE, No. 139621; reported below: 258 Mich App 181.

OBREMSKEY v ANDERSON, No. 139711; Court of Appeals No. 282853.

PEOPLE v KEVIN WILLIAMS, No. 139730; Court of Appeals No. 292715.

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* As amended by order of the Supreme Court entered June 1, 2010 —REPORTER.

PEOPLE v AMERICAN MOTOR LINES, INCORPORATED, No. 139783; Court of Appeals No. 292035.

PEOPLE v LYLE, No. 139848; Court of Appeals No. 291892. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

SPRUCE RIDGE DEVELOPMENT LLC v BIG RAPIDS ZONING BOARD OF APPEALS, No. 139853.

MERIDIAN TOWNSHIP v INGHAM COUNTY CLERK, No. 139911; reported below: 285 Mich App 581.

PEOPLE v SHEPPARD, No. 139945; Court of Appeals No. 291557. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v JAMARION WILSON, No. 139949; Court of Appeals No. 285970.

PEOPLE v HIGLEY, No. 139959; Court of Appeals No. 292489. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CRUMP, No. 139963; Court of Appeals No. 293906. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v LARRY BAKER, No. 139968; Court of Appeals No. 292145. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CHILDS, No. 139970; Court of Appeals No. 293915. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v JAMES WILLIAMS, No. 139987; Court of Appeals No. 292009. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v RONALD BENNETT, No. 139990; Court of Appeals No. 294201. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v TYLER, No. 140000; Court of Appeals No. 292673. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v SOBLESKY, No. 140005; Court of Appeals No. 292163. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v HOLLOWAY, No. 140006; Court of Appeals No. 292335. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v RIOS, No. 140007; Court of Appeals No. 292693. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ARTHUR SMITH, No. 140010; Court of Appeals No. 291935. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v AYALA, No. 140015; Court of Appeals No. 293563. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v WALTERS, No. 140018; Court of Appeals No. 293463. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v JORDAN, No. 140035; Court of Appeals No. 291150. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CARPENTER, No. 140036; Court of Appeals No. 293341. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ERIC POWELL, No. 140040; Court of Appeals No. 290916. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BURKS, No. 140044; Court of Appeals No. 291599. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v FOSTER, No. 140045; Court of Appeals No. 293219. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v JONATHON HUDSON, No. 140054; Court of Appeals No. 292918. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DIXON, No. 140058; Court of Appeals No. 292732. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CRAIG SMITH, No. 140060; Court of Appeals No. 293317.

PEOPLE v RUSSELL, No. 140080; Court of Appeals No. 292042. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DESMOND SHAW, No. 140088; Court of Appeals No. 292345. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v THACKER, No. 140089; Court of Appeals No. 292857. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

KENDALL v INTEGRATED INTERIORS, INCORPORATED, No. 140097; Court of Appeals No. 283494.

PEOPLE v DONALD CARLSON, No. 140118; Court of Appeals No. 294110. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v LAVONN BROWN, No. 140137; Court of Appeals No. 292141. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v KAHLEY, No. 140139; Court of Appeals No. 294202. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BELL, No. 140140; Court of Appeals No. 293659. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v CURTIS, No. 140145; Court of Appeals No. 292493. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v STRICKLEN, No. 140148; Court of Appeals No. 293612. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v RIDDELL, No. 140154; Court of Appeals No. 293525. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v HARRINGTON, No. 140156; Court of Appeals No. 292664. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ROPER, No. 140158; reported below: 286 Mich App 77.

PEOPLE v RANDALL, No. 140252; Court of Appeals No. 292447. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

LUCKY 7 DEVELOPMENT LLC v CLAY TOWNSHIP, No. 140271; Court of Appeals No. 293462.

EAGLE RIDGE LLC v ALBERT HOMES LLC, No. 140281; Court of Appeals No. 286862.

POTTS v POTTS, No. 140295; Court of Appeals No. 289992.

PEOPLE v ROCHELLE, No. 140313; Court of Appeals No. 283455.

PEOPLE v DWAYNE JOHNSON, No. 140326; Court of Appeals No. 294152. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v COUNTS, No. 140345; Court of Appeals No. 293865. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v LOPEZ, No. 140355; Court of Appeals No. 286852.

PEOPLE v SLOCUM, No. 140398; Court of Appeals No. 285563.

PEOPLE v DERRICK SMITH, No. 140415; Court of Appeals No. 294843.

PEOPLE v HURT, No. 140438; Court of Appeals No. 287911.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v SPEARS, No. 140449; Court of Appeals No. 286911.

PEOPLE v LACALAMITA, No. 140470; reported below: 286 Mich App 467.

PEOPLE v KERLEY, No. 140476; Court of Appeals No. 286963.

PEOPLE v MCFERRIN, No. 140478; Court of Appeals No. 286968.

PEOPLE v DEONTA SMITH, No. 140485; Court of Appeals No. 286954.

PEOPLE v ZEKE DALTON, No. 140496; Court of Appeals No. 295270.

PEOPLE v CHRISTOPHER LONG, No. 140502; Court of Appeals No. 286779.

PEOPLE v CARR, No. 140503; Court of Appeals No. 286086.

PEOPLE v PHILLIP WARD, No. 140509; Court of Appeals No. 286418.

PEOPLE v DONALD BROWN, No. 140511; Court of Appeals No. 286547.

KELLY, C.J., would grant leave to appeal for the reasons set forth in her dissenting statement in *People v Xiong*, 483 Mich 951 (2009).

CAVANAGH, J., would grant leave to appeal.

PEOPLE v BECKER, No. 140512; Court of Appeals No. 283573.

PEOPLE v LARRY, No. 140513; Court of Appeals No. 283364.

PEOPLE v MICHAEL JACKSON, No. 140517; Court of Appeals No. 295312.

PEOPLE v MERRIMAN, No. 140523; Court of Appeals No. 285959.

PEOPLE v MEAD, Nos. 140526 and 140527; Court of Appeals Nos. 285956 and 285957.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v MURRAY, No. 140537; Court of Appeals No. 286577.

PEOPLE v WILLSON, No. 140546; Court of Appeals No. 289430.

PEOPLE v MACDONALD, No. 140555; Court of Appeals No. 295341.

PEOPLE v PARHAM, No. 140559; Court of Appeals No. 283675.

PEOPLE v TROWBRIDGE, No. 140560; Court of Appeals No. 295234.

PEOPLE v ARTHUR JOHNSON, No. 140562; Court of Appeals No. 295330.

PEOPLE v ANTHONY BROWN, No. 140564; Court of Appeals No. 294658.

PEOPLE v DONALD MABIN, No. 140566; Court of Appeals No. 293969.

PEOPLE v RONALD POWELL, No. 140567; Court of Appeals No. 295393.

PEOPLE v LASENBY, No. 140575; Court of Appeals No. 284977.

PEOPLE v GREGORY JONES, No. 140584; Court of Appeals No. 284888.

PEOPLE v DONALD, No. 140588; Court of Appeals No. 295313.

MOSSING v DEMLOW PRODUCTS, INCORPORATED, No. 140591; reported below: 287 Mich App 87.

PEOPLE v COWART, No. 140593; Court of Appeals No. 287186.

PEOPLE v LEONARD, No. 140597; Court of Appeals No. 289914.

PEOPLE v ERWIN, No. 140600; Court of Appeals No. 294870.

PEOPLE v WOODRUFF, No. 140611; Court of Appeals No. 295616.

PEOPLE v PALMER, No. 140613; Court of Appeals No. 288869.

PEOPLE v ELMANAR, No. 140614; Court of Appeals No. 295153.

PEOPLE v COMTOIS, No. 140615; Court of Appeals No. 286965.

PEOPLE v DIMETRI SMITH, No. 140631; Court of Appeals No. 286552.

PEOPLE v PALENCIA-SANCHEZ, No. 140632; Court of Appeals No. 295670.

PEOPLE v BRYAN WALKER, No. 140633; Court of Appeals No. 289362.

PEOPLE v JOSEPH CARLSON, No. 140634; Court of Appeals No. 287420.

PEOPLE v FISHER, No. 140644; Court of Appeals No. 286412.

COMERICA BANK v PMN PETROLEUM, INCORPORATED, No. 140647; Court of Appeals No. 294077.

PEOPLE v ROLLAND, No. 140649; Court of Appeals No. 295195.

PEOPLE v CHAMBERLAIN, No. 140651; Court of Appeals No. 295335.

MILLER v D'ANGELO, No. 140653; Court of Appeals No. 295254.

PEOPLE v ROLON, No. 140658; Court of Appeals No. 295385.

PEOPLE v MICHAEL DAVIS, No. 140659; Court of Appeals No. 285473.

MOUNZER v AMERICAN HOME MORTGAGE SERVICING, INCORPORATED, No. 140661; Court of Appeals No. 289356.

PEOPLE v NORMAN HODGES, No. 140666; Court of Appeals No. 286177.

PEOPLE v WOOLLARD, No. 140688; Court of Appeals No. 295435.

PEOPLE v DIGGS, No. 140690; Court of Appeals No. 286983.

PEOPLE v FUENTES, No. 140691; Court of Appeals No. 295622.

PEOPLE v EUGENE COOK, No. 140693; Court of Appeals No. 295059.

ADKINS v RUTLAND TOWNSHIP ZONING BOARD OF APPEALS, No. 140696; Court of Appeals No. 286888.

PEOPLE v RAMSEY, No. 140698; Court of Appeals No. 289710.

PEOPLE v MURPHY, No. 140699; Court of Appeals No. 289562.

PEOPLE v HOLBROOK, No. 140700; Court of Appeals No. 287383.

PEOPLE v MAURICE JACKSON, No. 140706; Court of Appeals No. 286964.

JACOBSON v NORFOLK DEVELOPMENT CORPORATION, No. 140708; Court of Appeals No. 287458.

MULARCZYK v DIAMCO CONTRACTING, INCORPORATED, No. 140709; Court of Appeals No. 289140.

PEOPLE v GILLIAM-FRENCH, No. 140869; Court of Appeals No. 295996.

Reconsideration Denied May 25, 2010:

PEOPLE v AARON ATKINS, No. 139579. Leave to Appeal denied at 485 Mich 1101. Court of Appeals No. 290364.

HODGES v COLLINS EINHORN FARRELL & ULANOFF, No. 139922. Leave to appeal denied at 485 Mich 1102. Court of Appeals No. 292640.

FAVORS v DEPARTMENT OF CORRECTIONS, No. 139992. Leave to appeal denied at 485 Mich 1102. Court of Appeals No. 292245.

PEOPLE v WESTBROOK, No. 140165. Leave to appeal denied at 486 Mich 854. Court of Appeals No. 286463.

PEOPLE v THOMAS ATKINS, No. 140330. Leave to appeal denied at 485 Mich 1131. Court of Appeals No. 294428.

PEOPLE v COCKREAM, No. 140349. Leave to appeal denied at 485 Mich 1134. Court of Appeals No. 286046.

Superintending Control Denied May 25, 2010:

ROGERS v ATTORNEY GRIEVANCE COMMISSION, No. 140563.

Leave to Appeal Before Decision by the Court of Appeals Denied May 25, 2010:

ABATE v PUBLIC SERVICE COMMISSION, No. 140655; Court of Appeals No. 296374.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION, No. 140807; Court of Appeals No. 296379.

Summary Disposition May 26, 2010:

PEOPLE v DAVID JONES, No. 140191; Court of Appeals No. 293187. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court and we remand this case to that court for resentencing in light of *People v Hendrick*, 472 Mich 555 (2005). On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range or state on the record a substantial and compelling reason for the departure, in accordance with MCL 769.34(3) and *People v Babcock*, 469 Mich 247 (2003). We note that under *Hendrick*, *supra* at 564, the acts giving rise to the probation violation may provide a substantial and compelling reason to depart.

PEOPLE v PALUCH, No. 140360; Court of Appeals No. 294023. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Macomb Circuit Court for a determination of whether the defendant is entitled to credit for time served between his March 28, 2008, arraignment on the warrant and his June 1, 2009, sentencing in this case. Typically, the defendant would not be entitled to jail credit for time served for an unrelated offense or pursuant to a parole detainer. See *People v Idziak*, 484 Mich 549 (2009) and *People v Adkins*, 433 Mich 732, 742, 748-751 (1989). However, the record is unclear as to whether the defendant was promised jail credit as part of a plea bargain. When the court asked the defendant, pursuant to MCR 6.302(C)(4)(a), whether there had been any other promises or inducements for his plea, the defendant responded by asserting that he had been promised a concurrent sentence ". . . [w]ith credit that I've already done." The court responded, "Your current sentence." On remand, the court shall determine whether the plea bargain included an agreement that the defendant would receive jail credit toward the sentence in this case. The court shall specifically ascertain (1) whether the prosecution and defense counsel intended to make jail credit a part of the plea agreement, (2) whether the defendant reasonably understood that he would receive credit for time served on the sentences in this case, and (3) whether the court intended to convey to him that he would receive such credit. We do not retain jurisdiction.

Leave to Appeal Granted May 26, 2010:

KLOOSTER v CITY OF CHARLEVOIX, No. 140423; reported below: 286 Mich App 435. The parties shall include among the issues to be briefed: (1) whether a "conveyance" within the meaning of MCL 211.27a(3), (6), or (7) must be by means of a written instrument; (2) if so, whether the deed creating the joint tenancy qualifies as such an instrument; (3) whether the transfer of title to the petitioner in this case meets the exception of MCL 211.27a(7)(h); (4) whether the transfer of title to the petitioner and

his brother as joint tenants meets the exception of MCL 211.27a(7)(h); (5) whether this last issue is properly preserved; and (6) if not, whether this Court should nevertheless consider this issue to avoid a "miscarriage of justice." *Napier v Jacobs*, 429 Mich 222, 232-233 (1987).

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied May 26, 2010:

PEOPLE v RATLIFF, No. 139519; Court of Appeals No. 292395.

PEOPLE v RIGGINS, No. 140008; Court of Appeals No. 291953.

PEOPLE v MEDINA, No. 140290; Court of Appeals No. 293561. CAVANAGH, J., would grant leave to appeal.

PEOPLE v BIEREMA, No. 140376; Court of Appeals No. 294380.

PEOPLE v CAHILL, No. 140442; Court of Appeals No. 294996.

PEOPLE v SANFORD, No. 140994; Court of Appeals No. 291293.

PEOPLE v BAUMER, No. 141000; Court of Appeals No. 295481.

Summary Disposition May 28, 2010:

GRIESBACH v ROSS, No. 136731; Court of Appeals No. 275826. The motion for reconsideration of this Court's February 17, 2010, order* is considered, and it is granted. We vacate our order dated February 17, 2010. On reconsideration, the application for leave to appeal the May 22, 2008, judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are considered. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to that court for reconsideration of the defendant's appeal in light of this Court's decision in *Bush v Shabahang*, 484 Mich 156 (2009), and *Potter v McLeary*, 484 Mich 397 (2009). We do not retain jurisdiction.

MARKMAN, J. (*dissenting*). I dissent, and would grant the motion for reconsideration and, on reconsideration, would vacate this Court's February 17, 2010 order, and deny leave to appeal. I concur with Justice YOUNG's legal analysis in the previous order concerning the irrelevance of *Bush v Shabahang*, 484 Mich 156 (2009), and *Potter v McLeary*, 484 Mich 397 (2009), to the instant case. *Griesbach v Ross*, 485 Mich 1095, 1095-1099 (2010). The majority's decision to vacate the Court of Appeals and remand for reconsideration in light of our completely inapposite decisions in *Bush* and *Potter*, as well as the majority's recent decision in ADM 2009-13 to revise court rules pertaining to affidavits of merits in a manner inconsistent both with this Court's opinion in *Kirkaldy v Rim*, 478 Mich 581 (2007), and with the constitution's apportionment of legislative

* 485 Mich 1095 (2010) —REPORTER.

and judicial responsibilities, is indicative of an attitude toward tort and medical malpractice reform that ought to be deeply troubling to citizens of this state concerned about representative self-government. My objections are elaborated upon in dissents in *Bush*, *Potter*, and ADM 2009-13.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

PEOPLE V MUSHATT, No. 139413; Court of Appeals No. 283954. On March 10, 2010, the Court heard oral argument on the application for leave to appeal the June 23, 2009, judgment of the Court of Appeals. MCR 7.302(H)(1). In lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, we vacate the sentence of the Ingham Circuit Court, and we remand this case to the sentencing court for resentencing. The prosecutor has conceded that the scoring of 5 points for offense variable 3 (bodily injury not requiring medical treatment), MCL 777.33(1)(e), was erroneous under *People v McGraw*, 484 Mich 120 (2009), and that correction of this error would render the defendant's current sentence in excess of the corrected minimum sentence range. On remand, the "[o]ffense variables must be scored giving consideration to the sentencing offense alone," *id.* at 133, but the sentencing court may consider the injury to the victim "when deciding what sentence to impose within the appropriate guidelines range and whether to depart from the guidelines recommendation." *Id.* at 129.

Further, we clarify that the retroactive effect of *McGraw* is limited to cases pending on appeal when *McGraw* was decided and in which the scoring issue had been raised and preserved.[1] The appeal in this case was pending when *McGraw* was decided, and the issue was raised and preserved.

CORRIGAN, J. (*concurring*). I concur with the remand order because the prosecutor has conceded that defendant's OV-3 score was erroneous under *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009). Nonetheless, I continue to adhere to the views expressed in my dissenting opinion in *McGraw*, *supra* at 136.

YOUNG, J. (*concurring*). I concur with the remand order because the prosecutor conceded that the defendant's OV-3 score was erroneous under *People v McGraw*.[1] Although *McGraw* controls the scoring of OV-3, I continue to adhere to the position stated in Justice CORRIGAN's dissent in *McGraw*,[2] with which I concurred.

WEAVER, J. (*dissenting*). This Court heard oral argument on whether to grant the application for leave to appeal or take other peremptory action in this case. I would grant leave to consider whether *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), was wrongly decided as per the dissent in that case. I continue to believe that *McGraw* was wrongly decided in a 4 to 3 decision, and I believe that a remand in this case based on *McGraw* is a waste of judicial resources.

JANSON V SAJEWSKI FUNERAL HOME, INCORPORATED, No. 140071; reported below: 285 Mich App 396. On May 11, 2010, the Court heard oral

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[1] See, e.g., *People v Cornell*, 466 Mich 335, 367; 646 NW2d 127 (2002).

[1] 484 Mich 120; 771 NW2d 655 (2009)

[2] *Id.* at 136 (CORRIGAN, J., dissenting).

argument on the application for leave to appeal the August 25, 2009, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the summary disposition ruling of the Wayne Circuit Court. The Court of Appeals failed to adhere to the governing precedent established in *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483 (2008), which renders alleged "black ice" conditions open and obvious when there are "indicia of a potentially hazardous condition," including the "specific weather conditions present at the time of the plaintiff's fall." Here, the slip and fall occurred in winter, with temperatures at all times below freezing, snow present around the defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening. These wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475 (1993). Moreover, the alleged condition did not have any special aspect. It was avoidable and not unreasonably dangerous. *Joyce v Rubin*, 249 Mich App 231, 243 (2002).

KELLY, C.J. (*dissenting*). I would affirm the result reached by the Court of Appeals. Given the facts of this case, summary disposition was improper. Plaintiff raised a genuine issue of material fact regarding the open and obvious doctrine, and the issue should be submitted to a jury.[1]

Black ice is not open and obvious unless 1) there is evidence that it was visible on casual inspection by the person who fell or 2) other indicia of a potentially hazardous condition were shown to exist.[2] In this case, plaintiff presented evidence that when he fell, 1) precipitation was light and had tapered off earlier in the day, 2) the roads leading to defendant's premises were not icy, 3) defendant's parking lot appeared not to be icy, 4) plaintiff had not encountered ice in defendant's parking lot before his fall, and 5) a person employed by defendant who had been in the area saw no ice where plaintiff fell.

On the other hand, defendant presented evidence that 1) there was snow on the grass by the roads leading to defendant's premises at the time plaintiff fell, 2) temperatures had been below freezing throughout the day, 3) it had rained and misted earlier in the day, and 4) defendant's parking lot was generally slippery.

The trial court was required to evaluate this evidence in the light most favorable to the plaintiff.[3] Given the conflicting evidence, a genuine issue of material fact existed. I agree with the Court of Appeals that summary disposition should not have been granted.

CAVANAGH and HATHAWAY, JJ., would deny leave to appeal.

Leave to Appeal Granted May 28, 2010:

PEOPLE V DOWDY, No. 140603; reported below: 287 Mich App 278.

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[1] See, generally, *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-611 (1995).

[2] *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483 (2008).

[3] See *Wade v Dep't of Corrections*, 439 Mich 158, 162 (1992).

In re BECK (DEPARTMENT OF HUMAN SERVICES v BECK), No. 140842; reported below: 287 Mich App 400. The parties shall address whether a parent whose rights to his children have been involuntarily terminated in a child protective proceeding under the Juvenile Code can nonetheless be ordered to pay child support for those children.

The motion for leave to file brief amicus curiae is granted. The Children's Law Section and Family Law Section of the State Bar of Michigan and the Friend of the Court Association are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument on Case Pending on Application for Leave to Appeal May 28, 2010:

PLUNKETT v DEPARTMENT OF TRANSPORTATION, No. 140193; reported below: 286 Mich App 168. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address whether the highway exception to governmental immunity, MCL 691.1402(1), applies to an alleged failure to maintain a highway to correct rutting that allegedly resulted in the accumulation of water on the rutted portion of the pavement, causing hydroplaning and the loss of control of the vehicle that led to the fatal accident. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The Michigan Association for Justice, the Michigan Defense Trial Counsel, Inc., and the Negligence Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Motion for Clarification Granted May 28, 2010:

GADIGIAN v CITY OF TAYLOR, No. 138323; reported below: 282 Mich App 179. The April 16, 2010, order is amended to read as follows:

By order of November 19, 2009, the application for leave to appeal the January 27, 2009, judgment of the Court of Appeals was granted. On order of the Court, leave to appeal having been granted and the briefs of the parties having been considered, we vacate our order of November 19, 2009. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we affirm the result reached by the Court of Appeals in light of our decision in *Robinson v City of Lansing*, 486 Mich 1 (2010), which held that the "two-inch rule" of MCL 691.1402a applies only to "county" highways. The parties to this case did not dispute that the road at issue is not a "county" highway. Therefore, in light of our decision in *Robinson*, the two-inch rule does not apply to this case. We thus vacate the opinion of the Court of Appeals because its analysis is dictum given our determination in *Robinson* that MCL 691.1402a applies only to "county"

highways. We remand this case to the Wayne Circuit Court for further proceedings consistent with this order and *Robinson*. We do not retain jurisdiction.

Leave to Appeal Denied May 28, 2010:

CHIPPS v CHIPPS, No. 140878; Court of Appeals No. 291755.

DEPARTMENT OF TRANSPORTATION v DETROIT INTERNATIONAL BRIDGE COMPANY, No. 140991; Court of Appeals No. 296567.

Reconsideration Denied May 28, 2010:

SALT v GILLESPIE, Nos. 139319, 139320 and 139321; Court of Appeals Nos. 277391, 277392 and 277393.

MARKMAN, J., (*dissenting*). I would grant Bennigan's motion for reconsideration and, on reconsideration, would vacate this Court's order of February 2, 2010, which reinstated plaintiffs' claim against Bennigan's, for the reasons set forth in my dissenting statement in this case, 485 Mich 1090, 1093-1095 (2010).

CORRIGAN, J., joined the statement of MARKMAN, J.

Superintending Control Denied May 28, 2010:

CONWAY v BOARD OF LAW EXAMINERS, No. 141094.

Summary Disposition June 3, 2010:

HELMS v LEMIEUX, No. 140382; Court of Appeals No. 286397. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The Court of Appeals erred by finding that there was a conflict between the annuity application and the annuity policy with regard to the annuitant status of the two signing applicants. Reading the contract as a whole, the interpretation that harmonizes all of the relevant language is that the two applicants were "joint annuitants," as the Genesee Circuit Court correctly found. The application indicated that Ruth LeMieux was an "annuitant" jointly with another person, and the policy declaration identified that "joint annuitant" as Francis LeMieux. However, the Circuit Court erred in concluding that the death of one joint annuitant extinguished the rights of the remaining annuitant under the policy, where no provision in the policy justifies that conclusion, and the policy states that "after the Annuitant's death, any payments due will be paid to the Beneficiary," which in the case of two annuitants should be viewed as operative after the death of the last annuitant. As such, Francis LeMieux retained his annuitant rights under the policy after Ruth LeMieux died. We remand this case to the Genesee Circuit Court for further proceedings not inconsistent with this order.

DEBANO-GRIFFIN v LAKE COUNTY, No. 140400; Court of Appeals No. 282921. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Court of Appeals for consideration of the issue raised by the defendants but not addressed by that court during its initial review of the case. The Court of Appeals erred in holding that the plaintiff was not engaged in protected activity under the Whistleblowers Protection Act (WPA), MCL 15.361 *et seq*. Reporting a "suspected violation of a law" is protected activity. MCL 15.362. MCL 211.24f(2)(d) requires the ballot to include "[a] clear statement of the purpose for the millage." In *City of South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 533 n 23, 534 (2007), this Court, relying on this statutory language, held that "funds derived from levies must be used for the purpose stated in the ballot," and that using such funds for another purpose would "violate the law." See also, MCL 750.489; MCL 750.490; MCL 141.439. Accordingly, when the plaintiff reported her concerns that the ambulance funds were being used for purposes other than those stated in the ballot, the plaintiff was reporting a "suspected violation of a law," and, thus, was engaged in protected activity. Because the plaintiff reported a suspected violation of an *actual* law, it is unnecessary to address whether the reporting of a suspected violation of a *suspected* law constitutes protected activity.

KELLY, C.J., would grant leave to appeal.

PEOPLE v DESHONE, No. 140558; Court of Appeals No. 286417. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals. We do not disturb the Court of Appeals rulings that the trial court did not commit reversible error in admitting recordings and transcripts of telephone calls between the defendant and his mother, that the trial court properly admitted the detective's testimony, that the trial court properly instructed the jury on the use of recordings admitted into evidence, and that the introduction of a tape recorded conversation between the detective and one of his sisters was harmless error. However, we conclude that the Court of Appeals erred in finding that admission of the tape recorded conversation between the detective and the defendant's other sister was not harmless error. In light of the defendant's admissions of guilt to his family members, it is not probable that the detective's comments and observations affected the outcome of the trial. *People v Lukity*, 460 Mich 484 (1999). We reinstate the defendant's convictions and sentences.

KELLY, C.J., would deny leave to appeal.

Leave to Appeal Granted June 3, 2010:

VYLETEL-RIVARD v RIVARD, No. 140065; reported below: 286 Mich App 13. The parties shall address whether the Court of Appeals correctly held that: (1) MCL 600.5078(1) and (3) contemplate no more than two arbitration awards (the initial written award and any modified award following a motion to correct errors and omissions); (2) MCL 600.5078(3) does not permit the filing of more than one motion to correct errors and omissions; and (3) the defendant's motion to vacate the December 7, 2007, award was untimely.

The Family Law Section of the State Bar of Michigan and the Michigan Chapter of the American Academy of Matrimonial Lawyers are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal June 3, 2010:

BROWN v TAUBMAN COMPANY LLC, No. 140385; Court of Appeals No. 283521. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address (1) whether indicia of a potentially slippery condition are sufficient to make so-called "black ice" open and obvious, as explained in *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474 (2008); and (2) if so, whether the Court of Appeals erred by concluding that these indicia could be counteracted by the plaintiff's own representations about weather conditions on the date of her fall, thereby creating a question of fact about whether the alleged hazard was open and obvious. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied June 3, 2010:

SHIVERS v SCHMIEGE, No. 139972; reported below: 285 Mich App 636.

KELLY, C.J. and CAVANAGH and HATHAWAY, JJ., would grant the application for leave to appeal as cross-appellant.

JAYNES v ASHRAF, No. 140014; Court of Appeals No. 287427.

HATHAWAY, J., would grant leave to appeal.

MCDONALD v AUTO-OWNERS INSURANCE COMPANY, No. 140143; Court of Appeals No. 286499.

ERBER v DEPARTMENT OF COMMUNITY HEALTH, No. 140177; Court of Appeals No. 285470.

MCCARTHY v SCOFIELD, No. 140328; Court of Appeals No. 284129.

MARKMAN, J. (*concurring*). I would urge the Legislature to review MCL 28.243. Although I agree with the legal analyses of the trial court and the Court of Appeals, I can understand plaintiff's frustration with the manner in which the law has operated in his case. Plaintiff was wrongly charged with a sexual assault—complainants recanted before trial, they admitted that their accusations against defendant had been fabricated, and charges against plaintiff were dismissed. Yet pursuant to MCL 28.243 the record of plaintiff's arrest and the criminal charges brought against him must be maintained in perpetuity as a matter of public record. Thus, he will forever carry the stigma and taint of having been arrested and charged with a sexual offense and suffer the attendant consequences.

This seems to me unjust. The prosecutor has determined that she cannot prove plaintiff's guilt, and this is a result of the fact that criminal charges were predicated entirely upon what proved to be false allegations. Although it may be that the Legislature possesses the constitutional authority to require the retention of such records, I would nonetheless urge it to review cases such as this one—cases in which the complainant has admitted fabricating the charge—and assess whether the present result is truly within its contemplation.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

PANO v GENERAL MOTORS CORPORATION, No. 140405: Court of Appeals No. 294321.

PEOPLE v VICTOR JACKSON, No. 140430; Court of Appeals No. 285285.

VEMULAPALLI v CITY OF FLINT, No. 140494; Court of Appeals No. 287566.

PEOPLE v LLOYD, No. 140498; Court of Appeals No. 277172.

PEOPLE v ZACHARIAH CRAWFORD, No. 140504; Court of Appeals No. 287482.

Summary Disposition June 4, 2010:

GENAW v GENAW, No. 140017; reported below: 285 Mich App 660. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion, and remand this case to the St. Clair Probate Court for entry of an order granting defendant Unum Life Insurance Company's motion for summary disposition. The defendant insurer was discharged from all liability under MCL 552.101(2) when it paid the policy benefits to the named beneficiary prior to receiving any notice of a competing or adverse claim to those benefits.

KELLY, C.J. (*dissenting*). I would grant leave to appeal. At issue in this case is the interpretation of MCL 552.101(2), a statute that addresses entitlement to life insurance proceeds after a divorce. The statute declares that, absent an express designation to the contrary, once a divorce is final all policy benefits are payable to the insured. This addresses the problems posed when an ex-spouse is inadvertently left as the named beneficiary after a divorce. An additional clause protects insurance carriers. It provides that a carrier is discharged from liability for distribution of the insurance proceeds if it pays them to the named beneficiary, absent notice of a competing claim.[1]

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[1] MCL 552.101(2) states, in its entirety:

> Each judgment of divorce or judgment of separate maintenance shall determine all rights of the wife in and to the proceeds of any policy or contract of life insurance, endowment, or annuity upon the life of the husband in which the wife was named or designated as beneficiary, or to which the wife became entitled by assignment

The issue in this case is whether notice was provided to the insurance company. Gaylord Genaw, Sr. was killed in a traffic accident just three days after he was divorced from his wife. The judgment expressly indicated that his ex-wife was not entitled to the proceeds of his life insurance policy. However, his ex-wife's designation as beneficiary on the policy was never changed. She took advantage of this after the accident and made a claim for the proceeds. Defendant paid them to her, even though she disclosed the divorce on the claim form and the death certificate she submitted to defendant also indicated that Gaylord was divorced. When Gaylord's son discovered that she had improperly collected the policy proceeds, he brought this action against her and against the insurance company.

The trial court ordered the ex-wife to turn over to plaintiff what remained of the proceeds. The court then held defendant liable for the remainder. The Court of Appeals affirmed this action in a published split opinion.[2] It found that the ex-wife qualified as "any other person having interest in the policy" under MCL 552.101(2). Because she had given defendant written notice of the divorce, the court found that defendant had received notice according to the statute and was therefore responsible for wrongfully disbursing the funds.[3] The dissenting judge would have held that a named beneficiary cannot qualify as an "other person having interest in the policy."[4]

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or change of beneficiary during the marriage or in anticipation of marriage. If the judgment of divorce or judgment of separate maintenance does not determine the rights of the wife in and to a policy of life insurance, endowment, or annuity, the policy shall be payable to the estate of the husband or to the named beneficiary if the husband so designates. *However, the company issuing the policy shall be discharged of all liability on the policy by payment of its proceeds in accordance with the terms of the policy unless before the payment the company receives written notice, by or on behalf of the insured or the estate of the insured, 1 of the heirs of the insured, or any other person having an interest in the policy, of a claim under the policy and the divorce*. [Emphasis added.]

[2] *In re Genaw Estate*, 285 Mich App 660 (2009).

[3] Under the factual circumstances of this case, it is undisputed that Unum received a claim from Genaw that specifically acknowledged both her status as the ex-wife of the decedent and the existence of a divorce. Consequently, this information, submitted in conjunction with her claim, was sufficient to meet the notice requirement imposed by the existing statutory language, and the insurance company was not absolved of its liability for payment of the proceeds to the designated beneficiary. [*Id*. at 669.]

[4] [T]he plain language of the statute absolves an insurer of liability for paying its proceeds in accordance with the terms of the policy unless before the payment it receives written notice of a claim and of the divorce *from one of the persons identified in the*

The Supreme Court should resolve the correct interpretation of MCL 552.101(2). The majority has hastily accepted the dissenting opinion as correct without the benefit of full briefing or oral argument. I find this troublesome because, under the language of the statute, petitioner's ex-wife, a named beneficiary of the policy, appears to be a "person having interest in the policy." Nowhere does the statute contain a requirement that notice be given by someone other than the named beneficiary or that the insurer be advised of a competing claim to the insurance benefits.

Accordingly, I would grant leave to appeal to resolve the differing interpretations of the statute.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v WATERSTONE, No. 140775; reported below: 287 Mich App 368. On May 11, 2010, the Court heard oral argument on the application for leave to appeal the March 4, 2010, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and remand this case to the 36th District Court for further proceedings not inconsistent with this order. Given that appeals have already delayed a preliminary examination by 14 months since issuance of the criminal charges, and given that a full opinion could not proceed until the next term of this Court if leave to appeal were to be granted, we are satisfied that prompt resolution of this matter by issuance of an order is warranted. The Court of Appeals erred in holding that the Attorney General's office is disqualified from acting as special prosecutor. While recognizing that the Attorney General is subject to the rules of professional conduct, we hold that disqualification is not required in this case

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statute. These specified persons—(1) the insured or the estate of the insured, (2) the heirs of the insured, or (3) any *other* person having an interest in the policy—are plainly ones who *could* have an interest in the policy *if* the beneficiary designated in the policy no longer had a right to the benefits of the policy. A claim by such a person would clearly give the insurer notice of the extinguishment of the former wife/beneficiary's interest in the policy and of the existence of a claim by one other than the beneficiary designated in the policy. Thus, "other person" logically means a person other than the claimant (beneficiary) already known to the insurer. Absent written notice of a claim under the policy by one of the persons identified in the statute before making payment on its policy, the insurer is discharged of all liability on the policy for payment of its proceeds in accordance with the terms of the policy. This interpretation advances the clear purpose of the statutory language at issue, which is to protect an insurer that pays its policy proceeds in accordance with the terms of the policy absent the requisite notice of a claim by someone other than the beneficiary designated in the policy. In my view, the plain language of the statute mandates this conclusion. [*Id*. at 675-676; emphasis in original (FITZGERALD, J., dissenting).]

because accommodation of his unique constitutional and statutory status will not infringe on the defendant's right to a fair prosecution. See *Attorney General v Pub Serv Comm'n*, 243 Mich App 487 (2000). The Attorney General's unique status "requires accommodation," *id*. at 506, and such accommodation is particularly apt where no evidence has been presented of any prejudice that would be suffered by the defendant. We further hold that the Court of Appeals erred in suppressing the defendant's statements during the November 25, 2008, interview at her home. The defendant did not move for suppression of these statements in the lower courts and, thus, the Court of Appeals fact-finding and suppression rulings were premature. This order, however, does not preclude the defendant from pursuing suppression in the lower courts, nor does it preclude the Attorney General from conceding to suppression.

WEAVER, J. (*concurring*). I join and concur in the order reversing and remanding this case to the district court for further proceedings. I write separately to note:

The order of this Court provides due and proper process to the defendant judge, charged with allowing perjured testimony in a trial over which the judge presided. The Court's order gives the judge the specific opportunity to move for suppression of any evidence that she believes was unfairly obtained against her.

Justice YOUNG's dissent is quite a contrast to the straightforward, clear, and brief order of this Court. His dissent is lengthy and confused, and it provides no satisfactory solution to the fears he attempts to create.

Further, I note that Justice CORRIGAN is not participating because as she states: "I am not participating because I may be a witness in this case."

The Code of Judicial Conduct, Canon 2C states:

> A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others. A judge should not appear as a witness in a court proceeding unless subpoenaed.

On September 25, 2009, in *People v Aceval*, No. 138577, a related case to this case, *People v Waterstone*, Justice CORRIGAN stated:

"I am not participating because I may be a witness in a related case."

Regarding this statement, on September 28, 2009, the *Detroit News* reported:[1]

"Contacted at her home by The News on Sunday, CORRIGAN said, 'I was asked to be a character witness, and I agreed.' "

Has Justice CORRIGAN agreed to be a "character witness" in this case as quoted in the *Detroit News*?

Has Justice CORRIGAN been subpoenaed in this case? If so, when?

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[1] Doug Guthrie, Detroit News, *Supreme Court judge could be trial witness*, September 28, 2009.

What is Justice CORRIGAN's relationship, if any, to the accused defendant Judge Waterstone?

YOUNG, J. (*dissenting*).

"*Loyalty is an essential component in the lawyer's relationship to a client*."[1]

I dissent from the order reversing the Court of Appeals decision. Instead, I would grant leave on the broader question of how the Michigan Rules of Professional Conduct apply to the Attorney General's unique role as the chief legal officer of this State. The Michigan Rules of Professional Conduct (MRPC) establish necessary principles and rules to safeguard a fair adversarial system of justice under the law. I agree that the common law and constitutional role of the Attorney General requires accommodation, not an exception, in *applying* general ethical rules to specific situations, because the general rules do not fully encompass the Attorney General's unique role.[2] Nevertheless, we must be careful that, in forging the proper accommodation that would allow the Attorney General to carry out his various and sometimes conflicting functions, we do not jettison the important ethical principles that all lawyers must follow.

Unfortunately, I believe this is exactly what the majority has done. The order they have issued is intentionally and artfully obscure. It cursorily reverses the Court of Appeals decision and fails to offer a scintilla of rationale for the majority's decision in this case. The majority has provided no rationale, and I do not pretend to have a clear idea regarding how to tailor the MRPC to this case. That is precisely why I believe that this Court ought to grant appellant's application for leave to appeal so that the parties—and *amici*—can more fully brief this Court about the real-world consequences of accommodations that should or should not be made when applying the MRPC to the Attorney General.

FACTS AND PROCEDURAL BACKGROUND

Particularly since the majority has decided to dispose of this weighty matter in a cryptic order, some presentation of the facts is necessary to understand why the majority's resolution is entirely unsatisfactory.

The defendant is a retired Wayne County Circuit Court judge, and this case involves allegations that she knowingly allowed witnesses to commit perjury during the criminal trials of Alexander Aceval and Ricardo Pena.

Following his trial, Aceval filed a civil rights action in federal court against the defendant, alleging that she "allowed . . . perjured testimony to go to the jury" and that she conducted "secret ex-parte hearings" with the prosecutor assigned to the case. At that time, the General Counsel of the Michigan Supreme Court requested that the Attorney General

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[1] Comment to MRPC 1.7.

[2] See *Attorney General v Pub Serv Comm*, 243 Mich App 487, 506 (2000) ("[T]he Attorney General's unique status *requires accommodation, not exemption, under the rules of professional conduct*.") (emphasis added).

represent defendant, pursuant to 2006 PA 345.[3] An Assistant Attorney General within the Public Employment, Elections, and Tort (PEET) Division filed an answer on behalf of the defendant that denied any civil liability and asserted various affirmative defenses. In March 2008, the federal district court dismissed Aceval's complaint without prejudice. The Wayne County Circuit Court's counsel communicated this dismissal to Judge Waterstone by letter.

Following the federal court dismissal, an investigation was launched regarding various government officials' conduct in handling the Aceval matter—including, unbeknownst to her, Judge Waterstone. The Wayne County Prosecutor's Office disqualified itself from any investigatory or prosecutorial responsibilities involving Aceval's allegations of misconduct, and requested appointment of a special prosecutor in the matter. After the Oakland, Monroe, Genesee, and Washtenaw County Prosecutors each declined appointment, the Criminal Division of the Attorney General's office accepted appointment, apparently without knowing that Attorney General lawyers had previously represented Judge Waterstone on similar claims in the civil action.

The Attorney General's investigation ensued. On November 25, 2008, the Attorney General's Special Agent, Michael Ondejko, met with the defendant at her home to deliver an investigative subpoena. During the 30 minute interview, Judge Waterstone spoke unguardedly, once Agent Ondejko confirmed for her that the Attorney General was investigating *the prosecutor that brought Aceval to trial*, Karen Plants. A portion of the interview, which Agent Ondejko secretly recorded, proceeded as follows:

> Mr. Ondejko. I—I work for the Attorney General's Office now—
>
> Ms. Waterstone. Right.
>
> Mr. Ondejko. —and I've been tasked with doin' an investigation into the perjury that occurred at the Pena/Aceval trial.
>
> Ms. Waterstone. Right.
>
> * * *
>
> Mr. Ondejko. Well—and I've been through all the—the transcripts and talked to a lot of people. And I mean, just really doesn't seem to be any mystery. I mean, it—it pretty much is all black and white. But I guess—well, two things. There's a list of people that we're gonna do investigative subpoenas with; have 'em come in and—I don't know if you know John Dakmak?
>
> Ms. Waterstone. [inaudible]

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[3] 2006 PA 345, § 302(2) provides that the Attorney General "shall defend judges of all state courts if a claim is made or a civil action is commenced for injuries to persons or property caused by the judge through the performance of the judge's duties while acting within the scope of his or her authority as a judge."

Mr. Ondejko. You remember? Okay. John is gonna be the assistant. He's now with the office.

Ms. Waterstone. Yep.

Mr. Ondejko. And he's gonna be the assistant in charge of that—those interviews. So we've got you on the list as well as about 20 others.

Ms. Waterstone. As far as me.

Mr. Ondejko. Yeah.

Ms. Waterstone. This is in Karen Plants' investigation.

Mr. Ondejko. Yes, yes. That's-

Ms. Waterstone. I assumed that it—

Mr. Ondejko. I—

Ms. Waterstone. —that's what it was about.

Mr. Ondejko. —should've mentioned that.

Ms. Waterstone. That's okay. That was a—it was kind of an assumption, but I thought I should reclarify.

Mr. Ondejko. Yeah. That's kinda, you know, that's what it centers around. And then the officers who, you know, perjured themselves.

After receiving this assurance that the Attorney General's investigation focused on the prosecutor, Judge Waterstone discussed the trial in detail. Throughout the interview, Agent Ondejko *did not inform her that she was a potential target of the investigation and did not advise her of her right to seek independent counsel or remain silent*. And this interview occurred to Judge Waterstone's detriment notwithstanding the fact that the Attorney General's office had previously *defended* her in the federal litigation for the same conduct for which it is now prosecuting her. At the conclusion of the interview, Agent Ondejko served defendant with an investigative subpoena, ordering her to appear for a deposition on December 1, 2008.

The defendant appeared at her deposition without separate counsel. At the beginning of the deposition, Assistant Attorney General John Dakmak read the defendant her rights:

Mr. Dakmak. You understand that you have the right not to incriminate yourself, give any act that could get you charged or potentially charged with a criminal act at any point. Do you understand that?

Ms. Waterstone. I do.

Mr. Dakmak. And, of course, you have the right to consult with an attorney who could advise you on whether or not you should answer those questions. Do you understand?

Ms. Waterstone. I understand.

Mr. Dakmak. . . . Do you have any questions for me regarding your rights afforded to you under the Michigan [or] United States Constitution?

Ms. Waterstone. No. My understanding was this involved the investigation regarding Karen Plants; is that correct?

> Mr. Dakmak. Involving the investigation surrounding the trial of Alexander Aceval, Ricardo Pena, Wayne County Prosecutor's Office and the police department.
>
> Ms. Waterstone. Okay. That's a little broader than I understood.
>
> Mr. Dakmak. *Just so you know, we haven't narrowed it down to a defendant. We haven't charged anybody with a crime yet. We're investigating the acts, everything surrounding it. Do you understand*?
>
> Ms. Waterstone. I understand.
>
> Mr. Dakmak. Do you want to go forward and answer the questions we put forth to you today?
>
> Ms. Waterstone. *Sure*.[4]

Noteworthy about this exchange is Mr. Dakmak's failure to disclose that Judge Waterstone was herself a potential target of the investigation. In light of the prior representation, I submit that it is at least *arguable* that the Attorney General had a duty to make a disclosure that Judge Waterstone was a potential target. Instead, Mr. Dakmak gave a very "lawyer-like" and non-committal answer that was designed to allay any concerns Judge Waterstone might have had about the deposition, thus providing his office cover to prosecute Judge Waterstone without truly informing Judge Waterstone what was occurring. The deposition lasted approximately an hour and a half, and Judge Waterstone discussed additional specific information regarding the Aceval and Pena trials.

The Attorney General subsequently charged the defendant with four counts of common law misconduct in office, which is punishable under MCL 750.505.[5] The information alleges that the defendant "willfully neglect[ed] her duties by permitting or considering improper ex parte communications" and "willfully neglect[ed] her duties by allowing/concealing perjured testimony."

The day before charging the defendant, the Criminal Division was informed that the PEET Division had represented defendant in the related civil action. At this point, the Attorney General's ethics officer erected a conflict wall between the lawyers conducting the criminal prosecution and those who had defended Judge Waterstone in the civil case. The Attorney General did not seek the defendant's waiver of the conflict. Why erecting the conflict wall at this point was deemed a sufficient response to the Attorney General's ethical responsibility is not explained in the record.

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[4] Emphasis added.

[5] MCL 750.505 provides: "Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court."

The defendant moved to disqualify the Attorney General's office from prosecuting her because of the unwaived conflict of interest, claiming to have had "a series of confidential communications" with the Assistant Attorney General who served as her counsel "about the events that occurred during the trial, including the basis for the rulings made during the Aceval/Pena matter . . . ." She also averred that she had "never been asked, nor would [she] consent, to waiving the attorney/client privilege [she has] established with the Michigan Attorney General's office." Finally, she averred that, had she been informed that she was a subject or target of the Attorney General's criminal investigation, she "would have objected to the Attorney General's efforts to interview and depose [her] under oath" and, at minimum "would have insisted on the right to consult with an independent attorney. . . ."

The district court denied Judge Waterstone's motion to disqualify on the grounds that the Attorney General's unique status precluded the mechanical application of the MRPC, that its representation of Judge Waterstone had concluded prior to the beginning of the investigation, and that no evidence indicated that the two divisions of the Attorney General's office shared information.

On appeal, the circuit court affirmed the district court's decision. After the Court of Appeals denied Judge Waterstone's interlocutory application for leave to appeal, this Court remanded to the Court of Appeals as on leave granted to consider specific provisions of the MRPC,[6] and the Court of Appeals reversed the lower courts' decisions.[7] In holding that the Attorney General must be disqualified, the Court of Appeals determined that the Office of the Attorney General is a "firm" within the meaning of MRPC 1.10(a) "under these circumstances and for purposes of this case only."[8] It determined that because the Attorney General was asked to investigate the admission of perjury against a former client that it had defended against the same claim, there was an unacceptable risk that "defendant would continue to believe that she was a client of the Attorney General despite the Criminal Division's prosecution against her . . . where the Criminal Division failed to consult with her regarding the conflict."[9] The Court of Appeals also ordered the defendant's statements made to Agent Ondejko suppressed.

This Court ordered oral argument on the Attorney General's application for leave to appeal.[10]

ANALYSIS

For any other organization of lawyers, the Attorney General's decision to pursue a case in direct opposition to its client in the same matter

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[6] 485 Mich 1016.

[7] *People v Waterstone*, 287 Mich App 368 (2010).

[8] *Id*. at 387.

[9] *Id*. at 388.

[10] 485 Mich 1133.

as its prior representation would be a frank conflict of interest and a violation of the duty of loyalty to a client.[11] Indeed, the Court of Appeals held that, under the unique facts of this case, the Attorney General's office must be disqualified and the defendant's statements to Agent Ondejko suppressed. A majority of this Court obviously disagrees with that assessment, but its peremptory order does not explain why the Court of Appeals' analysis was erroneous.

Were the existence of such a conflict so unique as to be unlikely ever to recur, a Delphic order from this Court narrowly disposing of this case might be pardonable. However, at oral argument on the application for leave to appeal, the Solicitor General argued that the Attorney General repeatedly faced the prospect of this very kind of situation and urged that the Attorney General not be precluded from prosecuting those public officials and state employees it had previously represented. Consequently, the dilemma presented by this case is not one of a kind, and there is need to understand what ethical responsibilities the Attorney General owes its clients.

I am extraordinarily troubled by the majority's decision merely to reverse the decision of the Court of Appeals without articulating a clear and definite rule of law. The bench and bar—not to mention current and future clients of the Attorney General—deserve to know what ethical principles apply when, as here, the Attorney General represents an individual in a matter and then chooses to prosecute that person concerning the very conduct involved in its initial representation.

As it stands, the Court's order does not even recognize the *existence* of a conflict of interest in the Attorney General's exercise of prosecutorial discretion to the detriment of its previous client concerning the very same conduct for which It previously had defended her. This failure to recognize the inherent conflict in the Attorney General's exercise of prosecutorial discretion is especially strange in light of the majority's

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[11] MRPC 1.7(a) provides: "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation."

This limitation does not end when the representation ends. MRPC 1.9(a) provides: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."

Finally, MRPC 1.10(a) imputes this rule to all members of a law firm: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule[] . . . 1.9(a) . . . ."

only citation of authority: *Attorney General v Pub Serv Comm*.[12] *Pub Serv Comm* accommodates the MRPC to the Attorney General but expressly acknowledges that "a conflict of interest arises when the Attorney General intervenes as a party in opposition to a state agency that she represents as counsel."[13] Here, the conflict is even more patent than in *Pub Serv Comm*: Judge Waterstone was defended by Attorney General lawyers for the same conduct for which the Attorney General is now prosecuting her.

Here, the majority's order invokes, but does not apply, a vague balancing test of "accommodation of the attorney general's unique status and discharge of his constitutional and statutory duties" with "the defendant's right to a fair prosecution." Because the majority no more than "invokes" this notion, I cannot discern how this "balancing test" is applied. As far as I am able to tell, it fails to protect the rights of clients, a cornerstone of the very rules of professional conduct that the majority purports to apply, to say nothing of constitutional protections afforded criminal defendants. The MRPC seek to promote ethical action by lawyers by establishing a legal system in which a client can reasonably rely on the zealousness of her counsel to represent only her interests. This allows a client to have confidence that she can fully disclose all that should be disclosed—and rely on the undivided loyalty of her lawyer. Moreover, in applying any accommodation of the MRPC to the unique office of Attorney General, is it not relevant that the Attorney General exercised its prosecutorial *discretion* in accepting appointment as special prosecutor in this case? Nothing requires that the Attorney General prosecute these actions, and indeed, many county prosecutors were not even asked to accept an appointment as special prosecutor in this case.

The majority's oracular resolution prompts several obvious questions that its order cannot answer:

(1) What impact does the fact that this case involves a *criminal prosecution* have on the appropriate accommodations that must be made in applying the MRPC to the Attorney General?

(2) If this is not a frank case of a client conflict, why isn't it?

(3) What set of relationships or circumstances would *ever* create a conflict for the Attorney General when it has previously represented an individual?

(4) What obligation of loyalty does the Attorney General *ever* owe to its clients?

(5) Should we have any concern that failing to recognize a conflict in this situation will hinder cooperation from future Attorney General clients who, after today, will have a reasonable basis to fear that they might later be prosecuted by their lawyer?

The majority's decision to punt on the question of what ethical rules actually do apply to the Attorney General, and how they apply, is a frank abdication of this Court's constitutional responsibility to declare what are the ethical rules of Michigan and sows unnecessary uncertainty in the

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[12] 243 Mich App 487 (2000).

[13] *Id*. at 516.

law.[14] If the Court of Appeals erred in failing properly to "accommodate" the unique status of the Attorney General to the Michigan Rules of Professional Conduct, this Court has a duty to explain what accommodation is required and how the Attorney General should acquit itself in future cases in which it has represented an individual that it later wishes to prosecute for conduct it previously defended.

I think it particularly noteworthy that none of the Attorney General lawyers or agents in their interactions with Judge Waterstone purported to be other than representatives of "the Attorney General," not representatives of their respective divisions within the Office of Attorney General.[15] Accordingly, she had every reason to believe that each of them was "her" attorney. At a minimum, this Court should not allow the use of confidential and potentially incriminating information gathered while the defendant was induced into operating under the false pretense that she was speaking with representatives of *her* attorneys. Leaving this defendant without any remedy when the lawyers she justifiably expected to protect her turned on her and prosecuted her is simply shameful.[16]

As stated, I do not claim to know how precisely to "accommodate" the Michigan Rules of Professional Conduct to this case. However, I do believe, first, that the defendant had a reasonable expectation that the very lawyers who had previously defended her would not be permitted to prosecute her for the very same conduct and, second, that she was prejudiced by this expectation in her subsequent dealings with the Attorney General's investigator and Criminal Division lawyers. During her interview with Agent Ondejko and her deposition, the defendant

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[14] Const 1963, art 6, § 5.

[15] See MRPC 1.10, Amended Comment, "Definition of 'Firm': "For purposes of these rules, the term 'firm' includes lawyers in a private firm and lawyers employed in the legal department of a corporation or other organization or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. *However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules*." (Emphasis added.)

[16] The shame I refer to is borne by the majority of this Court, not the Attorney General. I do not mean to impute to any Attorney General lawyer or agent any bad or unethical motivation. As far as the record shows, all performed their various duties completely unaware that they were investigating and prosecuting a client other lawyers of the Office of Attorney General had previously defended—until just before the Attorney General brought charges. However, as stated, once that knowledge was shared, one wonders why a "wall" separating those who had defended Judge Waterstone from those who would prosecute her was a sufficient ethical response to this situation.

clearly thought she was speaking to "*her* attorneys" and helping them conduct an investigation into the actions of the Wayne County Assistant Prosecuting Attorney. She had no expectation that she was the target of a criminal investigation by representatives of the Attorney General's legal staff—which staff, through other assistant Attorneys General, had previously defended *the very conduct for which she is now being prosecuted*.

CONCLUSION

In this case, both the Attorney General and the majority accept a world in which the backbone of our legal system—an attorney's undivided loyalty to his or her client—is ignored and trampled because of the unique nature of the Attorney General. This decision fails to recognize the interest that clients of the Attorney General have in zealous, loyal, and confidential representation. (This is an interest that I would imagine the Attorney General and his lawyers share.) Otherwise, the Attorney General's clients have an incentive to withhold crucial information that they fear may someday be used in a prosecution by the very agency that represents them. In essence, what the Attorney General is claiming in this case is that he doesn't *really* "represent" anybody, and so reliance on the advocacy of his lawyers is at the client's peril. The majority accepts this premise without qualification or explanation.

As a consequence of the Court's order, the Attorney General now has *carte blanche* to represent anyone and then use statements or other information obtained during its investigation in future prosecutions, even when the Attorney General permits the defendant to believe it was acting in her interest. In sum, it turns the shield of attorney loyalty into a sword for prosecution. No one, not the Attorney General, lawyers in general, their respective clients or our legal system, should welcome such a prospect. This case cries out for a reasoned set of principles. Unfortunately, my colleagues in the majority are unwilling to supply them.

For these reasons, I must lodge my vigorous dissent. I would grant leave to appeal.

HATHAWAY, J., would grant leave to appeal.

CORRIGAN, J. I am not participating because I may be a witness in this case.

Leave to Appeal Granted June 4, 2010:

MICHIGAN EDUCATION ASSOCIATION v SECRETARY OF STATE, No. 137451; reported below: 280 Mich App 477. The parties shall include among the issues to be briefed the effect, if any, of *Citizens United v Fed Election Comm*, 558 US ___; 130 S Ct 876; 175 L Ed 2d 753 (2010), on this case.

MARKMAN, J. (*dissenting*). I would not grant leave to appeal, and I therefore dissent. To the best of my recollection, this is the first occasion on which I have ever dissented to an order to grant leave to appeal. The Court of Appeals issued its decision in this case on August 28, 2008, this Court entered an order scheduling oral argument on the application on May 8, 2009, and oral arguments were heard on November 5, 2009. Now

6½ months after hearing oral arguments on the application, the majority grants leave to appeal. The only fig leaf of an excuse for doing this is a request that the parties should now brief the impact of *Citizens United v Fed Election Comm*, 558 US ___; 130 S Ct 876; 175 L Ed 2d 753 (2010), a case decided by the United States Supreme Court more than four months ago and bearing no discernible connection to the instant case.

Unlike *Citizens United*, the issues in this case have nothing to do with corporate free speech, nothing to do with labor union free speech, nothing to do with the Federal Election Campaign Act, nothing to do with Federal Election Commission rules or regulations, and indeed nothing to do with campaign speech or the First Amendment. In short, it has nothing to do with anything involved in *Citizens United*. Instead, it involves only whether § 57 of the Michigan Campaign Finance Act bars a school district from administering a payroll deduction plan for a political action committee.

Indeed, neither party itself has suggested that this case is affected in any way by *Citizens United*, nor sought any opportunity to file a supplemental brief. Yet suddenly it is necessary that this Court delay resolution of this case for what will be a minimum of seven or eight additional months, on top of the six or seven months that have already passed since oral argument. I am aware of no previous instance in which this Court has held arguments on an application, taken no action in response to such arguments for more than six months, and then granted leave to appeal late during that term, ensuring that such case will not be further considered during that term and that a decision will not be forthcoming until, at the earliest, the beginning of the second calendar year, 2011, after arguments were initially heard. This, with regard to a case that may affect the administrative processes of every school district across this state.

This Court has been presented with substantial briefs from each party. Each party has filed an original and supplemental brief, four amicus briefs have been filed, and oral argument has taken place that lasted well beyond the normal time allotted for such argument. We have heard from the Secretary of State, the Attorney General, the Michigan AFL-CIO, the Chamber of Commerce, the Michigan State Employees Association, and the Mackinac Center, with a supplemental brief filed by the AFL-CIO and two supplemental briefs filed by the Chamber of Commerce. This case involves a straightforward matter of *statutory* interpretation, and no justice has identified to any of the parties at oral argument, or at any later juncture, any aspect of this case that has not been thoroughly addressed.

To grant leave to appeal under these circumstances constitutes an utter waste of judicial resources, imposes an altogether unnecessary expense upon the parties, and unconscionably delays resolution of an important dispute of statewide importance for no proper reason. What accounts for, and justifies, this delay? What is taking place here is an abuse of the judicial process, and the majority owes considerably more explanation for its actions than it has given.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal June 4, 2010:

PEOPLE v ACEVAL, No. 138577; reported below: 282 Mich App 379. The motion for reconsideration of this Court's September 25, 2009, order is considered, and it is granted. We vacate only that portion of our order dated September 25, 2009 that denied leave to appeal. On reconsideration, the application for leave to appeal the February 5, 2009, 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(H)(1). At oral argument the parties shall address whether the prosecution's acquiescence in the presentation of perjured testimony in order to conceal the identity of a confidential informant amounts to misconduct that deprived the defendant of due process such that retrial should be barred. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application and reconsideration motion papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

The motions for appointment of alternate jurist, for disclosure and remand to the Court of Appeals, and for stay are denied.

WEAVER, J. (*concurring*). I join in and concur fully with the order granting reconsideration and directing that oral argument be heard on the application for leave to appeal. I note in this case that last September 25, 2009, Justice CORRIGAN stated:

> "I am not participating because I may be a witness in a related case."

Regarding this statement, on September 28, 2009, *The Detroit News* reported:[1]

> "Contacted at her home by *The News* on Sunday, Corrigan said, 'I was asked to be a character witness, and I agreed.' "

The "related case" is *People v Waterstone*, No. 140775, a case involving charges of perjury against a judge who presided over proceedings in this instant case, *People v Aceval,* in which Justice CORRIGAN has stated:

> "I am not participating because I may be a witness in this case."

The Code of Judicial Conduct Canon 2C states:

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[1] Doug Guthrie, Detroit News, *Supreme Court judge could be trial witness*, September 28, 2009.

> A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others. A judge should not appear as a witness in a court proceeding unless subpoenaed.

Has Justice CORRIGAN agreed to be a "character witness" in the "related case," *People v Waterstone,* as quoted in *The Detroit News*?

Has Justice CORRIGAN been subpoenaed in the "related case," *People v Waterstone*? If so, when?

What is Justice CORRIGAN's relationship, if any, to the accused defendant Judge Waterstone in the "related case," *People v Waterstone*?

CORRIGAN, J. I am not participating because I may be a witness in a related case.

Order Denying Motion to Disqualify June 4, 2010:

PEOPLE v ACEVAL, No. 138577; reported below: 280 Mich App 477. On order of the Court, the motion for full-Court consideration of the motion for disqualification of Justice HATHAWAY is considered. Upon full-Court consideration, we deny the motion to disqualify Justice HATHAWAY because the reasons she gave in denying the defendant's motion to disqualify her are sufficient.

WEAVER, J. (*concurring*). I join in and concur fully with the order denying defendant's motion to disqualify Justice HATHAWAY.

I write separately to note that Justice YOUNG claims that this Court's disqualification rule, MCR 2.003, has "serious constitutional flaws" and, therefore, he refuses to abide by it and refuses to participate.

Justice YOUNG also expressed his position on the disqualification rule in *Pellegrino v Ampco*, 485 Mich 1155 (2010), where he expressly stated: "As I have previously stated, MCR 2.003 as amended is unconstitutional."[1] I make no criticism or objection to his position to not participate because he believes the rule is "unconstitutional."

However, Justice YOUNG's approach as to the disqualification rule is quite inconsistent with his condemnation of my position that the "Gag Order," AO 2006-8,[2] is unconstitutional; is in conflict with and in violation of Canon 3A(6) of the Code of Judicial Conduct; and is an effort

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[1] In his dissent to the order amending MCR 2.003, Justice YOUNG stated: "I respectfully dissent from the new majority's enactment of this unconstitutional rule of disqualification. 485 Mich cxxx, clxvii.

[2] AO 2006-8 states:

> All correspondence, memoranda and discussions regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical, improper or criminal conduct to the JTC or proper authority.

to establish secrecy (i.e., a "secret club" rule) to keep me from performing my duty to the people to inform them of what I believe they need to know—no more, no less—about how, what, when and where the Court performs the people's judicial business.[3]

I explained in my dissent to the "Gag Order," AO 2006-8, on December 6, 2006, that the order was unconstitutional "because it unconstitutionally restricts a justice's ability to perform his duty to the public by barring a justice from 'giv[ing] in writing' his 'reasons for each decision' and 'the reasons for his dissent.' "[4] The "Gag Order" is not only unconstitutional,[5] but it is in conflict with and in violation of Canon 3A(6) Code of Judicial Conduct.[6]

I reiterated my position from my December 6, 2006 dissent to the "Gag Order" at the May 12, 2010, public administrative conference. (To view the video of the May 12, 2010, Administrative Conference, see my personally-funded website: www.justiceweaver.com.) During that conference, Justice YOUNG acknowledged that he referred me to the Judicial Tenure Commission and judged me as "unethical" for refusing to abide by the "Gag Order," an order that I find unconstitutional.

Justice YOUNG took these extreme measures even though he himself refuses to abide by the disqualification rule adopted by this Court that *he* alleges is unconstitutional.

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[3] The "Gag Order" was adopted on an emergency basis, without notice to the public and to some justices by a 4-3 vote, over three (3) years ago on December 6, 2006. It was only recently, at the May 12, 2010, public administrative conference, that a majority of the Supreme Court effectively "retained" the "Gag Order" to make it retroactively effective to January 17, 2007.

[4] AO 2006-8, WEAVER J., (*dissenting*) (quoting Const 1963, art 6, § 6).

[5] Article 6, Section 6 of the Michigan Constitution states:

> § 6 Decisions and dissents; writing, contents.
>
> Sec. 6. 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.

[6] Canon 3A(6) of the Michigan Code of Judicial Conduct states:

> (6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require a similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court or the judge's holdings or actions.

MARKMAN, J. (*concurring*). Defendant, in my judgment, has offered no evidence suggesting that Justice HATHAWAY is biased against defendant or his attorney, or that she cannot decide defendant's case fairly. At the same time, I respectfully believe that Justice HATHAWAY's response to defendant's motion evidences the confusion that the majority has now introduced into this Court's disqualification process by its new "appearance of impropriety" standard. In short, it is hard to understand the relevance *under this standard* of Justice HATHAWAY's various assertions: (a) that she is "unaware" of certain facts; (b) that her ex-husband's role in the prosecutor's office "has no bearing whatsoever on my decision in this case;" or (c) that she does not "harbor any bias or prejudice for or against her former husband." While I do not doubt the truth of any of these assertions, and while each is highly relevant in ascertaining that Justice HATHAWAY is not "actually biased"—which historically has defined the exclusive disqualification standard of this Court—it is unclear what the legal significance is of her *personal* knowledge and attitudes in assessing the "objective perceptions" that can be discerned from her circumstances and relationships. I continue to be concerned that the vague and formless "appearance of impropriety" standard is susceptible to arbitrary and inconsistent application. I also continue to be concerned, for the reasons set forth in my statement of April 22, about the specific procedures now being followed by this Court in deciding disqualification motions. However, notwithstanding these concerns, I believe there is no actual bias on the part of Justice HATHAWAY, and that defendant has not satisfied what I view as his threshold obligation to demonstrate even an appearance of impropriety. Although raising legitimate concerns as to the meaning of the "appearance of impropriety" standard, defendant's motion is scattershot and undisciplined in its assertions and has imposed an almost impossible obligation upon Justice HATHAWAY to respond any more thoroughly than she does.

CORRIGAN, J. I am not participating because I may be a witness in a related case.

YOUNG, J., not participating. I do not participate in the order or the Court's decision-making under the new rule for the reasons stated in my November 25, 2009, dissent from the rule's promulgation[1] and in my March 31, 2010, statement of non-participation in a similar motion in *Pellegrino v Ampco Sys Parking*.[2] I believe that rule to have serious constitutional flaws.

Leave to Appeal Denied June 4, 2010:

PEOPLE v GAYHEART, No. 139664; reported below: 285 Mich App 202.

CORRIGAN, J. (*concurring*.) I concur in the Court's order denying leave to appeal. I write separately to express my agreement with a majority of other states that territorial jurisdiction presents an issue of subject-matter, rather than personal, jurisdiction, which cannot be waived. See

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[1] See 485 Mich cxxx, clxvii-clxxx (2009) (YOUNG, J., dissenting).

[2] 485 Mich 1134, 1155-1165 (2010) (YOUNG, J., not participating).

People v Betts, 34 Cal 4th 1039, 1049 (2005); *State v Willoughby*, 181 Ariz 530, 538, n 7 (1995); *People v McLaughlin*, 80 NY2d 466, 471 (1992); see also LaFave, Criminal Procedure (3d ed), § 16.4(a), n 2, p 830 ("Since territorial jurisdictional limits operate to restrict the subject matter over which the court can exercise authority, they are treated procedurally as presenting issues of subject matter jurisdiction."). Further, I emphasize that the record in this case clearly established that the state of Michigan had territorial jurisdiction to prosecute defendant pursuant to MCL 762.2. After a six-day trial, a jury convicted defendant of both first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b). The record reveals that the prosecutor presented ample evidence that defendant committed at least one element of each charged offense in Michigan. This evidence, which the jury found persuasive, was more than sufficient to establish territorial jurisdiction under MCL 762.2(1)(a) and (2)(a). Accordingly, I agree with the Court of Appeals that "even though the evidence suggested that the fatal blows were struck in Indiana, and despite the discovery of the victim's body in Indiana, the trial court had territorial jurisdiction to try defendant for murder under the laws of Michigan." *People v Gayheart*, 285 Mich App 202, 220 (2009).

KELLY, C.J., would grant leave to appeal.

O'BRIEN v PUBLIC SCHOOL EMPLOYEES RETIREMENT BOARD, No. 140484; Court of Appeals No. 294388.

CORRIGAN, J. (*concurring*). I concur in the Court's decision to deny the application for leave to appeal. I write to express my shock and disbelief at the salary of petitioner Robert M. O'Brien as a school superintendent, to urge legislative attention to the statutory scheme that gave rise to this expenditure, and to alert the public to this use of its tax dollars.

Petitioner was a Huron Valley School District superintendent from 1998 until his retirement in 2006. Petitioner made regular contributions to the Public Employees Retirement Fund during that time. This case concerns petitioner's dispute with respondent Public School Employees' Retirement Board over the amount of his remuneration that may be considered "compensation" under the public school employees retirement act of 1979, MCL 38.1301, *et seq*., for purposes of determining his monthly pension benefit. An employee's retirement benefit is calculated based on his "final average compensation," which is an average of the employee's reportable "compensation" for the 36 consecutive months during which the employee had the highest compensation. MCL 38.1304(12). Petitioner contests the final average compensation calculated by the Office of Retirement Services. Petitioner appealed to the Michigan Public Schools Retirement Board (Board), which denied his request that his retirement allowance be increased from $8,346.92 per month to $15,601.95 per month. The circuit court affirmed. The Court of Appeals denied leave to appeal. *O'Brien v Pub School Employees' Retirement Bd*, unpublished order of the Court of Appeals issued December 21, 2009 (Docket No. 294388).

Petitioner now seeks leave to appeal to this Court, claiming that respondent erred in several respects in calculating the final average compensation used to determine his retirement benefits and that

certain terms used in the retirement act are unconstitutionally vague. I agree with the Court's decision to deny leave to appeal. I write separately to express my amazement at the amount petitioner was compensated for serving as a public employee and to draw legislative and public attention to these alarming facts. Given the considerable concern over public expenditures in the current economic climate, I believe the facts of this case signal a need for legislative scrutiny.

For the year ending June 30, 2001, petitioner earned a total of $158,911.00. For the year ending June 30, 2006, petitioner earned a total of $418,965.00. The chart below shows petitioner's compensation from 2001 to 2006:

Year Ending June 30	Total Remuneration
2001	158,911.00
2002	244,726.00
2003	328,902.00
2004	356,662.00
2005	388,121.00
2006	418,965.00

According to the Board's Decision and Order, December 11, 2008 (Docket No. 2008-221 PSRS) at 15-16, the $418,965.00 petitioner received in 2006 included:

- $154,181.00 as a gross salary;
- $24,500.00 as deferred compensation;
- $17,369.07 for days worked beyond allotted vacation and personal days;
- $20,101.00 for reimbursement for contributions to the Member Investment Plan;
- $114,111.86 for the purchase of two years service credit by Huron Valley School District or the equal cost of an investment by petitioner;[1]
- $30,836.20 for merit pay;
- $57,839.04 for longevity.

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[1] The Board's opinion explains this component of petitioner's compensation as follows:

> The Act provides for a MPSERS [Michigan Public School Employee Retirement System] member to purchase service credit. MCL 38.1369f[.] The member's annual retirement benefit amount increases with an increase in the amount of service time, and a member may expand his service time by purchasing service credit. In this matter, the Petitioner's employment contracts stated that Huron Valley would purchase:

These amounts are eye-popping. I question which individuals and bodies are responsible for this use of tax dollars and whether the legislature and the public are aware that this is happening.

Order Dismissing Application for Leave to Appeal June 4, 2010:

HASTINGS MUTUAL INSURANCE COMPANY v SAFETY KING INCORPORATED, Nos. 140320 and 140321; reported below: 286 Mich App 287.

Summary Disposition June 10, 2010:

PEOPLE v GATISS, No. 139628; Court of Appeals No. 289375. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the December 13, 2007 order of the Alger Circuit Court, and we remand this case to that court to reconsider the defendant's motion for relief from judgment. A trial court, in its discretion, may generally strike pleadings containing "redundant, immaterial, impertinent, scandalous, or indecent matter." MCR 2.115(B). But the court may not dismiss a defendant's motion for relief from judgment merely for failure to comply with court rules; rather, the court must adjudicate the motion or return it "with a statement of reasons for its return." MCR 6.502(D). On remand, the court shall specify what portions of the defendant's pleadings were stricken as immaterial, impertinent, or scandalous. The court shall adjudicate the portions that merely failed to conform to the court rules or return the pleadings with an explanation for their return. In adjudicating the relevant portions of the motion, the court must "include a concise statement of the reasons for the denial," MCR 6.504(B)(2), or "set forth in the record its findings of fact and its conclusions of law, and enter an appropriate order disposing of the motion," MCR 6.508(E). Although the court's reasoning may again incorporate the prosecutor's response by reference, we note that the prosecutor did not respond to all of the defendant's arguments for relief; accordingly, the court must dispose of the defendant's remaining relevant arguments, if any, without merely referring to the prosecutor's response.

We do not retain jurisdiction.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal June 10, 2010:

CAMPBELL v DEPARTMENT OF HUMAN SERVICES, No. 140319; reported below: 286 Mich App 230. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties may file supplemental briefs within 56

> . . . retirement credit in MSPERS for the SUPERINTENDENT'S benefit . . . or at the SUPERINTENDENT'S election, pay the cost of such year into an investment of the SUPERINTENDENT'S choice. [*Id*. at 23.]

days of the date of this order, but they should not submit mere restatements of their application papers.

PEOPLE v BRANDT, No. 140744; Court of Appeals No. 288466. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address whether points for abuse of authority status against a vulnerable victim may be assessed for Offense Variable 10, MCL 777.40(3)(c) and (d), where the defendant was a financial officer for a credit union and embezzled funds from that financial institution. They may file supplemental briefs within 56 days of the date of this order, but they should not submit mere restatements of their application papers.

We further order the Jackson Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, 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. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 10, 2010:

PEOPLE v STEPHENS, No. 140413; Court of Appeals No. 294749.

CURRY v MEIJER, INCORPORATED, No. 140535; reported below: 286 Mich App 586.

KELLY, C.J., and HATHAWAY, J., would grant leave to appeal.

CAVANAGH, J., not participating due to a familial relationship with counsel of record.

GMAC, LLC v DEPARTMENT OF TREASURY and NUVELL CREDIT COMPANY, LLC v DEPARTMENT OF TREASURY, Nos. 140637, 140638, 140639 and 140640; reported below: 286 Mich App 359.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to address the following questions: (1) whether the Due Process Clause of Const 1963, art 1, § 17 says anything different concerning the constitutionality of retroactive application of state tax laws than does Article V of the United States Constitution; and (2) whether it is relevant in enacting retroactive tax laws that the Legislature asserting that such laws are "curative," and intended to express the "original intent of the Legislature," is not the Legislature that enacted the laws in question but a subsequent Legislature. I would direct that this case be argued and submitted together with *Ford v Dep't of Treasury*, No. 140624.

MCDERMENT v BILTMORE PROPERTIES, INCORPORATED, No. 140570; Court of Appeals No. 285570.

PEOPLE v SNYDER, No. 140605; Court of Appeals No. 295508.

FORD MOTOR CREDIT COMPANY v DEPARTMENT OF TREASURY, No. 140624; Court of Appeals No. 289781.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to address the following questions: (1) whether the Due Process Clause of Const 1963, art 1, § 17 says anything different concerning the constitutionality of retroactive application of state tax laws than does Article V of the United States Constitution; and (2) whether it is relevant in enacting retroactive tax laws that the Legislature asserting that such laws are "curative," and intended to express the "original intent of the Legislature," is not the Legislature that enacted the laws in question but a subsequent Legislature. I would direct that this case be argued and submitted together with *GMAC v Dep't of Treasury*, No. 140637-40.

Reconsideration Denied June 10, 2010:

FIRST INDUSTRIAL LLP v DEPARTMENT OF TREASURY, No. 139748; Court of Appeals No. 282742.

Reconsideration Denied June 10, 2010:

PEOPLE v FREDDIE PARKER, No. 139985; Court of Appeals No. 283569. Leave to appeal denied at 485 Mich 1082.

Summary Disposition June 11, 2010:

NORDSTROM v AUTO-OWNERS INSURANCE COMPANY, No. 140551; Court of Appeals No. 294705. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the December 1, 2009, and January 26, 2010, orders of the Court of Appeals and remand this case to that court for reinstatement of the plaintiff's claim of appeal. The Court of Appeals erred in dismissing the plaintiff's claim of appeal for lack of jurisdiction. The plaintiff was entitled to file a timely claim of appeal from the trial court's October 5, 2009, final order. MCR 7.202(6)(a)(i); 7.204(A)(1)(a). The fact that the plaintiff had already filed a timely motion for reconsideration in the trial court, which remained pending when the claim of appeal was filed, did not operate to divest the Court of Appeals of jurisdiction. See MCR 7.208(A). We do not retain jurisdiction.

Leave to Appeal Granted June 11, 2010:

BOWENS v ARY, INCORPORATED, No. 140296; Court of Appeals No. 282711. The parties shall include among the issues to be briefed: (1) whether, as a matter of law, the videotaped conversation in question was a "private conversation" or "private discourse" for purposes of the eavesdropping statutes, MCL 750.539a, *et seq*.; and (2) whether, and under what circumstances, a public-official- or police-plaintiff possesses a

reasonable expectation of privacy under MCL 750.539c in conversations with private citizens in pursuit of official business in enforcing state or local laws and ordinances.

PEOPLE v HAILEY, Nos. 140514 and 140515; Court of Appeals Nos. 276423 and 276904. The parties shall include among the issues to be briefed whether trial counsel was ineffective for any of the reasons asserted by the defendant.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal June 11, 2010:

POLLARD v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, No. 140322; Court of Appeals No. 288851. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address whether this Court should reconsider *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007). They may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The Michigan Association for Justice and the Michigan Defense Trial Counsel, Inc. are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

YOUNG, J. (*dissenting*). I respectfully dissent from the order directing further argument on the application for leave to appeal in this case and instead would deny leave to appeal. The order directs the parties to discuss whether this Court should reconsider *Rowland v Washtenaw Co Rd Comm*.[1] I believe *Rowland* was correctly decided. While it is certainly the prerogative of the Court to reconsider that decision, this order is another instance where the majority seems to retreat from its previously stated fidelity to stare decisis.[2]

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[1] 477 Mich 197 (2007).

[2] See, e.g., *Pohutski v City of Allen Park*, 465 Mich 675, 712; 641 NW2d 219 (2002) (KELLY, J., dissenting) ("[I]f each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable."); *People v Hawkins*, 468 Mich 488, 517-518; 668 NW2d 602 (2003) (CAVANAGH, J., dissenting) ("We have overruled our precedents when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doc-

Since the shift in the Court's philosophical majority in January 2009, the majority has pointedly sought out precedents only recently decided,[3]

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trines or policies.' . . . Absent those changes or compelling evidence bearing on Congress' original intent . . . our system demands that we adhere to our prior interpretations of statutes."), quoting *Patterson v McLean Credit Union*, 491 US 164, 173; 109 S Ct 2363; 105 L Ed 2d 132 (1989), and *Neal v United States*, 516 US 284, 295; 116 S Ct 763; 133 L Ed 2d 709 (1996); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 278; 731 NW2d 41 (2007) (CAVANAGH, J., dissenting) (" 'Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed.' "), quoting *People v Jamieson*, 436 Mich 61, 79; 461 NW2d 884 (1990); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 622; 702 NW2d 539 (2005) (WEAVER, J., dissenting) ("Correction for correction's sake does not make sense. The case has not been made why the Court should not adhere to the doctrine of stare decisis in this case."); Todd C. Berg, *Hathaway attacks*, Michigan Lawyers Weekly, October 27, 2008 (" 'People need to know what the law is,' Hathaway said. 'I believe in stare decisis. Something must be drastically wrong for the court to overrule.' "); *Lawyers' election guide: Judge Diane Marie Hathaway*, Michigan Lawyers Weekly, October 30, 2006, in which Justice HATHAWAY, then running for a position on the Court of Appeals, was quoted as saying: "[t]oo many appellate decisions are being decided by judicial activists who are overturning precedent."

[3] See, e.g., *Univ of Mich Regents v Titan Ins Co*, 484 Mich 852 (2009) (directing the parties to consider whether *Cameron v ACIA*, 476 Mich 55 [2006], was correctly decided); *McCormick v Carrier*, 485 Mich 851 (2009) (granting leave to consider the plaintiff's request to overrule *Kreiner v Fischer*, 471 Mich 109 [2004]); *Lenawee Co Bd of Rd Comm'rs v State Auto Prop & Cas Ins Co*, 485 Mich 853 (2009) (directing the parties to consider whether *Miller v Chapman Contracting*, 477 Mich 102 [2007], was correctly decided); *Edry v Adelman*, 485 Mich 901 (2009) (directing the parties to consider whether *Wickens v Oakwood Healthcare Sys*, 465 Mich 53 [2001], was correctly decided); *Hoover v Mich Mut Ins Co*, 485 Mich 881 (2009) (directing the parties to consider whether *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521 [2005], was correctly decided); *Lansing School Ed Ass'n v Lansing Bd of Ed*, 485 Mich 966 (2009) (directing the parties to consider whether *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 [2001], was correctly decided); *Anglers of the AuSable v Dep't of Environmental Quality*, 485 Mich 1067 (2010) (directing the parties to consider whether *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280 [2007], and *Preserve the Dunes v Dep't of Environmental Quality*, 471 Mich 508 [2004], were correctly decided); *Colaianni v*

has failed to give effect to other recent precedents,[4] and has outright overturned other recent precedents of this Court.[5] I can only assume that the majority is making good on our Chief Justice's pledge she made shortly before the shift in the Court's philosophical majority:

> We the new majority will get the ship off the shoals and back on course, and we will undo a great deal of the damage that the Republican-dominated court has done. Not only will we not neglect our duties, we will not sleep on the bench.[6]

Today, the Court again orders reconsideration of a case that was decided just three years ago. Nothing in the law of this State or the rationale of that decision has changed in this short time. Accordingly, as I have in other similar orders,[7] I respectfully dissent from this order.

CORRIGAN, J., joined the statement of YOUNG, J.

Stuart Frankel Dev Corp, 485 Mich 1070 (2010) (granting to consider whether *Trentadue v Buckler Automatic Lawn Sprinkler*, 479 Mich 378 [2007], was correctly decided); *Idalski v Schwedt*, 486 Mich 916 (2010) (granting to consider whether *Rory v Continental Ins Co*, 473 Mich 457 [2005], should be reconsidered).

[4] See, e.g., *Hardacre v Saginaw Vascular Servs*, 483 Mich 918 (2009), where the majority failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), where it failed to follow *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606 (1940), and *Camburn v Northwest School Dist*, 459 Mich 471 (1999); *Vanslembrouck v Halperin*, 483 Mich 965 (2009), where it failed to follow *Vega v Lakeland Hosps*, 479 Mich 243, 244 (2007); *Juarez v Holbrook*, 483 Mich 970 (2009), where it failed to follow *Smith v Khouri*, 481 Mich 519 (2008); *Beasley v Michigan*, 483 Mich 1025 (2009), *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009), and *Ward v Mich State Univ*, 485 Mich 917 (2009), where it failed to follow *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007); *Scott v State Farm Auto Ins Co*, 483 Mich 1032 (2009), where it failed to follow *Thornton v Allstate Ins Co*, 425 Mich 643 (1986), and *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626 (1997); and *Esselman v Garden City Hosp*, 486 Mich 892 (2010) (Docket No. 139273, order entered April 23, 2010).

[5] See, e.g., *People v Feezel*, 486 Mich 184 (2010), where the majority overruled *People v Derror*, 475 Mich 316 (2006).

[6] *She Said*, Detroit Free Press, December 10, 2008.

[7] See, e.g., *Univ of Mich Regents*, 484 Mich at 853; *Lenawee Co Bd of Rd Comm'rs*, 485 Mich at 855; *Hoover*, 485 Mich at 882; *Lansing School Ed Ass'n*, 485 Mich at 966; *Anglers*, 485 Mich at 1067; *Colaianni*, 485 Mich at 1070; *Idalski*, 486 Mich at 916 (2010).

Leave to Appeal Denied June 11, 2010:

PEOPLE v REDD, No. 138161; Court of Appeals No. 283934. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of May 29, 2009. The application for leave to appeal the December 4, 2008, judgment of the Court of Appeals is denied, because we are no longer persuaded that the question presented should be reviewed by this Court.

MARKMAN, J. (*concurring*). I concur in the Court's order denying leave to appeal. I write separately only to offer some context and perspective concerning the meaning and continued significance of *People v Bigge*, 288 Mich 417 (1939). Specifically, it is necessary to emphasize that: (1) *Bigge*'s rule is evidentiary in nature as it concerns the admissibility of tacit admissions under MRE 801(d)(2)(B); and (2) every so-called *Bigge* error does not require automatic reversal. Accordingly, contrary to Chief Justice KELLY's assertion, a *Bigge* error can be waived by a criminal defendant.

In *Bigge*, the prosecutor in his opening statement made reference to the defendant's silence in the face of an incriminatory accusation made in his presence. This Court ruled that the defendant's failure to deny the accusation could not be used as substantive evidence of guilt, explaining:

> There can be no such thing as confession of guilt by silence in or out of court. The unanswered allegation by another of the guilt of a defendant is no confession of guilt on the part of a defendant. Defendant, if he heard the statement, was not morally or legally called upon to make denial or suffer his failure to do so to stand as evidence of his guilt. [*Bigge*, 288 Mich at 420.]

Bigge, grounding its determination in the "right of due process," found that this error required reversal, stating that it was "so prejudicial as to constitute irreparable error." *Id.* at 421.

Since *Bigge*, this Court has had several occasions on which to reexamine this rule. In *People v McReavy,* 436 Mich 197, 213 (1990), we clarified that *Bigge*'s exclusionary rule is evidentiary in nature, and equated it with MRE 801(d)(2)(B), which states: "A statement is not hearsay if . . . the statement is offered against a party and is . . . a statement of which the party has manifested an adoption or belief in its truth." *McReavy* further explained that *Bigge* precludes admissibility of a defendant's failure to say anything in the face of an accusation as an adoptive or tacit admission under MRE 801(d)(2)(B) unless the defendant 'manifested his adoption or belief in its truth . . . .' " *Id*. We reiterated this understanding in *People v Hackett*, 460 Mich 202, 213 (1999), in which we noted that "[a]lthough *Bigge* preceded the enactment of the Michigan Rules of Evidence, the rule of *Bigge*, like MRE 801(d)(2)(B), concerns tacit admissions."

I take this opportunity to again clarify that *Bigge*'s rule is evidentiary and that "use of a party opponent's statements and conduct are to be evaluated pursuant to MRE 801." *McReavy*, 436 Mich at 222. For although *Bigge* concluded that the error before it was of constitutional

proportion, significant developments in Michigan's legal landscape in subsequent years have undermined that conclusion. These developments include the enactment of the Rules of Evidence[1] and significant changes to Fifth and Fourteenth Amendment jurisprudence occasioned by decisions of the United States Supreme Court.

Not least among the decisions that have altered our understanding of the constitutional implications of a defendant's silence is *Miranda v Arizona*, 384 US 436 (1966). Despite the fact that *Bigge* predated *Miranda* by 27 years, this Court in *People v Bobo*, 390 Mich 355, 359-361 (1973), associated *Bigge*'s rule with the Fifth Amendment privilege against compelled self-incrimination protected in *Miranda* to support its holding that a criminal defendant's silence could never be used against him under any circumstances during a trial, regardless of whether the evidence was used substantively or for impeachment, or whether the silence was prior to or at the time of arrest. However, the United States Supreme Court declined to extend such broad protections. Instead, that Court held that the Due Process Clause of the Fourteenth Amendment is violated when a defendant's silence, *at the time of arrest* and *after* receiving *Miranda* warnings, is used for impeachment purposes, *Doyle v Ohio*, 426 US 610, 619 (1976), and that the Fifth and Fourteenth Amendments are not violated when a defendant's pre-arrest, pre-*Miranda* silence is used for impeachment. *Jenkins v Anderson*, 447 US 231, 240 (1980). The Supreme Court left the admissibility of such evidence to be determined by evidentiary laws of the states. *Id.* This Court has subsequently construed Michigan's constitutional protections as "coextensive with the Fifth Amendment of the United States Constitution and the due process analysis of *Doyle v Ohio*." *People v Cetlinski*, 435 Mich 742, 759 (1990).

Thus, both the United States Supreme Court and this Court have made clear that there are no constitutional bars to using a defendant's pre-arrest, pre-*Miranda* silence—the precise type of silence at issue in *Bigge*—for impeachment. While neither of these Courts has addressed the substantive use of defendant's silence in such circumstances, our Court of Appeals, as well as several federal circuits, have likewise found no constitutional barriers to the admission of such evidence for this purpose. See *People v Schollaert*, 194 Mich App 158, 166-167 (1992); *People v Solmonson*, 261 Mich App 657, 665 (2004); *United States v Love*, 767 F2d 1052, 1063 (CA 4, 1985); *United States v Oplinger*, 150 F3d 1061, 1066 (CA 9, 1998), overruled on other grounds in *United States v Contreras*, 593 F3d 1135 (CA 9, 2010). In *Solmonson*, our Court of Appeals explained:

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[1] "The fact that the *Bigge* decision predates the adoption of th[e] Rule[s] of Evidence is of no consequence to challenges to the admissibility of tacit admissions." *McReavy*, 436 Mich at 213 n 15. As *McReavy* recognized, *Bigge* does not alter or augment an analysis of a party admission under the MRE 801(d)(2)(B) because after the enactment of the Rules of Evidence, *Bigge*'s rule against tacit admissions is essentially coextensive with that evidentiary rule.

> [W]here a defendant has received no *Miranda* warnings, no constitutional difficulties arise from using the defendant's silence before or after his arrest as substantive evidence unless there is reason to conclude that his silence was attributable to the invocation of the defendant's Fifth Amendment privilege. [*Solmonson*, 261 Mich App at 665.]

In my view, *Solmonson* sets forth a correct statement of the law regarding the constitutional implications of the substantive use of a defendant's silence in a pre-arrest, non-custodial interview. Because of the absence of governmental coercion or compulsion to speak in this non-custodial, pre-*Miranda* setting, the Fifth Amendment is simply inapplicable. As Justice Stevens explained in his concurrence in *Jenkins*:

> When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment. [*Jenkins*, 447 US at 243-244.]

In view of these developments, *Bigge*'s constitutional foundations as to the admissibility of tacit admissions in a pre-arrest, non-custodial context have been severely eroded. Rather, the admissibility of such testimony is to be evaluated under MRE 801(d)(2)(B). See *McReavy*, 436 Mich at 222; *Hackett*, 460 Mich at 213. "[A]n evidentiary approach to the use of a defendant's pre-arrest, pre-*Miranda* statements, including omissions, will adequately protect the policy interest in foreclosing the factfinder from unfair inferences of guilt." *Cetlinski*, 435 Mich at 759.

This understanding of a *Bigge* error leads to my second point of clarification. Although *Bigge* found that the error before it was "so prejudicial as to constitute irreparable error," when *Bigge* is properly understood as concerning a violation of MRE 801(d)(2)(B), it is clear that not every *Bigge* violation amounts to an "irreparable error" if this is interpreted as requiring automatic reversal. The reversal of a conviction entails substantial social costs and, thus, rules of automatic reversal are disfavored. *People v Mosko*, 441 Mich 496, 502 (1992); *People v France*, 436 Mich 138, 161 (1990). This Court has explained that such "structural errors" are "intrinsically harmful" and "necessarily render[] unfair and unreliable the determining of guilt or innocence." *People v Duncan*, 462 Mich 47, 51 (2000) (holding that the complete failure to instruct the jury regarding any of the elements necessary to determine if the prosecutor has proven the charge beyond a reasonable doubt constituted structural error requiring automatic reversal).

Against this backdrop, *Bigge*'s "irreparable error" language is extraordinary. Indeed, in the history of Michigan's criminal jurisprudence, *Bigge* is the singular authority for an "irreparable error," and its language has only been invoked three times in the 70 years since *Bigge* was decided, and just once in a majority opinion of this Court. *People v Gibbs*, 483 Mich 925 (2009) (KELLY, C.J., dissenting); *People v Robinson*, 386 Mich 551, 564 (1972); *People v Christensen*, 64 Mich App 23, 36 (1975) (KAUFMAN, J., dissenting). To

give this language broad effect, and to preclude a finding of waiver or harmless error for every violation of *Bigge*, would conflict with this Court's more recent criminal case-law, see, e.g., *People v Carter*, 462 Mich 206 (2000); *People v Carines*, 460 Mich 750 (1999), as well as MCL 769.26, which permits a grant of a new trial only when "the error complained of has resulted in a miscarriage of justice," and MCR 2.613, which permits a grant of a new trial only when the result is "inconsistent with substantial justice." Simply put, not every *Bigge* error is so substantively different from the multiplicity of other potential trial errors that it rises to the level of a "structural error that defies harmless error analysis," *Carines*, 460 Mich at 774, automatically results in a "miscarriage of justice," MCL 769.26, or necessarily leads to a result that is "inconsistent with substantial justice." MCR 2.613.

In sum, this Court has clarified that *Bigge*'s 'exclusionary rule' is evidentiary, not constitutional, and the "use of party opponent's statements and conduct are to be evaluated pursuant to MRE 801." *McReavy*, 436 Mich at 222. Consequently, when properly understood, not every *Bigge* error is "irreparable," such that it defies waiver or harmless error analysis, and requires automatic reversal. *Carines*, 460 Mich at 774; *Carter*, 462 Mich at 206; MCL 769.26; MCR 2.613.[2]

Here, the Court of Appeals correctly determined that defendant waived the challenged *Bigge* error by affirmatively approving the trial court's cautionary instruction and abandoning his right to move for a mistrial. *People v Redd*, unpublished opinion of the Court of Appeals, issued December 4, 2008 (Docket No. 283934), slip op at 2. Furthermore, nothing on this record suggests that the challenged error amounted to "structural error" evading a waiver analysis. See *Duncan*, 462 Mich at 51. Accordingly, I concur in the order denying leave to appeal the Court of Appeals judgment.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

KELLY, C.J. (*dissenting*). I oppose vacating our previous order which granted defendant's application for leave to appeal. I believe that, under the law in this state, this Court must reverse the Court of Appeals decision and reinstate the trial court's grant of a new trial.

THE TRIAL COURT'S GRANT OF A NEW TRIAL

Defendant was charged with third-degree criminal sexual conduct[1] after a fourteen-year-old friend of his younger sister alleged that he had

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[2] As Chief Justice KELLY correctly observes in her dissent, this analysis of *Bigge* is not legally binding. Rather, as explained at the outset, it represents an attempt to offer guidance as to the contemporary understanding of the *Bigge* rule. The significance of this concurrence depends on the extent to which it presents a reasoned account of the relevant developments in this area of the law over the past 70 years and their impact on *Bigge*. The Chief Justice seemingly would prefer to ignore these developments and this context, preserving *Bigge* forever in its own time capsule and abjuring any analysis as to what has occurred over the past seven decades.

[1] MCL 750.520d.

sexually assaulted her. Pontiac Police Detective Derrance Betts was assigned initially to investigate two separate incidents involving defendant and the complainant, one allegedly having occurred in defendant's kitchen and the other in a car.[2]

Betts testified at trial that, after interviewing the victim, he sent defendant a letter requesting that he come to the police station for an interview, and defendant did so voluntarily. At the interview, Betts testified, he told defendant that he was free to leave anytime he wished and would not be arrested as a consequence.

Betts testified that defendant confirmed that he knew the complainant. Betts informed defendant that he had been accused of criminal sexual conduct but provided no details about the allegations. Betts then testified that he asked where defendant was living at the time of the alleged assaults. He said that defendant gave inconsistent answers concerning locations where he and his wife had lived. Betts testified that he was confused by the answers and wanted to obtain a better timeline from defendant. Defendant responded to the request by saying that it was not his fault that Betts was confused.

At that point, Betts testified, defendant became upset, said he was done, and stormed out of the interview. Betts also indicated that he had been unable to question defendant about the kitchen incident, but that defendant never denied any allegations of sexual misconduct. The Court of Appeals described portions of the disputed testimony:

> Betts testified that he "just brought up about the criminal sexual conduct against [the complainant]" and that defendant "never denied it. He—he just—he just sat there, and . . . he made a comment about the back of the car." Betts stated that he advised defendant of the allegations of something occurring on the kitchen floor, and defendant "never denied it." Betts later explained that he "told [defendant] that he was being accused of a criminal sexual conduct. I don't believe I came right out and asked him did he do it, 'cause he never did respond to a question."[3]

The trial transcript also indicates that Betts testified about defendant's act of leaving the interview:

> *Betts*: I needed to talk to him a bit more, to get some more information. Because all of the information he threw at me about Tennessee, I—I explained to him that I was confused and I needed to talk to him a bit more, to kind of—to help weed it out a little bit. And, that's when he—he became upset and walked out, and stormed out of the interview room. I didn't have a chance to ask him any more questions 'cause he was free to go.

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[2] The defendant was charged with only one count of CSC on the basis of the incident in the kitchen.

[3] *People v Redd*, unpublished opinion of the Court of Appeals, issued December 4, 2008 (Docket No. 283934).

When defense counsel objected to this line of questioning, the trial court instructed the jury that someone being interviewed by the police has an absolute right to leave the interview. However, on cross-examination, Detective Betts again discussed defendant's failure to deny the allegations and emphasized that defendant chose to leave the interview, stating: "I gave [defendant] an opportunity to talk to me- . . . about it . . . and he stormed out of the interview." Defense counsel responded, "Right, but there's nothing wrong with that . . . and don't try to make the jurors think that there is something wrong with that." Again, Betts insisted: "I figured I'd give him an opportunity to tell his side of the story. . . . And he stormed out, so—."

At the end of proofs, the trial court gave the jury a second cautionary instruction that reiterated that defendant had an absolute right not to testify and not to be interviewed. The jury found defendant guilty of third-degree criminal sexual conduct, as charged.

Defendant moved for a new trial, arguing that Detective Betts had improperly commented about his silence during the interview and about his departure, and that the curative instruction was not sufficient. The prosecutor argued that there was no error and, even if there had been error, it was expressly waived once the curative instruction was administered and accepted by defense counsel. The trial court held a hearing, recounted much of Betts's testimony, and found it was "clearly prejudicial" to defendant and constituted "irreparable error." Therefore, the court granted defendant a new trial.

On appeal by the prosecution, the Court of Appeals reversed the trial court's order for a new trial.[4] It concluded that no error had occurred because "[t]here is no indication that Betts made a 'positive statement or declaration' to which defendant's silence might be construed as an admission of truth."[5] Alternately, the panel determined that, even if an error occurred, defense counsel waived it by acquiescing in the trial court's curative instruction.

We granted leave to appeal.[6]

THE EXCLUSIONARY RULE OF *BIGGE*

The disputed testimony is the detective's discussion of defendant's act of leaving the interview and defendant's unresponsiveness during the interview. In *People v Bigge*,[7] this Court explained that a defendant's silence in the face of a third-party accusation cannot be used as evidence of the defendant's guilt. The court explained:

> There can be no such thing as confession of guilt by silence in or out of court. The unanswered allegation by another of the guilt

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[4] *Id.*

[5] *Id.*, unpub op at 3.

[6] *People v Redd*, 483 Mich 1024 (2009).

[7] *People v Bigge*, 288 Mich 417 (1939).

> of a defendant is no confession of guilt on the part of a defendant. Defendant, if he heard the statement, was not morally or legally called upon to make denial or suffer his failure to do so to stand as evidence of his guilt.[8]

Thus, the exclusionary rule of *Bigge* precludes testimony concerning a defendant's silence in the face of an allegation because it characterizes such silence as an adoptive admission of guilt.

Detective Betts discussed defendant's failure to deny the allegations against him at least four times in the course of his testimony. Betts also discussed giving defendant "an opportunity to tell his side of the story," but that rather than doing so, defendant "stormed out."

Bigge leads me to conclude that the portions of Betts's testimony referencing defendant's failure to deny the criminal sexual conduct allegations were inadmissible. Betts testified repeatedly that defendant never denied the allegations. Betts frequently characterized the interview as defendant's "opportunity to tell his side of the story" and described how defendant "stormed out" of the interview.

This testimony was introduced solely as substantive evidence of defendant's guilt. There was no significance to defendant's failure to deny the allegations of criminal sexual conduct except to show that defendant was guilty of the alleged crimes. Moreover, characterizing the interview as defendant's "opportunity to tell his side of the story" was improper. Its only usefulness was to get the jury to infer that defendant should have spoken up and denied the accusations; hence, his failure to do so must have meant that he was guilty. Because Detective Betts's testimony violated the rule against tacit admissions originating in *Bigge*, the trial court did not abuse its discretion in granting a new trial.

I also cannot accept the Court of Appeals conclusion that there was no *Bigge* error on the theory that Betts made no "positive statement or declaration." Betts's testimony demonstrates that he made an assertion against defendant. He asserted that defendant was accused of a crime and invited him to admit or deny it.

Betts sent defendant a letter requesting that he come to the police station and outlining the allegations against him. Moreover, Betts testified that, during the interview, he "came forth" and told defendant, "this is the reason why you're here: You're accused of . . . criminal sexual conduct." He testified that defendant "[n]ever denied any allegations about sexual conduct."

Betts's own words undermine the Court of Appeals conclusion that he made no assertion that defendant could tacitly adopt as an admission of guilt. If Betts never made a specific assertion that defendant could tacitly adopt, then there were no "allegations about sexual conduct" for defendant to deny.

Contrary to the prosecution's argument, a *Bigge* error cannot be waived. Although "[i]t is presumed that waiver is available in 'a broad

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[8] *Id.* at 420.

array of constitutional and statutory provisions,' "[9] a *Bigge* error is not so easily discounted. In *Bigge*, this Court strongly condemned the use of tacit admissions because of their highly prejudicial effect:

> The statement was inexcusable, wholly without warrant of law, planted irremovable impression, and rendered defendant a victim of the error. The prosecutor, by such statement of intended proof of defendant's guilt brought an effect so probable, so inadmissible and so prejudicial as to constitute irreparable error.[10]

While this Court has limited or distinguished *Bigge* in several cases,[11] we have never retreated from the conclusion that a *Bigge* error is an "irreparable error" requiring reversal.[12]

Because I conclude that under *Bigge*, an "irreparable error" that could not be waived occurred in this case, I would reinstate the trial court's order granting defendant a new trial. However, even without those conclusions, I would find that the trial court did not abuse its discretion in granting a new trial to defendant. This case demonstrates the wisdom underlying the abuse of discretion standard, especially as it pertains to appellate review of a decision to grant a new trial. That rationale is "soundly rooted in the proposition that '[t]he judge was "there" we were not.' "[13]

It is clear from the trial judge's citations to Betts's testimony that he did not exercise his discretion lightly when granting a new trial. He noted

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[9] *People v Carter*, 462 Mich 206, 217-218; 612 NW2d 144 (2000), quoting *New York v Hill*, 528 US 110, 120; 120 S Ct 659; 145 L Ed 2d 560 (2000).

[10] *Bigge*, 288 Mich at 421.

[11] *People v Hackett*, 460 Mich 202, 204; 596 NW2d 107 (1999); *People v McReavy*, 436 Mich 197 (1990).

[12] *Bigge*'s "irreparable error" analysis has never been rejected by this Court. Justice MARKMAN's concurring statement opines that our decisions, coupled with intervening developments in United States Supreme Court jurisprudence, have eroded the holding in *Bigge*. He also observes that to preclude a finding of waiver or harmless error for every *Bigge* violation would contravene our recent criminal case law.

However, the fact remains that *Bigge*'s "irreparable error" language, sparsely cited as it may be, is legally binding. Justice MARKMAN's concurrence is not. Nor does this Court's order denying leave to appeal provide any basis for ignoring *Bigge*. Because *Bigge* remains good law until overruled, this Court is bound to honor its holding and reverse the judgment of the Court of Appeals.

[13] *People v Lemmon*, 456 Mich 625, 638; 576 NW2d 129 (1998), quoting *Alder v Flint City Coach Lines Inc*, 364 Mich 29, 39; 110 NW2d 606 (1961).

that reading the testimony on paper would not provide the reader with a complete understanding of Betts's testimony. He went so far as to state:

> [t]he Court invites the Court of Appeals to look at the raw video data. It's very important that they get the sense and feel of what was going on in that hour period of time . . . and it's just so desperately clear on the facts if you'll read [sic] the video and . . . in print, it's not the same thing, it's just not the same thing, so.

We should not overlook the gravity of the judge's concern about Betts's testimony. Given the deference we afford to trial courts on the decision to grant a new trial, we should not find an abuse of discretion here. MCL 770.1 and MCR 6.431(B) employ a subjective test affording trial courts wide latitude in granting a defendant a new trial.[14] It is unmistakable from the trial court's recountal of Betts's testimony that he viewed the verdict as a miscarriage of justice. Therefore, the trial court's decision to grant a new trial does not fall outside the range of principled outcomes.

CONCLUSION

The admission of Detective Betts's testimony regarding defendant's silence violated the rule against tacit admissions that we pronounced in *People v Bigge*. A *Bigge* error cannot be waived because the prejudicial effect of admitting such evidence is so high that it constitutes irreparable error. The trial judge did not abuse his discretion by granting defendant a new trial because that decision was not outside the range of principled outcomes. Therefore, I would reverse the decision of the Court of Appeals and reinstate the grant of a new trial.

CAVANAGH and HATHAWAY, JJ., joined the statement of KELLY, C.J.

PEOPLE v GAMBLE, No. 140190; Court of Appeals No. 284824.

TUCKER v CAPITAL AREA TRANSPORTATION AUTHORITY, No. 140293; Court of Appeals No. 288367.

CORRIGAN, J. (*dissenting*). I would grant leave to appeal to consider defendant's argument that its bus driver was not negligent in his operation of defendant's bus. Even if, as plaintiff claims, the wheelchair lift on defendant's bus lacked a safety belt, how did this product defect constitute "negligent operation" of the bus *by the driver*, as required to satisfy the motor vehicle exception to governmental immunity, MCL 691.1405?

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[14] MCL 770.1 gives a trial court the discretion to grant a new trial in criminal cases "for any cause for which by law a new trial may be granted, *or when it appears to the court that justice has not been done.*" (Emphasis added.); MCR 6.431(B) similarly allows a court to order a new trial "on any ground that would support appellate reversal of the conviction *or because it believes that the verdict has resulted in a miscarriage of justice*." (Emphasis added.)

Defendant, the Capital Area Transit Authority (CATA), allegedly failed to provide a safety belt on a wheelchair lift on its bus. For unknown reasons, plaintiff's decedent's wheelchair went over the end of the lift while the bus was parked and while the bus driver was not behind the wheel. Plaintiff filed this action seeking to take advantage of the motor vehicle exception.

Although this Court has held that the loading and unloading of passengers is part of the operation of a bus, *Martin v The Rapid Inter-Urban Partnership*, 480 Mich 936 (2007), the mere fact that a bus is in operation does not, by itself, satisfy the motor vehicle exception. The plaintiff must further show that the driver was *negligent* in that operation. The motor vehicle exception plainly requires a plaintiff to show that the injury "result[ed] from the *negligent* operation *by any officer, agent, or employee of the governmental agency*, of a motor vehicle of which the governmental agency is owner . . . ." MCL 691.1405 (emphasis added).

The statutory language thus requires us to ask: How was the bus driver negligent in his operation of the bus, and how did that negligent operation result in the decedent's injury? Even if CATA itself acquired or provided a defective product, how does this fact show that *the driver was negligent in his operation of the bus*? Because these difficult questions warrant further scrutiny, I would grant leave to appeal.

Reconsideration Denied June 11, 2010:

TRAMMEL v CONSUMERS ENERGY COMPANY, No. 140183; Court of Appeals No. 292912. Leave to appeal denied at 485 Mich 1104.

Statement on Motion for Recusal June 11, 2010:

GRIEVANCE ADMINISTRATOR v MILLER, No. 140081.

KELLY, C.J. I deny appellants' motion for my recusal. The motion was not timely filed under MCR 2.003(D)(1)(c). Moreover, no objective appearance of impropriety arises from respondent Sheldon Miller's lawful contribution to my 2004 reelection campaign committee.

Appellants filed their motion for my recusal on April 29, 2010. On that date, MCR 2.003(D)(1)(c), as amended on March 16, 2010, was in effect. That rule provides:

> If an appellant is aware of grounds for disqualification of a justice, the appellant must file a motion to disqualify with the application for leave to appeal. All other motions must be filed within 28 days after the filing of the application for leave to appeal or within 28 days of the discovery of the grounds for disqualification.[1]

Appellants cannot be expected to have known on November 30, 2009, when they filed their application for leave to appeal with the Court, that

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[1] MCR 2.003(D)(1)(c).

MCR 2.003 would be amended as it was on March 16, 2010. Therefore, I would not expect that their motion for my recusal would have been filed accompanying their application. However, appellants should have filed their motion, at the latest, 28 days after the court rule was amended. They did not.

Furthermore, appellants assert that they only "recently discovered" the 2004 campaign contribution that they allege as grounds for my recusal.[2] However, campaign contribution records were available to the public and included the contribution in question years before appellants filed their motion. This fact renders irrelevant their allegation that they learned about it recently. They were given notice of it long before the instant case was filed. Thus, because appellants' motion was not filed in accordance with MCR 2.003(D)(1)(c) after it became effective, the motion was untimely.[3]

Even assuming, arguendo, that appellants' motion for my recusal had been timely filed, I would still deny the motion because I am not biased for or against any party or counsel involved in this action. And, addressing the grounds appellants have raised, no objective appearance of impropriety exists. Appellants allege as the sole grounds for my recusal that respondent contributed $3,400.00 to my 2004 reelection campaign committee. That contribution is insufficient to create an objective appearance of impropriety for several reasons.

First, respondent's contribution was lawful. A lawful campaign committee contribution, absent more, does not warrant recusal under our objective standard for the appearance of impropriety.[4] Indeed, such contributions are commonplace in judicial campaigns. The Michigan

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[2] Appellants' motion for recusal, p 3, ¶ 8.

[3] Even if appellants had filed their motion under the rule governing disqualification motions for trial level judges, it still would have been untimely. Under the version of MCR 2.003(C)(1) in effect at the time appellants filed their application, a motion to disqualify had to be filed within 14 days after the moving party discovers the ground for disqualification. Yet the Michigan Department of State, Bureau of Elections posted listings showing respondent's contribution, as well as those of all other donors, in 2004. See Justice Kelly's Itemized Contributions Schedule 1A, p 76 ("Pre-Convention CS(e)"), filed August 16, 2004, available at <http://miboecfr.nictusa.com/cgi-bin/cfr/com_det.cgi?com_id=508277> (accessed June 10, 2010).

[4] Appellants cite the recommendations of the ABA Task Force on Lawyer's Political Contributions as a basis for my recusal. Appellants' motion for recusal, p 3 ¶ 9. The findings of the ABA task force recommend that a judge disqualify himself or herself when "a lawyer . . . or a party to litigation . . . has made a campaign contribution in excess of a jurisdiction's limits . . . ." Appellants ignore the phrase "in excess of a jurisdiction's limits." Here, there is no dispute that respondent's contribution was lawful and within Michigan's campaign contribution limits. Thus, the task force's recommendation has no bearing on this case.

Campaign Finance Act's[5] campaign contribution disclosure provisions reflect the Legislature's understanding that, standing alone, lawful contributions to campaign committees in the permitted amounts will not undermine the public's confidence in our judiciary. The contribution alone does not indicate any closer relationship between myself and respondent than would ordinarily exist between members of the same bar association.[6] In fact, appellants have not suggested that there exist any facts, aside from the contribution, that could cause my impartiality in this case to be questioned. And *none does* exist.

Second, respondent's single contribution of $3,400.00 represents a de minimis amount of the total raised by my campaign committee in 2004: less than one-half of one percent.[7] This small amount does not create an objective appearance of impropriety.

In *Caperton v A T Massey Coal Co, Inc*,[8] the U.S. Supreme Court ruled on a West Virginia Supreme Court justice's refusal to recuse himself. The CEO of a lead defendant in a case before the West Virginia Supreme Court had contributed $3.5 million to the justice's campaign. The refusal to recuse was held to constitute a violation of the due process clause of the Fourteenth Amendment. However, given the obvious difference in size between the contribution at issue in *Caperton* and respondent's contribution here, one could not reasonably analogize the two cases.

Thus, respondent's contribution, absent any indicia of an appearance of impropriety, does not mandate my recusal, and the *Caperton* decision does not require it, either. In any event, appellants do not argue that *Caperton* mandates my recusal. Nor do they allege that respondent's campaign contribution and my participation in this case amount to a due process violation.

In sum, appellants' motion for my recusal was untimely under MCR 2.003(D)(1)(c). Furthermore, there exists no objective appearance of impropriety based solely on the fact that respondent lawfully contributed to my 2004 reelection campaign committee. Accordingly, I deny appellants' motion for my recusal.

Leave to Appeal Granted June 18, 2010:

LIGONS V CRITTENTON HOSPITAL, No. 139978; reported below: 285 Mich App 337. The parties shall include among the issues to be briefed: (1) whether the plaintiff may amend his affidavits of merit in light of *Bush v Shabahang*, 484 Mich 156 (2009), and/or MCL 600.2301, and (2) whether the recent amendment of MCR 2.118 applies to the plaintiff's affidavits of merit.

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[5] MCL 169.201 *et seq*.

[6] See, e.g., *Frade v Costa*, 342 Mass 5, 8 (1961).

[7] The Committee to reelect Supreme Court Justice Marilyn Kelly raised $728,800.45 from over 2,200 individual contributions. $3,400.00/$728,800.45 = .004665, or .4665%. See Justice Kelly's Dissolution of Candidate Committee Statement ("Post-General CS Diss(e)"), filed December 12, 2004, available at <http://miboecfr.nictusa.com/cgi-bin/cfr/com_det.cgi?com_id=508277> (accessed June 10, 2010).

[8] *Caperton v A T Massey Coal Co, Inc*, 556 US ___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009).

The Michigan Association for Justice and the Michigan Defense Trial Counsel, Inc. are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

CORRIGAN, J. (*dissenting in part*). I would not grant leave with regard to question "(2) whether the recent amendment of MCR 2.118 applies to the plaintiff's affidavits of merit." This question was expressly resolved by this Court's February 16, 2010 order amending MCR 2.118. The order specified that the amendment was "effective May 1, 2010." 485 Mich cclxxv. Clearly the amendment cannot apply here; it took effect not only long after plaintiff filed his affidavits of merit, but after the Court of Appeals issued its opinion and, indeed, even after plaintiff filed his application in this Court. Accordingly, we waste time and resources—of the parties, of organizations filing briefs amicus curiae, and of this Court—by directing the parties to address whether the amended version of MCR 2.118 should apply in this case.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal June 18, 2010:

FERDON V STERLING PERFORMANCE, INCORPORATED, No. 140723; Court of Appeals No. 294562. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address: (1) whether the Workers' Compensation Appellate Commission abused its discretion in dismissing the plaintiff's appeal for her failure initially to submit a 7-page transcript which contained no substantive information; and (2) if the Commission abused its discretion, what less harsh action would have been appropriate? The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied June 18, 2010:

PEOPLE V KADE, No. 139540; Court of Appeals No. 285402.

KELLY, C.J. (*concurring*). I concur with the Court's order denying defendant's application for leave to appeal. I write separately to discuss MCR 6.302(B), what I believe to be the Court of Appeals incorrect interpretation of that rule in *People v Boatman*,[1] and why this Court should amend the rule.

THE EFFECT OF THE HABITUAL OFFENDER ENHANCEMENT

Defendant was charged with third-degree fleeing and eluding and driving with a suspended license, second offense. At his arraignment on July 31, 2007, he pled guilty to the charges. The trial court advised him that the

[1] *People v Boatman*, 273 Mich App 405 (2006).

maximum possible sentence for fleeing and eluding is five years in prison. On August 2, 2007, the prosecutor filed a timely supplemental information under MCL 769.10 and MCL 769.13(3) charging defendant as a third habitual offender. The court subsequently sentenced defendant to 30 months to 10 years in prison as a third habitual offender. Without the enhancement, defendant's guidelines range would have been 7 to 34 months in prison.

Defendant sought withdrawal of his plea, vacation of his sentence, and resentencing. He claimed that his plea was not knowing and voluntary because the judge had not informed him of the enhanced maximum sentence for his offense. The judge denied the motions. He ruled that he had informed defendant of the consequences of his plea and that defendant had said he pleaded guilty understandingly, voluntarily, and without being coerced or promised anything.

The Court of Appeals granted defendant's application for leave to appeal and affirmed the convictions and sentences.[2] It ruled that defendant was not entitled to be informed of the enhanced maximum sentence under MCR 6.302(B). We granted oral argument on defendant's application for leave to appeal to this Court.[3]

Defendant argues that he should be allowed to withdraw his plea because he had not been informed of the enhanced maximum sentence for the offense when he pled guilty. He relies on MCR 6.302(B).[4] He also argues that the Court of Appeals incorrectly decided *Boatman* four years ago.

PEOPLE v BOATMAN

In *Boatman*, the judge informed the defendant at his plea hearing that the maximum sentence for the offense with which he was charged was

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[2] *People v Kade*, unpublished opinion per curiam of the Court of Appeals, issued July 7, 2009 (Docket No. 285402).

[3] *People v Kade*, 485 Mich 1039 (2010).

[4] MCR 6.302 provides, in pertinent part:

> (A) Plea Requirements. The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out subrules (B)-(E).
>
> (B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:
>
> (1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;
>
> (2) *the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law*. [Emphasis added.]

two years. Defendant had already been informed that he was also being charged as an habitual offender. His maximum possible sentence was 15 years. His plea agreement was that his minimum sentence would be within the sentencing guidelines range. However, at the plea hearing, confusion arose over the applicable guidelines range, with the prosecutor referring to the enhanced range and defense counsel referring to the unenhanced range. The judge sentenced the defendant to 3 to 15 years imprisonment, which was within the enhanced range. The defendant moved to set aside his plea because, when he agreed to it, he believed his maximum sentence would be two years. When his motion was denied, he appealed to the Court of Appeals, which denied leave to appeal. This Court remanded the case to the Court of Appeals for consideration as on leave granted.[5]

On remand, the Court of Appeals concluded that a trial court need not inform a defendant of the enhanced maximum sentence in order to comply with MCR 6.302(B). The court reasoned that the wording of the court rule requires only that a defendant be advised of the maximum possible sentence and any mandatory minimum sentence. However, the court conceded that the wording does not embody the rule's spirit:

> [T]he existence of separate guidelines for use with habitual offenders creates a tension between the specific language and implied spirit of the court rule. Clearly, an important focus of MCR 6.302 is to assure that any defendant who has entered into a sentencing agreement has made a knowing, understanding, and informed plea decision. This requires a defendant to be informed of the consequences of his or her plea and, necessarily, the resultant sentence. Unfortunately, the language of the court rule does not encompass a specific requirement to inform a habitual offender regarding the effect this status has on sentencing. This is at odds with the intent of the law, which is to assure an informed decision by a defendant in accepting or entering into a plea agreement by requiring that the most significant repercussion of that agreement, by actual duration of the sentence to be imposed, be known and understood in advance.[6]

The Court of Appeals concluded that it lacked the authority to expand the scope of the rule's language. But it found that the defendant was entitled to withdraw his plea because of the confusion over the applicable guidelines. In doing so, the court explicitly stated that the defendant was not entitled to relief under the court rule.

Concurring in result only, Judge SERVITTO opined that a defendant's status as an habitual offender directly affects the possible maximum sentence for the underlying offense. As a consequence, she wrote, the court rule requires a trial court to advise a defendant of the maximum possible sentence, including an habitual offender enhancement. She

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[5] *People v Boatman*, 475 Mich 862 (2006).

[6] *Boatman*, 273 Mich App at 409.

added that "[t]o hold otherwise would undermine the goal of ensuring that guilty pleas are made voluntarily."[7]

The Court of Appeals decision in *Boatman* was not appealed to this Court, and this Court has never addressed the proper interpretation and scope of the rule.

BOATMAN SHOULD BE OVERRULED

I concur with the Court's order denying defendant's application for leave to appeal because of this case's unique procedural posture. Defendant has already been released on parole, and his parole is scheduled to be discharged on September 22, 2010. It seems unlikely that the Court can afford him meaningful relief. However, I believe that the Court should prevent a similar injustice from occurring in a future case.

MCL 769.10, the habitual offender statute, provides possible sentence enhancements that apply directly to the sentence imposed for an underlying offense. This enhancement merges with the underlying offense rather than constituting an independent offense.[8]

MCR 6.302(B)(2) requires that a defendant be informed of "the maximum possible prison sentence" for *the offense*. I believe that an habitual offender enhancement, which lengthens the maximum sentence for "the offense," falls within this rule because the enhanced maximum becomes the "maximum possible prison sentence" for the principal offense. Therefore, as Judge Servitto noted, "[b]y failing to advise a defendant of the potential maximum sentence that may be imposed by virtue of his or her status as an habitual offender, a trial court is not advising of the true potential maximum sentence."[9]

I also believe that *Boatman*'s analysis was logically flawed. The Court of Appeals stated that "defendant was informed of the maximum sentence for the charged 'offense,' because '[t]he habitual-offender statute does not create a substantive offense that is separate from and independent of the principal charge."[10] Yet if an habitual offender supplement is not a separate offense, then it logically follows that it must be linked to, or considered one with, the underlying offense. As such, to comply with MCR 6.302(B)(2), a defendant must be made aware of the consequences of "the offense" including any habitual offender enhancement.

I nonetheless recognize that MCR 6.302(B)(2) and MCL 769.13(3)[11] arguably conflict. The rule fosters knowing and intelligent pleas by

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[7] *Id*. at 414 (SERVITTO, J., concurring in result only).

[8] *People v Oswald (After Remand)*, 188 Mich App 1, 12 (1991).

[9] *Boatman*, 273 Mich at 414 (SERVITTO, J., concurring in result only) (quotation marks omitted).

[10] *Id*. at 407, citing *Oswald (After Remand)*, 188 Mich App at 12 (1991).

[11] MCL 769.13(3) governs the timing of habitual offender enhancements. It specifically provides that the prosecutor may file a notice of enhancement after a defendant pleads guilty at his or her arraignment.

requiring that a defendant be informed of the maximum possible time he or she may face in prison. The statute permits a prosecutor to file notice of an habitual offender enhancement after entry of a plea. Accordingly, the Court has taken steps administratively to consider amending the rule to remedy any perceived or actual tension between it and the statute.[12]

In this case, the prosecutor had not filed a supplemental information when defendant pled guilty. Thus, the trial court correctly informed defendant of the maximum possible sentence he faced under the facts as they existed at the time. That said, the entire period that a defendant may serve in prison strikes at the very essence of a defendant's decision to plead guilty. When a defendant makes that decision, he or she should know the total duration of his or her potential incarceration. Therefore, as a matter of basic fairness, we should amend MCR 6.302 to allow a defendant to withdraw his or her plea if, as in this case, the prosecutor files an habitual offender supplement after the plea is entered.

CONCLUSION

I concur with the Court's order denying defendant's application for leave to appeal. However, I urge interested parties to submit their views when the Court considers publishing a change to MCR 6.302 for public comment and hearing. I believe that MCR 6.302 should be amended to prevent the situation defendant faced in this case from arising again.

CAVANAGH, MARKMAN, and HATHAWAY, JJ., joined the statement of KELLY, C.J.

WILLIAMS V CHAVEZ-WILLIAMS, No. 141121; Court of Appeals No. 293536.

Order Denying Motion to Dismiss June 18, 2010:

ANGLERS OF THE AUSABLE, INCORPORATED V DEPARTMENT OF ENVIRONMENTAL QUALITY, Nos. 138863, 138864, 138865 and 138866; reported below: 283 Mich App 115.

CAVANAGH, J. (*concurring*). I concur in the order denying the motion for dismissal. This Court originally granted leave to appeal to consider several issues, including whether the state could convey an easement to defendant, Merit Energy Company, that granted the right to discharge water on state-owned land; the proper test for determining the extent to which defendant may discharge water; and whether plaintiffs may pursue a cause of action against the Department of Environmental Quality (DEQ) that challenges the propriety of the DEQ approving and issuing a permit to defendants. *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 485 Mich 1067 (2010). Defendant now argues that the case is moot because, since the Court granted leave to appeal, defendant has quit-claimed its interest in the easement and claimed that it has abandoned any plans to discharge water into Kolke Creek. I am not convinced.

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[12] ADM File 2010-20.

It is well established that "this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before us unless the issue is one of public significance that is likely to recur, yet evade judicial review." *Federated Publications, Inc v Lansing*, 467 Mich 98, 112 (2002). An issue is not necessarily moot, however, "[w]here a party voluntarily ceases an activity challenged as illegal . . . ." *Dep't of Social Services v Emmanuel Baptist Preschool*, 434 Mich 380, 425 (1990), CAVANAGH, J., concurring, quoting *United States v W T Grant Co*, 345 US 629, 633 (1953). In such cases, the issue may still be moot only if the party attempting to moot the issue can show that "there is no reasonable expectation that the wrong will be repeated," and "the burden is a heavy one." *Id.*, 345 US at 633. The United States Supreme Court has been particularly wary of finding an issue moot when there remains "a public interest in having the legality of the practices settled," *Grant*, 345 US at 632-633, and when the party seeking to moot the issue is the party who prevailed in the lower court. *City of Erie v Pap's A M*, 529 US 277, 287-288 (2000).[1] In *City of Erie*, the Court cautioned that appellate courts have an "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review . . . ." *Id.* at 288.

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[1] The dissenting statements rely on cases that are inapposite to the factual situation in this case. Justice MARKMAN relies on recitations of the general principles of the mootness doctrine from *People v Richmond*, 486 Mich 29 (2010), and *Federated Publications*. He fails to recognize, however, that these applications of these general principles, no matter how recently decided, do not control the outcome of this case because *Grant* and its progeny identify an exception to those general principles that is specific to cases, like this one, that involve the voluntary cessation of allegedly illegal conduct that has the potential to be resumed. Similarly, the case on which Justice YOUNG heavily relies, *Street R Co of E Saginaw v Wildman*, 58 Mich 286 (1885), is inapplicable because it was predicated on distinct legal principles and also did not involve the voluntary cessation of allegedly illegal conduct. In *Wildman*, the plaintiff sought an injunction to prevent the defendant from moving a building, but the defendant moved the building while the plaintiff's appeal to this Court was pending. 58 Mich at 286-287. This Court therefore dismissed plaintiff's *equitable* action for injunctive relief because, given that the allegedly illegal activity had been *completed*, it would have been useless for the Court to grant the requested injunctive relief. *Id.* at 287-288. Therefore, *Wildman* is inapplicable to this case because the Court's holding was not predicated on whether there was an ongoing legal dispute affecting the parties' rights but instead on the impossibility of granting injunctive relief to prevent an already completed action. In fact, the Court noted that the plaintiff could still pursue an action in law for damages. 58 Mich at 287-288.

Under these principles, I do not believe that all of the issues presented in this case are no longer justiciable. Defendant's conduct amounts to nothing more than a "voluntary cessation of allegedly illegal conduct" that does not render the case moot unless the defendant shows that the alleged wrong will not arise again. I cannot see that defendant has met this heavy burden. The legality of the practices addressed by the Court of Appeals remain important public questions.[2] Moreover, because defendant prevailed before the Court of Appeals on several of these important public issues, and did not move to moot the issues until *after* this Court had granted leave to appeal, this Court's interest in preventing defendant from insulating a favorable decision from review is strongly implicated.

Indeed, the facts of this case are strikingly similar to those in *City of Erie*, where the Court rejected the plaintiff's attempt to moot the city's appeal of the plaintiff's successful challenge to a city ordinance, when the plaintiff had prevailed in the lower court and cried mootness only *after* the Court had granted leave to appeal. *City of Erie*, 529 US at 287-288. As in this case, the party seeking to moot the case in *City of Erie* had submitted an affidavit claiming that it would no longer pursue the challenged conduct and presented its voluntary surrender of the property interest necessary to pursue that conduct as evidence of its intent.[3] Yet the *City of Erie* Court reasoned that because the lower court's decision would otherwise remain intact, continuing to affect both parties, and the party could potentially resume the conduct, the issues were not moot.[4]

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[2] For example, defendant prevailed on whether the plaintiffs may challenge the DEQ's decision to issue or deny a permit and whether the state could convey an easement granting riparian rights to state-owned land. Further, the Court of Appeals decision left intact the trial court's injunction, which would permit defendant, upon obtaining riparian rights, to pursue a discharge that constitutes a "reasonable use." The propriety and proper interpretation of that test was another issue on which this Court granted leave to appeal. These issues are of significant public importance, for, as stated in our Constitution, "[t]he conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people." 1963 Const, art 4, § 52.

[3] In *City of Erie*, the plaintiff-respondent was the owner of a nude dancing establishment affected by the challenged city ordinance, and the Pennsylvania Supreme Court had held that the ordinance was unconstitutional. After the United States Supreme Court granted certiorari, the plaintiff-respondent filed an affidavit stating that he had closed his business, sold his property, and never intended to operate a nude dancing establishment again. *City of Erie*, 529 US at 284-288 and 302-303, Scalia, J., concurring.

[4] The *City of Erie* Court reasoned that the plaintiff-respondent could still obtain another building and reopen the establishment, given that it was still incorporated under state law. *City of Erie*, 529 US at 288. Simi-

Further, and perhaps most importantly, the Court found the notion that a party who had prevailed in the lower court could moot a case through its voluntary actions to be repugnant to "[o]ur interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *Id.* at 288. See also, *City News & Novelty, Inc v City of Waukesha*, 531 US 278, 283-284 (2001). Dismissing this case as moot would be equally repugnant to this principle.

In light of the important public interests implicated by the issues before this Court, the parties' continuing interest in having them settled, and this Court's interest in ensuring that litigants are not merely "insulat[ing] a favorable decision from review," I cannot agree with defendant that this case no longer presents any justiciable issues.[5] Therefore, I concur with the denial of defendant's motion to dismiss.

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larly, in this case, defendant could obtain another easement and pursue a discharge that would constitute a reasonable use of the water under the existing test. The *City of Erie* Court also reasoned that both parties had a continuing interest in the litigation because the city could not enforce its ordinance under the lower court's decision, even against other parties, and the plaintiff-respondent still had an interest in preserving the lower court's decision in favor of his rights. *Id.* Justice YOUNG acknowledges that the city's inability to enforce its ordinance against the plaintiff and other inhabitants of the city constituted an ongoing injury and yet concludes that these plaintiffs do not have an ongoing injury. Notably, however, the result of leaving the Court of Appeals decision intact in this case is similar. Plaintiffs' ability to enforce their riparian interests, against defendant and other parties seeking to use Kolke Creek, will continue to be affected by the Court of Appeals conclusions that an easement over state-owned land may grant riparian rights to Kolke Creek and that plaintiffs lack a cause of action to challenge the DEQ's decision to issue a permit to discharge water into Kolke Creek. Further, as in *City of Erie*, defendant has an interest in preserving the lower court's decision with regard to these issues.

[5] Unlike Justice YOUNG, I prefer to rest my analysis and conclusions on the strength of my legal reasoning alone. I believe that reasonable people can, in good faith, disagree on the proper interpretation and application of the law without it signifying deleterious motives or a lack of fidelity to the principles of justice and fair advocacy. I thus find it unnecessary, and unbecoming to the office, to attempt to bolster my position by resorting to personal attacks on those who hold opposing views. In my 27 years of service to the people of Michigan as a member of this Court, I have rarely found such methods to improve the level or depth of the Court's discourse. Regrettably, the effect is generally the opposite. I must note, however, that Justice YOUNG's mewling over *stare decisis* is remarkably ironic, given his part in efforts over the past years to dismantle and undo decades of this Court's jurisprudence. See Sedler, Robert A., *The Michi-*

HATHAWAY, J., joined in the statement of CAVANAGH, J.

CORRIGAN, J. (*dissenting*). I concur in Justice Young's legal analysis of the mootness issue. As Justice MARKMAN states, consistent with Justice YOUNG's analysis: "By allowing this appeal to proceed, the Court can only 'reach moot questions or declare principles or rules of law that have no practical legal effect in the case before [it],' " citing *Federated Publications, Inc v Lansing*, 467 Mich 98, 112 (2002). Because this case is moot, plaintiffs' appeal should be dismissed.

I especially share Justice YOUNG's concern that, because there are no longer any "live" issues between plaintiffs and defendant Merit Energy, this Court will be constrained to consider significant constitutional questions presented by plaintiffs without the benefit of full opposing advocacy by Merit. Merit has already acquiesced to plaintiffs' demands. Accordingly, plaintiffs cannot achieve additional relief against Merit.[1] Therefore, Merit reasonably will be significantly less motivated to expend resources to counter plaintiffs' general legal arguments, by which plaintiffs urge us to overturn precedential opinions in unrelated cases.

It is beyond debate that the judicial power to hear a case inheres, in part, in the existence of parties with sufficient interests in a suit to guarantee vigorous advocacy. Although members of this Court disagree about the applicability of the traditional "case and controversy" requirement in Michigan, *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co* itself confirms that we agree about the fundamental need for meaningful advocacy. In *Nat'l Wildlife Federation*, which addressed the judicial power primarily in the context of standing, a majority of the Court explained that the proper exercise of the judicial power requires the existence of a "real dispute," of a "plaintiff who has suffered real harm," and of "genuinely adverse parties." *Nat'l Wildlife Federation v Cleveland*

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gan Supreme Court, Stare Decisis, and Overruling the Overrulings, Wayne State University Law School Research Paper No. 09-28 (2009). <http://ssrn.com/abstract=1520719> (accessed May 21, 2010).

[1] My concurring colleague concludes that, because Merit *voluntarily* ceased its allegedly illegal conduct, it thus might voluntarily resume the conduct in the future, and therefore this case is distinguishable from moot cases in which injunctive relief is no longer available to prevent an already *completed*, allegedly harmful action. I disagree that this case is distinguishable for this reason. Rather, Merit has thoroughly documented that it is no longer physically capable of resuming the conduct that plaintiffs sought to prevent, as has been confirmed by the Department of Natural Resources and Environment and Merit's application for Department of Environmental Quality approval of an alternative groundwater discharge plan. If Merit's future alternative plans somehow encroach on the property at issue here, plaintiffs would have new grounds for a separate lawsuit in which they would be free to again challenge the precedent with which they voice their disagreement here.

Cliffs Iron Co, 471 Mich 608, 614 (2004).[2] Justice WEAVER, concurring in result, similarly opined that, "[b]efore Michigan courts will hear a case, they consider whether 'a party's interest in the outcome of the litigation . . . will ensure sincere and vigorous advocacy.' " *Id.* at 658 (WEAVER, J., concurring in result only), quoting *House Speaker v State Admin Bd*, 441 Mich 547, 554 (1993); and see *Nat'l Wildlife Federation, supra* at 676 (CAVANAGH, J., concurring in result and concurring in Justice WEAVER's reasoning); *id.* (KELLY, J., concurring in result only and concurring in Justice WEAVER's opinion). The United States Supreme Court expressed the concept well in *Baker v Carr*, 369 US 186, 204; 82 S Ct 691 (1962), where the high Court presented a threshold question with regard to whether a party has standing to appeal, particularly when constitutional questions are at issue: "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?" Because there is no longer a genuine controversy between the parties—in particular, because Merit has no real reason to vigorously defend now that it has ceased the activity of which plaintiffs complained and no further relief against Merit is available—I conclude that this Court should grant Merit's motion to dismiss the appeal.

YOUNG, J. (*dissenting*). I dissent. This case is moot. But the majority permits the case to remain on the docket. Why? The answer is simple. The majority desires to make good on the promise that Chief Justice Kelly made to her supporters shortly after the election of Justice HATHAWAY to this Court:

> We the new majority [Chief Justice KELLY and Justices CAVANAGH, WEAVER, and HATHAWAY] will get the ship off the shoals and back on course, and we will undo a great deal of the damage that the Republican-dominated court has done. Not only will we not neglect our duties, we will not sleep on the bench.[1]

The reason why the "new majority" declines to grant defendant Merit Energy's motion to dismiss for mootness is because it disagrees with this Court's decisions in *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*[2] and *Preserve the Dunes, Inc v Dep't of Environmental Quality*.[3] It now seeks to overrule them despite constitutional mootness principles that deprive this Court of the authority to do so in

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[2] The majority also concluded that exercising the judicial power requires the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making. [*Id.* at 614-615.]

[1] *She Said*, Detroit Free Press, December 10, 2008.

[2] 479 Mich 280 (2007).

[3] 471 Mich 508 (2004).

this appeal. Because this case is moot, it presents no legitimate basis for this Court to exercise the "judicial power" given to it under the Michigan Constitution.

I. THE FACTS OF THIS CASE

In a nutshell, this is what this suit is about: Plaintiffs feared damage to their riparian rights if defendant was permitted to complete and use a mile long pipeline in order to discharge a treated effluent into a tributary of a river along which plaintiffs own property. Merit has now abandoned that plan.

Defendant Merit Energy owns land in Otsego County containing a groundwater contaminant plume. It sought DEQ approval of its corrective action plan to treat the contaminated water and discharge the treated water near Kolke Creek, which flows into the AuSable River. To effect this plan, Merit obtained an easement from the Michigan Department of Natural Resources to construct a 1.3 mile pipeline to carry the treated water over state-owned land covered by the easement. The plaintiffs seek to enjoin Merit from carrying out its corrective action plan, alleging violations of their common law riparian rights and the Michigan Environmental Protection Act.[4]

After this Court granted leave, Merit moved to dismiss the appeal because it abandoned its plan to discharge the treated wastewater into Kolke Creek. The plaintiffs do not dispute that Merit has not discharged any treated wastewater into Kolke Creek. Moreover, Merit quitclaimed its interest in the easement back to the Department of Natural Resources and Environment (DNRE) and provided thorough documentation to this Court to prove it did so. This documentation included a copy of the quitclaim deed that conveyed its interest in the easement back to the DNRE. Accordingly, Merit no longer has physical access to Kolke Creek. It cannot violate the MEPA or plaintiffs' common law riparian rights. Further, it offered proof that it filed for a new groundwater discharge permit to achieve its treatment goals by an alternative plan that avoids discharging treated effluent into Kolke Creek. In short, the plaintiffs' common law riparian rights and their rights under the MEPA are secure.

Merit has abandoned and deeded over its interest in the property on which it planned to run the pipeline that plaintiffs feared would eventually contaminate the AuSable River and violate their riparian rights. Accordingly, plaintiffs no longer have a viable claim against Merit. In lawyer speak, plaintiffs' claims are now completely "moot."

II. MOOTNESS

This Court has the constitutional authority to exercise only the

[4] MCL 324.1701 *et seq*.

judicial power, not "powers properly belonging to another branch. . . ."[5] This Court has defined the judicial power to include "the existence of a real case or controversy" and "the eschewing of cases that are moot at any stage of their litigation."[6]

The avoidance of deciding moot questions is a firmly established principle of law to which this Court has adhered for more than a century. *Street R Co of E Saginaw v Wildman*, an 1885 case of this Court, is an especially apt application of this Court's longstanding mootness doctrine.[7] In *Street R Co*, the plaintiff railroad sought to enjoin the defendant from moving a building along its railroad tracks "to the great interruption of its business and profits, the serious inconvenience of the public, and the hindrance and delay of the United States mails which it carried. . . ."[8] Shortly after the lower court dismissed the plaintiff's claim, but before the plaintiff appealed to this Court, the defendant moved the building, thereby negating any ability to prevent the claimed harm or a basis for injunctive relief. On appeal, this Court determined that "[i]f the complainant was ever entitled to the [equitable] relief prayed for, we cannot now make any decree to aid it" because "[w]e can hardly prevent [the defendant] from doing what has already been done."[9]

In this case, the defendant no longer has the physical means of discharging treated water into Kolke Creek, which is the harm that plaintiffs seek to enjoin.[10] This Court simply cannot enjoin a harm that

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[5] Const 1963, art 3, § 2.

[6] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614 (2004).

[7] *Street R Co of E Saginaw v Wildman*, 58 Mich 286, 286 (1885).

[8] *Id*.

[9] *Id*. at 287.

[10] The concurrence cites *City of Erie v Pap's A M*, 529 US 277 (2000), to explain why the defendant's voluntary abandonment of its plan should not preclude this Court's review of the case. But the overriding concern present in the U.S. Supreme Court's decision in City of Erie—the possibility that the plaintiff would purchase another property anywhere within the city limits to maintain his victory in the Pennsylvania Supreme Court—is not present in the instant case. Here, the defendant would have to receive another easement on the specific property from its state owner, the Department of Natural Resources and Environment, before the plaintiffs' alleged harm would occur. Such action is exceedingly unlikely, especially in light of the DEQ's admission in its brief supporting dismissal that "there no longer exists the possibility of surface water discharge to Kolke Creek of the AuSable River" and defendant's proof that it gave up all rights and means to access Kolke Creek.

Another distinction between this case and *City of Erie* is that, in *City of Erie*, the defendant city suffered an ongoing injury from the Pennsyl-

can no longer occur. However, Chief Justice Kelly and Justices Cavanagh, Weaver, and Hathaway are not concerned about the harm about which plaintiffs have complained because it no longer exists. On the contrary, the majority needs this appeal, now an empty vessel, to attack precedent with which it disagrees.

Once Merit quitclaimed the easement necessary to build the pipeline, it no longer had the physical ability to contaminate the Kolke or the AuSable in the manner plaintiffs claimed in their suit. As established by Street, it obviously follows for all but Chief Justice KELLY and Justices CAVANAGH, WEAVER, and HATHAWAY that, without the threatened construction of the pipeline, there remains no threatened injury to plaintiffs' riparian rights and certainly none that this Court can remedy.

Indeed, plaintiffs do not contend that they have an immediate injury at stake. But they still want this Court to rule on the substantive legal issues — for the benefit of future cases. Again, the *Street R Co* decision provides guidance:

> It was suggested on the hearing that we ought to settle the rights of the parties so that the principle established might be a guide in other cases likely to arise. But courts of equity will not lend their aid by injunction for the enforcement of a right or the prevention of a wrong in the abstract, not connected with any injury or damage to the person seeking relief, nor when such injury or damage can be fully and amply recovered in an action at law. Nor are courts of equity established to decide or declare abstract questions of right for the future guidance of suitors.[11]

The plaintiffs also claim that this case fits into an exception to the mootness doctrine, that "the issue is one of public significance that is likely to recur, yet evade judicial review."[12] Not so. The issues presented here are not the sorts of issues whose transitory nature makes it likely that future litigation would "evade judicial review."[13] To the contrary, any riparian owner aggrieved by the actions or imminently threatened actions of another can seek injunctive or other relief.

Although the concurrence posits that the plaintiffs' riparian rights are endangered by the Court of Appeals decision, such decision merely applied existing Michigan law. More important, however, is the fact that

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vania Supreme Court's decision that the First Amendment barred it from enforcing its nude dancing ordinance, not only against the plaintiff but also against all inhabitants of the city. No such ongoing injury exists here. In particular, the Court of Appeals ruling did not divest the plaintiffs of their riparian rights. Rather, it merely applied the settled precedent of this Court to the facts of the case.

[11] *Id*.

[12] *Federated Publications, Inc v Lansing*, 467 Mich 98, 112 (2002).

[13] See, e.g., *Socialist Workers Party v Secretary of State*, 412 Mich 571, 582 n 11 (1982).

the plaintiffs' riparian rights can no longer be invaded by defendant, which has abandoned the only means by which it might have injured plaintiffs' rights. Thus, the real reason this case is not being treated as moot is because the plaintiffs, like Chief Justice KELLY and Justices CAVANAGH, WEAVER, and HATHAWAY, wish to challenge whether this Court correctly decided two previous cases, *Mich Citizens for Water Conservation v Nestle Waters North America Inc* and *Preserve the Dunes v Dep't of Environmental Quality.* A dismissal, of course, will preclude them from doing so.

The concurrence claims that the "defendant prevailed on whether plaintiffs may challenge the DEQ's decision to issue or deny a permit and whether the state could convey an easement granting riparian rights to state-owned land,"[14] and that not to review such issues implicates "this Court's interest in preventing defendant from insulating a favorable decision from review. . . ."[15] These claims are red herrings.

First, the Court of Appeals merely applied this Court's existing precedent in determining that the issuance of a permit is not "conduct" that "has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources," within the meaning of the Michigan Environmental Protection Act.[16] There is every reason to assume that someone in the future who actually has a justiciable claim will challenge the correctness of this Court's jurisprudence, if this Court had properly dismissed the instant case.

Second, the Court of Appeals' determination that the state had the authority, as a riparian property owner, to convey an easement to the defendant is moot now that the underlying easement no longer exists. If plaintiffs' or the majority's primary concern is the published Court of Appeals ruling permitting the state to convey an easement rooted in its riparian rights, this Court could simply vacate that portion of the Court of Appeals opinion. We have done precisely this in the past when denying leave or disposing of a case on grounds of mootness, most recently in *Gadigian v City of Taylor*[17] and *Howe v Boucree*.[18] **That the new majority has declined simply to correct what it believes is erroneous in the Court of Appeals decision is further indication of its desire, at any cost, to reach and overturn cases with which it disagrees**.

The mootness doctrine partly stems from the necessity of an adversarial process to a society governed under the rule of law. As it stands now, Merit has no stake in the future outcome of this case, and thus has no remaining interest to pursue the appeal vigorously. Why would Merit

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[14] *Ante* at 984 n 2.

[15] *Ante* at 984.

[16] MCL 324.1703(1); *Preserve the Dunes v Dep't of Environmental Quality*, 471 Mich 508 (2004).

[17] 486 Mich 869 (2010) (affirming the Court of Appeals result on different grounds and vacating that court's unnecessary analysis as dictum).

[18] 483 Mich 907 (2009) (denying leave to appeal but vacating moot portions of the Court of Appeals opinion).

pay the expense of contesting in the Supreme Court a matter in which it has already conceded by its actions? By rights, having abandoned the pipeline, Merit should also abandon this case even if a majority insists on it going forward. Accordingly, I am greatly concerned by the resulting total collapse of the adversarial process in this case—having no party vigorously to argue in defense of the cases with which the plaintiffs and Chief Justice KELLY and Justices CAVANAGH, WEAVER, and HATHAWAY intend to overturn. For those who wish to overturn cases decided by "the Republican-dominated Court," it is useful to have no one with a serious interest in defending them.

Chief Justice KELLY and Justices CAVANAGH, WEAVER, and HATHAWAY have fully advertised their interest in overturning these precedents in the order granting leave in this appeal. Their decision to persist in this appeal despite its patent mootness shows that they are prepared to accomplish its stated objective of "undoing" the precedent of this Court without even waiting for a plaintiff who has a live claim and parties who will participate in a meaningful adversarial process.

In short, there is not a clearer instance of mootness than this case: **the action originally challenged by plaintiffs can no longer be physically accomplished by the defendant.** However, the majority's decision to permit the appeal to proceed despite the absence of a live controversy demonstrates that it has other fish to fry; irrespective whether the case before it presents a legitimate vehicle for it to accomplish its goal, it will entertain plaintiffs' argument in favor of overturning yet another precedent with which it disagrees. The fact that the members of the majority have for 10 years been stout supporters of stare decisis illustrates how "situational" was their prior claimed fidelity to precedent.[19]

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[19] See, e.g., *Pohutski v City of Allen Park*, 465 Mich 675, 712 (2002) (KELLY, J., dissenting) ("[I]f each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable."); *People v Hawkins*, 468 Mich 488, 517-518 (2003) (CAVANAGH, J., dissenting) ("We have overruled our precedents when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.' . . . Absent those changes or compelling evidence bearing on Congress' original intent . . . our system demands that we adhere to our prior interpretations of statutes."), quoting *Patterson v McLean Credit Union*, 491 US 164, 173; 109 S Ct 2363; 105 L Ed 2d 132 (1989) and *Neal v United States*, 516 US 284, 295; 116 S Ct 763; 133 L Ed 2d 709 (1996); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 278 (CAVANAGH, J., dissenting) ('"Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed.' "), quoting

The concurring justice claims that it is "remarkably ironic" that I raise the majority's selective interest in respecting precedent. However, my position on stare decisis has not changed,[20] and the concurring justice attempts to shift focus to me in order to avoid confronting his own inconsistency. The public should understand when justices' positions on important matters shift. And that is the focus of this dissent: when the concurring justice was in the minority, he liked stare decisis a lot; now that he is in the majority, it is not an issue. That is the "irony" the public should understand.

Having no substantive response to my noting the reversal of his reverence for precedent, the concurring justice has entered into the explicitly partisan realm, referencing an article by a Wayne State University law professor. Not everything written by a law professor is unbiased, nor is this particular law professor. In fact, this professor's ubiquitous appearances on the Democratic Party web site attacking me and urging my political defeat demonstrates that he has a dog in the November hunt. So does the concurring justice.

III. CONCLUSION

The fact that the "new majority" refuses to dismiss this case as moot is noteworthy but hardly surprising in light of Chief Justice KELLY's pledge to her supporters to "undo — the damage that the Republican-

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People v Jamieson, 436 Mich 61, 79 (1990); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 622 (2005) (WEAVER, J., dissenting) ("Correction for correction's sake does not make sense. The case has not been made why the Court should not adhere to the doctrine of stare decisis in this case."); Todd C. Berg, *Hathaway attacks*, Michigan Lawyers Weekly, October 27, 2008 (" 'People need to know what the law is,' Hathaway said. 'I believe in stare decisis. Something must be drastically wrong for the court to overrule.' "); *Lawyers' election guide: Judge Diane Marie Hathaway*, Michigan Lawyers Weekly, October 30, 2006, in which Justice HATHAWAY, then running for a position on the Court of Appeals, was quoted as saying: "[t]oo many appellate decisions are being decided by judicial activists who are overturning precedent."

[20] I signed *Robinson v City of Lansing*, 462 Mich 439 (2000), and continue to subscribe to its principles concerning stare decisis. See also *Rowland v Washtenaw Co Rd Comm'n*, 477 Mich 197, 225 (2007) (MARKMAN, J., concurring) (stating that cases that the Court's previous philosophical majority overruled were ones "in which the clear language of the law was misconstrued, or in which the policy preferences of the justices were substituted for those of the lawmaker"). What principles guide the new majority when it overrules the precedent of this Court? The new majority's true perspective on stare decisis is clearly evident in their actions in this case: The majority here reaches outside of its judicial powers to overturn precedent with which it disagrees.

dominated court has done." Yet in *People v Richmond*, Justice CAVANAGH, Chief Justice KELLY, and Justice HATHAWAY have all just recently pronounced that "a court cannot 'tender advice' on matters that are no longer in litigation."[21] Their failure to apply this principle to this case reflects a fickleness to consistent rules of law — even rules to which they claim to subscribe. They and Justice WEAVER are eager to oblige the plaintiffs' request to undo this Court's precedents despite the mootness of plaintiffs' claims.

The decision of Chief Justice KELLY and Justices CAVANAGH, WEAVER, and HATHAWAY to persist in this appeal despite its patent mootness shows that the majority is prepared to accomplish its stated objective of "undoing" precedent of the last decade by any means necessary.

Thus, not only have Chief Justice KELLY and Justices CAVANAGH, WEAVER, and HATHAWAY determined to reconsider two cases that were decided just three and six years ago, they are also determined to do so in defiance of our constitutional limitations on judicial power. Because I have sworn to uphold the constitution of this state, I must emphatically dissent from the determination of Chief Justice KELLY and Justices CAVANAGH, WEAVER, and HATHAWAY to reach non-justiciable questions of law by refusing to dismiss this moot appeal.

MARKMAN, J. (*dissenting*).

I concur fully in Justice YOUNG's legal analysis concerning the mootness of this case, and, therefore, join in dissenting from the order denying defendant's motion to dismiss. As this Court just recently explained in *People v Richmond*, 486 Mich 29 (2010), "[w]hether a case is moot is a threshold issue that a court addresses before it reaches the substantive issues of the case itself." And as Justice YOUNG has clearly demonstrated, plaintiffs' claims became moot when defendant deeded over its interest in the easement on which it planned to run a pipeline back to the Department of Natural Resources. Simply put, without a remaining property interest, it is impossible for defendant to harm plaintiffs' riparian rights, or their other rights under the Environmental Protection Act. With this uncontroverted evidence, defendant carried its burden of demonstrating that "there is no reasonable expectation that the wrong will be repeated." *United States v W T Grant Co*, 345 US 629, 633 (1953).[1]

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[21] *People v Richmond*, 486 Mich 29 (2010), quoting *Anway v Grand Rapids R Co*, 211 Mich 592, 611-612 (1920). I continue to adhere to the substantive position stated in Justice CORRIGAN's dissent, which I joined.

[1] The concurrence begs the question of what evidence, in its view, *would* ever be sufficient for a defendant to show that "there is no reasonable expectation that the wrong will be repeated." *W T Grant Co*, 345 US at 633. If (a) defendant's quit-claim deed conveying its property interest back to the state; (b) documentation establishing that defendant has received a discharge permit from the DEQ to dispose of the water by alternative means; and (c) DEQ's admission that "there no longer exists the possibility of surface water discharge to Kolke Creek or the AuSable

By allowing this appeal to proceed, the Court can only "reach moot questions or declare principles or rules of law that have no practical legal effect in the case before [it]." *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112 (2002). To do so is directly contrary to *Richmond*, a decision of five weeks vintage.

Summary Disposition June 23, 2010:

PEOPLE v LAROSE, No. 139699; Court of Appeals No. 292610. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the defendant's application for leave to appeal as having been timely filed and shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(D)(2). We conclude that the defendant was deprived of his direct appeal as a result of constitutionally ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Peguero v United States*, 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999). On the facts of this case, counsel performed ineffectively by deciding to present motions in the trial court despite knowing that the deadline for filing such motions had passed at the time that he was retained, and by failing to timely file defendant's application for leave to appeal within the deadlines set forth in MCR 7.205(F). These actions and omissions were the "but-for" cause of defendant's lost appeal.

Costs are imposed against the attorney, only, in the amount of $250, to be paid to the Clerk of this Court.

WOODWARD PARKING COMPANY v DETROIT, Nos. 140073, 140074 and 140075; Court of Appeals Nos. 285073, 285074 and 285075. By order of February 26, 2010, the application for leave to appeal the October 19, 2009 order of the Court of Appeals was held in abeyance pending the decision in *Briggs Tax Service, LLC v Detroit Public Schools, et al* (Docket Nos. 138168, 138179, 138182). On order of the Court, the opinion having been issued on March 30, 2010, 485 Mich 69 (2010), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the decision of the Tax Tribunal. The assessing officer and the petitioner did not make a mutual mistake of fact. As a result, the three-year limitations period of MCL 211.53a does not apply to the petitioner's claim. Accordingly, the Tax Tribunal did not err in dismissing the petitioner's claim. *Briggs Tax Service, LLC v Detroit Public Schools, et al*, 485 Mich 69 (2010).

HARRINGTON v FATCHETT-HARRINGTON, No. 140833; Court of Appeals No. 295757. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals dismissing the plaintiff's claim of appeal and we remand this case to the Court of Appeals for reinstatement of the appeal.

River" are insufficient, it is difficult to imagine how defendant could *ever* demonstrate to the majority's satisfaction that the alleged wrong will not arise again.

Leave to Appeal Granted June 23, 2010:

HAMED v WAYNE COUNTY, No. 139505; reported below: 284 Mich App 681. The application for leave to appeal the July 7, 2009 judgment of the Court of Appeals is considered, and it is granted, limited to the issues whether: (1) defendants Wayne County and Wayne County Sheriff's Department may be held liable to the plaintiff for quid pro quo sexual harassment under MCL 37.2103(i); (2) the plaintiff's incarceration in the Wayne County Jail is a public service within the meaning of MCL 37.2301(b); and (3) the trial court erred in permitting the plaintiff to amend her complaint to allege violations of the Michigan Civil Rights Act.

The motions for leave to file briefs amicus curiae are granted. The Michigan Association for Justice and the Michigan Defense Trial Counsel, Inc. are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 23, 2010:

PEOPLE v GARLAND, No. 139772; reported below: 286 Mich App 1.
KELLY, C.J. and CAVANAGH, J., would grant leave to appeal.

PEOPLE v PLUMAJ, No. 139808; Court of Appeals No. 293008.
KELLY, C.J. and CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

BROWN v WRIGHT, No. 139879; Court of Appeals No. 285509.
HATHAWAY, J., would grant leave to appeal.

PEOPLE v MCBURNEY, No. 139941; Court of Appeals No. 285485.
CAVANAGH, J., would grant leave to appeal.

SOUFANE v WU, No. 140267; Court of Appeals No. 279227.
HATHAWAY, J., would grant leave to appeal.

HAINES v HAINES, No. 140446; Court of Appeals No. 285932.
KELLY, C.J. and WEAVER, J., would grant leave to appeal.

PEOPLE v RAYMOND SMITH, No. 140455; Court of Appeals No. 293436.

HEALTHCALL OF DETROIT v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Nos. 140489 and 140490; Court of Appeals Nos. 286353 and 288009.

KROEGER v AEC ENTERPRISES CONSTRUCTION, INCORPORATED, No. 140493; Court of Appeals No. 286333.

PEOPLE v MICHAEL REED, No. 140533; Court of Appeals No. 295620.

PEOPLE v TURNER, No. 140536; Court of Appeals No. 286823.

PEOPLE v SHATARA JONES, No. 140596; Court of Appeals No. 289612.

SOUFANE v WU, Nos. 140667 and 140668; Court of Appeals Nos. 279227 and 279325.

PEOPLE v YARAN, No. 140759; Court of Appeals No. 286690.

CORRIGAN, J., would hold this case in abeyance pending *People v Smith*, Docket No. 140371, lv gtd 485 Mich 1133 (2010).

PEOPLE v YARAN, No. 140761; Court of Appeals No. 286690.

Superintending Control Denied June 23, 2010:

BRADY v ATTORNEY GRIEVANCE COMMISSION, No. 140409.

HATHAWAY, J. (*dissenting*). I would grant the complaint for superintending control and, in lieu of granting the requested relief, I would direct the Attorney Grievance Commission to vacate its dismissal of the request for investigation, and to appoint independent legal counsel to review and investigate the allegations of misconduct against the respondent attorney that are contained in the request for investigation. I would further direct the appointed counsel to present findings and conclusions to the Attorney Grievance Commission, which should then reconsider its decision whether to file a formal disciplinary complaint against the respondent attorney with the Attorney Discipline Board.

WEAVER, J., not participating. I am not participating in this complaint for superintending control because the circumstances that I describe below could have raised an appearance of impropriety had I participated in the case.[1] I informed the parties in this case of my disqualification in a letter dated April 20, 2010.[2] (A copy of my letter to the parties is

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[1] This Court recently amended MCR 2.003—Disqualification of Judge to include an appearance of impropriety standard as a ground for disqualification of judges. The newly amended rule set forth in MCR 2.003(C)(1)(b) states: "The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as annunciated in *Caperton v A T Massey Coal Co, Inc*, 556 US ___; 129 S Ct 2252, 2255; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct."

The test for determining whether an appearance of impropriety exists, as laid out in *Caperton v Massey*, is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

[2] Plaintiffs Brady et al. consist of: James S. Brady, Jon R. Muth, Bruce W. Neckers, Michael A. Walton, Robert J. Dugan, L. Roland Roegge, William W. Jack Jr., H. Rhett Pinsky, John D. Tulley, Joseph M. Sweeney, Paul T. Sorensen, Frederick D. Dilley, Janet A. Haynes, Dennis C.

attached.) As the circumstances described in the letter establish, I have done nothing wrong and nothing unethical. Nevertheless, I followed my long-standing practice for disqualification that "when in doubt, get out."

This complaint for superintending control, filed January 2010, arose from the Attorney Grievance Commission's (AGC) dismissal on November 17, 2009 of the plaintiffs' June 27, 2008 request for investigation of alleged attorney misconduct by Paul J. Fischer, Executive Director and General Counsel of the Judicial Tenure Commission (JTC), in the disciplinary proceeding against Judge Steven Servaas. The disciplinary proceeding against Judge Servaas was reviewed and ruled upon by this Court in *In re Servaas*, 484 Mich 634 (2009).

In *In re Servaas*, attorney Jon Muth represented Judge Servaas. This Court's decision and opinions in *In re Servaas* were published for the public on July 31, 2009. On August 24, 2009 the JTC filed a motion for rehearing or clarification in this Court. On September 11, 2009 this Court issued an order denying a motion for rehearing and containing an additional statement by Chief Justice Kelly, which clarified by amendment her original opinion. Therefore, this Court's file in *In re Servaas* closed on September 11, 2009.

In mid-September 2009, I briefly encountered my friend and former attorney, Mr. Muth, at the State Bar of Michigan Fellows reception in Dearborn. Given that the file in *In re Servaas* had already been closed, Mr. Muth and I agreed to meet in Traverse City for a visit over lunch when he would be passing through town on October 1, 2009. At the time that we agreed to meet, and up until the time I received this Court's Commissioner Report in late March 2010, I had no reason to recall that at the March 4, 2009 *In re Servaas* oral argument, Mr. Fischer stated that "Judge Servaas had his attorneys and a number of others file a grievance against me with the Attorney Grievance Commission." Mr. Fischer made this statement in response to questions about whether the JTC had authorized or encouraged him to proceed in the manner that he did while handling the *Servaas* matter and making an unannounced visit to confront Judge Servaas in his chambers.[3]

I had no reason to realize that a file for a grievance against Mr. Fischer may have been opened and an investigation of his conduct may have been

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Kolenda, Robert L. Lalley Jr., William S. Farr, and Diann J. Landers. The defendant is the Attorney Grievance Commission.

[3] The record in *In re Servaas* contains an audio recording of Mr. Fischer's unannounced visit to Judge Servaas's chambers on January 16, 2008 and his threat to "drag [Judge Servaas's] name through the mud" unless he agreed to resign by 9:00 a.m. the following morning. The recording was made, apparently without the knowledge of Mr. Fischer or Judge Servaas, by the State Police Trooper accompanying Mr. Fischer on the unannounced visit to Judge Servaas's chambers. The recording was also made public in the media, and is available online at http://blog.mlive.com/grpress/2008/04/_by_john_tunison_the.html (last accessed June 18, 2010).

ongoing. Under MCR 9.126, such files are sealed.[4] I had no official notice of any file's existence, and I had no notice of any file's status.

Mr. Muth and I did meet on October 1, 2009 for lunch in Traverse City. He indicated that he found this Court's result in *In re Servaas* strange, convoluted, and surprisingly close after what he had witnessed during the oral argument.[5] I responded that his observation was correct and that the vote was originally 6-1 in Judge Servaas's favor. I told him my speculation was that the emphasis and the direction of some justices' positions perhaps shifted with recognition that the State Court Administrative Office (SCAO) may have had more involvement in the *Servaas* matter than merely referring such allegations to the JTC for investigation and process according to JTC rules.

I reminded Mr. Muth that in my concurrence in *In re Servaas*,[6] I called for an investigation of the JTC and any others possibly involved, but that no such investigation had occurred. Instead, this Court published six (6) separate opinions,[7] resulting in the convoluted decision that prompted a motion for rehearing or clarification by the JTC, required an amendment for clarification to one justice's opinion, and led to Mr. Muth's questions. Mr. Muth and I did not discuss or mention any request for an AGC investigation of Mr. Fischer or the possibility of a complaint for superintending control, which is the underlying issue of the instant complaint. We did not discuss any possible allegations of misconduct by Mr. Fischer, or the instant complaint, in any way.[8]

Although Mr. Muth was my attorney at one point in time, he was not my attorney at any time while *In re Servaas* was pending, nor when we met in October 2009. To clarify, Mr. Muth is not currently my attorney,

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[4] MCR 9.126—Open Hearings; Confidential Files and Records, provides in pertinent part:

> (A) Investigations. Except as provided in these rules, investigations by the administrator or the staff may not be made public. At the respondent's option, final disposition of a request for investigation not resulting in formal charges may be made public.

[5] See the video of that March 4, 2009 oral argument, soon to be placed on my personally-funded website: www.justiceweaver.com.

[6] In my concurring opinion in *In re Servaas*, I urged this Court to "open an administrative file to investigate how this matter unfolded, including the events and actions of the Judicial Tenure Commission (JTC) and/or others responsible leading up to the JTC's recommendation of this case to this Court." 484 Mich at 654 (WEAVER, J., concurring). I note that Justice HATHAWAY signed both my concurring opinion and my lead opinion.

[7] See *In re Servaas*, 484 Mich 634 (2009). The opinion and order will also be at my personally-funded website: www.justiceweaver.com.

[8] At that time, October 1, 2009, the instant complaint did not exist. The AGC did not even dismiss the referral until November 17, 2009. There-

and I have not discussed the instant complaint with him, nor have I had any communication with him since I learned in late March 2010 that the instant complaint had been filed in this Court.[9] The instant complaint, while related to the *Servaas* matter, is a separate and distinct case.

Had I realized that any grievance filed against Mr. Fischer by Mr. Muth could be pending with the AGC, I would not have met with Mr. Muth. Therefore, while there was nothing unethical about my conversation with Mr. Muth, I informed the parties that I must disqualify myself from participating in the instant complaint for superintending control because of the appearance of bias or impropriety that my meeting with Mr. Muth may have presented.

On April 20, 2010, I sent my disqualification letter to the parties in this case, and requested that the parties reply at their earliest convenience, but no later than 28 days from receipt of my letter.

By letter dated April 30, 2010, I received notice from attorney-plaintiff Dennis Kolenda on behalf of the plaintiffs that the 17 plaintiffs waived my disqualification. In his letter, Mr. Kolenda stated "[t]here is—no basis for any objection to Justice Weaver's continued participation." In addition, by letter dated April 30, from attorney-plaintiff Jon Muth, Mr. Muth stated that there is no basis for my disqualification.[10] Mr. Muth explained that his letter "states the facts of [his] communication with Justice Weaver and establishes categorically that there was no violation of any of the Canons or Rules of Professional Conduct—." He additionally explained "that these facts also clearly establish that there is no basis [for] Justice Weaver to consider disqualification, even under an appearance of impropriety standard." Having received no response to my disqualification statement from the AGC, I did not participate in this complaint for superintending control.[11]

At the May 12, 2010 public administrative conference, Justices CORRIGAN, YOUNG and MARKMAN admitted publicly that on April 28, 2010,

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fore, I could not possibly have given Mr. Muth any advice regarding the instant complaint for superintending control when the grounds for this complaint did not even exist.

[9] I was notified of the instant complaint by Chief Justice KELLY and by the Commissioner's Report that was prepared for this case. Contrary to the reports in Lawyers Weekly, as cited by Justices CORRIGAN, YOUNG, and MARKMAN, I have never suggested that I was the one to notify this Court about my meeting with Mr. Muth. In fact, I had no knowledge that my meeting with Mr. Muth had any relevance to the instant complaint until I read this Court's Commissioner's Report.

[10] Attached are copies of the April 30, 2010 letters from Mr. Kolenda and Mr. Muth.

[11] Based on the responses from Mr. Muth and Mr. Kolenda, I would have withdrawn my disqualification if the AGC had also sent a similar response.

they had referred me to the JTC regarding this case.[12] Justices CORRIGAN, YOUNG and MARKMAN sent the JTC a copy of my April 20, 2010 disqualification statement and one page of a hearsay memorandum report by an AGC investigator, which is contained in the AGC's sealed file in this *Brady v AGC* case. Justices CORRIGAN, YOUNG, and MARKMAN state that I have intentionally left this document out of my statement. However, the reason that I have not attached this document to my statement is because it is contained within a sealed file. By the majority order today, that AGC file remains sealed.[13]

I can only assume that the hearsay memorandum report by an AGC investigator is the "revealing document" referred to by Justices CORRIGAN, YOUNG, and MARKMAN in their statement attached to this Order. Given that Justices CORRIGAN, YOUNG, and MARKMAN cast 3 of the 5 votes to deny relief on the complaint for superintending control and effectively keep the AGC file sealed,[14] it is ironic and disingenuous that they complain that I have not supplied a document that is contained within that sealed file. My colleagues were, and still are, free to vote to unseal this file.

And contrary to Justices CORRIGAN, YOUNG and MARKMAN's assertion that they merely brought this matter to the attention of the JTC and the AGC and will leave it to those agencies for judgment, Justices CORRIGAN, YOUNG and MARKMAN not only publicly accused me, but judged me as guilty. The judgments of Justices CORRIGAN, YOUNG and MARKMAN are apparent when viewing this Court's May 12, 2010 public administrative conference. Their judgments clearly go beyond "bringing this matter to

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[12] I leave Justices CORRIGAN, YOUNG and MARKMAN to their own concerns about violating MCR 9.221(C) by speaking publicly about their referral of me to the JTC.

[13] Also contained within the AGC's sealed file is information not sent to the JTC, containing statements obtained in the AGC investigation which, if true, show that the SCAO was involved in an investigation of the complaint against Judge Servaas. In response to Justices CORRIGAN, YOUNG, and MARKMAN's statement urging me to waive my right to confidentiality and privilege regarding their JTC referral of me under MCR 9.221(C), I recommend that Justices CORRIGAN, YOUNG and MARKMAN join me in voting to unseal all the files in In re Servaas. Waiver has little if anything to do with transparency.

I further recommend that this Court vote to unseal all the AGC files concerning the referral of Mr. Fischer underlying the instant complaint in Brady v AGC, pursuant to MCR 9.122(D). For complete transparency, all parts of these matters should be opened to the public, not just one part at the request of Justices CORRIGAN, YOUNG, and MARKMAN.

[14] The vote to deny relief on the complaint for superintending control and effectively keep the AGC file sealed was 5 to 1, with Justice HATHAWAY as the lone vote to grant superintending control. Given that I am not participating in this matter, I did not vote.

the attention" of the JTC and the AGC. To view the May 12, 2010 public administrative conference, please see my personally-funded website: www.justiceweaver.com.[15]

As the attached correspondence shows, I did not violate any ethical rules or do anything warranting JTC consideration by discussing *In re Servaas* with Mr. Muth after that case was *closed*. The only possible "rule" I could have violated was the "Gag Order," AO 2006-8,[16] which I believe is unconstitutional[17] because the "Gag Order" improperly prohibits speech about a case even after the case is closed. The "Gag Order" is in violation of both the Michigan Constitution and Canon 3A(6) of the Code of Judicial Conduct;[18] and the "Gag Order" is an attempt to forever prevent a justice (in this case me) from performing the justice's duty to inform the public about what the justice believes the public needs to know—no more, no less—regarding how this Court conducts the people's judicial business. There is no basis for referring a justice to the JTC for not following a rule that the justice believes is unconstitutional.

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[15] In addition, attached is a June 8, 2010, letter from Mr. Muth to the Court in which he brought to the Court's attention certain inaccurate information that had been reported in the press and attributed to statements made by members of this Court at the May 12, 2010 public administrative conference and thereafter.

[16] AO 2006-8 states:

> All correspondence, memoranda and discussions regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical, improper or criminal conduct to the JTC or proper authority.

[17] Const 1963, art 6, § 6 requires that:

> 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. [Emphasis added.]

[18] Canon 3A(6) provides:

> A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court or the judge's holdings or actions. [Emphasis added.]

I note that Justices CORRIGAN and YOUNG have also chosen not to abide by a rule—the disqualification rule—adopted by this Court because they believe it is unconstitutional. They expressed their positions on this Court's disqualification rule, MCR 2.003, in *Pellegrino v Ampco*, 485 Mich 1134, 1150 (2010), where Justice CORRIGAN stated: "I do not participate in the majority's decisions under the unconstitutional new version of MCR 2.003," and Justice YOUNG stated: "As I have previously stated, MCR 2.003 as amended is unconstitutional."[19] 485 Mich at 1155.

I make no criticism or objection to Justices CORRIGAN and YOUNG's choice to not apply and participate in this Court's disqualification rule because they believe the rule is "unconstitutional."

However, Justices CORRIGAN and YOUNG's approach as to the disqualification rule as applied to themselves is quite in contrast and inconsistent with their condemnation of my position that the "Gag Order," AO 2006-8, is unconstitutional, and it is in conflict with and in violation of Canon 3A(6) of the Code of Judicial Conduct and forever prohibits a justice from performing the justice's duty to report to the public what the justice believes the public needs to know—no more, no less—about how the justices conduct the public's business.

As these facts illustrate, I have done nothing unethical, and the actions of Justices CORRIGAN, YOUNG, and MARKMAN amount to nothing more than political maneuvering in this Supreme Court justice election year. (See my attached May 13, 2010 press release, documenting Justice YOUNG's objection to my serving on this Court.)

Once again, Justices CORRIGAN, YOUNG, and MARKMAN are attempting to confuse the public by distracting attention from the true reason for my non-participation. I spoke with an attorney regarding a *closed* case. Our conversation was limited to that *closed* case, and we did not discuss the subject of the attorney grievance referral that arose from that *closed* case. Nevertheless, I recused myself from participation in this Court's review of the attorney grievance referral that arose from that *closed* case because these circumstances could have raised an appearance of impropriety had I participated. As this statement and its attachments show, I did not provide any information to a party which could give that party a "strategic advantage" in the attorney grievance referral that arose from that *closed* case.

In their statement to this order, Justices CORRIGAN, YOUNG, and MARKMAN continue to misstate the facts surrounding this matter. While they are entitled to their opinions, their opinions are incorrect and based on their continued misstatement of facts and vague, inaccurate allegations. Justices CORRIGAN, YOUNG, and MARKMAN assert that I provided information to a party that could be used as a "strategic advantage" in a related case, however, they fail to explain what this "information" is.

Regardless of Justices CORRIGAN, YOUNG, and MARKMAN's repeated vague, inaccurate assertions, the fact remains that the subject of the

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[19] In his dissent to the order amending MCR 2.003, Justice YOUNG stated: "I respectfully dissent from the new majority's enactment of this unconstitutional rule of disqualification." 485 Mich at clxvii.

instant complaint for superintending control is *not* dependent on the resolution of the closed *In re Servaas* case. As both Mr. Muth and I have stated, we did not discuss Mr. Fischer or his conduct relevant to the *Servaas* matter. The public can obtain any information regarding my colleagues' views or opinions with respect to Mr. Fischer's handling of the *Servaas* matter simply by viewing this Court's oral argument in that case and by reading the opinions issued in *In re Servaas*. Nothing about the conversation I had with Mr. Muth can be considered "secret" information that could be used for a "strategic advantage" in the instant complaint for superintending control. If my colleagues have additional hearsay information that they wish to be made public, they should have voted to take superintending control and to open *all* files relevant to this matter.

As of today, June 22, 2010, the JTC has not contacted me about the referral and has taken no public action. Although I did nothing unethical in discussing a *closed* case, and I believe that this Court's forever-binding "Gag Order" is unconstitutional and violates the Code of Judicial Conduct, I did not participate in the instant complaint for superintending control because at the time I became aware that the instant complaint existed, I believed my meeting with Mr. Muth might cause a reasonable person to think that I would not be impartial if I were to participate in this complaint.[20]

Justices CORRIGAN, YOUNG, and MARKMAN have repeatedly taken issue with my stated desire to keep the proceedings of this Court open and transparent. Transparency is not a new issue, nor is it limited to the

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[20] My meeting with Mr. Muth took place before this Court amended MCR 2.003 to include an appearance of impropriety standard. The first opportunity for this Court to apply the newly amended MCR 2.003 was in *Pellegrino v Ampco Systems Parking*, Docket No. 137111, when the plaintiff in that case filed a motion for disqualification of Justice MARKMAN based on campaign statements Justice MARKMAN had made about the plaintiff's attorney nine years prior to this Court amending the rule to include the appearance of impropriety standard. When reviewing and deciding the disqualification motion filed against Justice Markman, I stated that I "will not apply the appearance-of-impropriety standard retroactively to statements made by a justice concerning a party or a party's attorney prior to the rule's amendment." Id. While I stated in Pellegrino that I would not apply the appearance of impropriety standard retroactively to other members of this Court, in this matter I applied the standard retroactively to myself because since 2003 I have been calling for this Court to establish clear, written, and fair rules for disqualification and have been addressing the issue of my participation when necessary, as I did in *In re JK*, 468 Mich 202; 661 NW2d 216 (2003), *Gilbert v Daimler Chrysler*, 469 Mich 883; 669 NW2d 265 (2003), *Henry v Dow Chem Co*, 484 Mich 483; 772 NW2d 301 (2009), *In re Servaas*, 484 Mich 634; 774 NW2d 46 (2009), and *Kyser v Kasson Twp*, 483 Mich 903; 761 NW2d 692 (2009).

Supreme Court. In fact, transparency has been a prominent issue in almost every representative government throughout the ages.

As Edmund Burke, a noted 18th Century statesman and philosopher, wrote:

> In all justice, as in all government, the best and surest test of excellence, is the publicity of its administration; for, whenever there is secrecy, there is implied injustice.

With regard to "secrecy," Lord Acton said:

> Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity.

In addition, President John F. Kennedy stated:

> The very word "secrecy" is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths, and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it.

On the issue of "secrecy," I stand by Edmund Burke, Lord Acton, and President Kennedy. A justice's duty to inform the public about what the justice believes the public needs to know—no more, no less—regarding how this Court conducts the people's judicial business is more important than some judges' desire to make the judiciary a "secret club."

The Michigan Supreme Court should not be a "secret club." When elected twice by the people, I did not join one.

CORRIGAN, YOUNG, and MARKMAN, JJ. Justice WEAVER could simply have chosen to explain why she is not participating in this case. That is the only issue that she now needs to address. Instead, she argues once more that she has done nothing improper. We fulfilled our ethical duties by bringing her conduct to the attention of the Judicial Tenure Commission (JTC) and the Attorney Grievance Commission (AGC), and we leave it to them to determine whether there has been any misconduct. In view of Justice WEAVER's many public statements on this matter, we emphasize the following points:

(1) Everyone understands that a judge should not secretly help one side in a lawsuit. That is what Justice WEAVER appears to have done. She has apparently given valuable insider Court information to one party, information that the party could use to strategic advantage in a related case. She did not share this information with the public or the media; she secretly gave it only to one side.

(2) Our ethical responsibilities required us to refer Justice WEAVER's conduct to the JTC and the AGC. No rule precludes a complainant from disclosing to the public that an allegation of judicial misconduct has been brought to the attention of the JTC or the AGC. Moreover, our disclosure at a public administrative conference of Justice WEAVER's referral came in direct response to her attempt at this same conference, without any disclosure to the public, to retroactively eliminate a court rule that served as a legal basis for her referral. Five justices joined in rejecting this attempt.

(3) Justice WEAVER's claim, reflected in media reports, that *she* initiated disclosure of her secret conversation is false. Her conduct came to the Court's attention on March 25, 2010, and Justice WEAVER only provided a statement attempting to justify her conduct on April 20, 2010.

(4) Justice WEAVER'S statement fails to disclose the full content of her secret conversation. She leaves out critical information that she shared with one side that possessed strategic value in a related case. A confidential document that contains this information, and that brought Justice Weaver's conduct to our attention, has been turned over to the proper authorities. The confidential documents that Justice WEAVER has attached to her statement are by no means the only pertinent documents in her possession.

(5) We have urged Justice WEAVER in public sessions of the Court to waive her right of confidentiality under MCR 9.221(C)(1) so that the public can assess the evidence and judge the merits of our referral. Justice WEAVER has thus far refused to do so. We remain prepared to waive any right to confidentiality available to us under MCR 9.221(C)(2), and urge Justice Weaver to do the same.

(6) Justice WEAVER attempts to distract attention from her refusal to release these documents by arguing for the release of *other* court files in *In re Servaas* and *Brady v AGC*. Given that a formal complaint was filed, and a published opinion issued, in *Servaas*, that case is already "unsealed," and in *Brady*, it is up to the respondent in that case, not any justice, to determine whether it can be "unsealed." See MCR 9.126(A).

(7) Justice WEAVER has maintained for years that she is not bound to honor the confidentiality of our deliberations, unlike every other justice that has served on this Court throughout its history. It is easy for an individual to provide a skewed and inaccurate account of the facts when that individual understands that others feel bound, and will abide, by rules of confidentiality, while that individual will not. It is also easy under these circumstances for that individual to raise a host of distracting and irrelevant arguments that have nothing to do with the merits of the case, and to selectively include and exclude confidential documents, as she does here.

(8) Justice WEAVER's statement that our referral of her constitutes mere "political maneuvering" disregards that judges have an ethical obligation to refer apparently serious judicial misconduct to the proper authorities. Code of Judicial Conduct, Canon 3(B)(3). This is necessary in order to uphold the integrity of this Court so that it can fairly and responsibly serve the people of Michigan. Once the facts in this case become public, the people can reach their own conclusions as to whether this referral constitutes "political maneuvering."

(9) The tonnage of documents supplied by Justice WEAVER to accompany her statement should not obscure the simple fact that the single most revealing document of all—that describing the specific conduct by Justice WEAVER that serves as the basis for our referral—has not been supplied.

[Attachment to Justice Weaver's statement explaining her non-participation.]

MEMORANDUM

TO: Corbin Davis, Clerk of Court
cc: The Justices and Mike Schmedlen

FROM: Justice Elizabeth A. Weaver

DATE: April 20, 2010

RE: Disclosure statement in *Brady et al. v Attorney Grievance Commission*, #140409 [redacted] – Complaint for Superintending Control

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I request the Clerk of the Court, Corbin Davis, to promptly transmit the following statement to the parties (Brady *et al.* and the Attorney Grievance Commission) in this complaint, and that in the interest of moving this case along, the parties indicate to this Court whether they will exercise their right of waiver at their earliest convenience, but no later than 28 days from receipt of this statement. I also request the Clerk to please inform me as soon as he has transmitted this statement to the parties:

In this statement of disclosure to the parties involved in *Brady et al.*[1] *v Attorney Grievance Commission*, Docket No. 140409, I hereby raise the issue of

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[1] Plaintiffs Brady *et al.* consist of: James S. Brady, Jon R. Muth, Bruce W. Neckers, Michael A. Walton, Robert J. Dugan, L. Roland Roegge, William W. Jack Jr., H. Rhett Pinsky, John D. Tulley, Joseph M. Sweeney, Paul T. Sorensen, Frederick D. Dilley, Janet A. Haynes, Dennis C. Kolenda, Robert L. Lalley Jr., William S. Farr, and Diann J. Landers. This complaint for superintending control was filed by a group of Grand Rapids attorneys, including two former State Bar presidents and two former judges. One of the former State Bar presidents is Jon Muth, who was the attorney for 63rd District Court Judge Steven Servaas in *In re Servaas*, ___ Mich ___; 774 NW2d 46 (2009).

[Attachment to Justice Weaver's statement explaining her non-participation.]

disqualification with regard to my participation[2] in this complaint for superintending control for the reasons disclosed below.

This complaint for superintending control, filed January 2010, arises from the Attorney Grievance Commission's (AGC) dismissal on November 17, 2009 of the plaintiffs' June 27, 2008 request for investigation of alleged attorney misconduct by Paul J. Fischer, Executive Director and General Counsel of the Judicial Tenure Commission (JTC), in the disciplinary proceeding against Judge Steven Servaas.[3] The disciplinary proceeding against Judge Servaas was reviewed and ruled upon by this Court in *In re Servaas* pursuant to the procedures set forth in Article 6, section 30 of the Michigan Constitution and the rules set forth by this Court in MCR 9.200, *et seq*.

I do not have actual bias or prejudice for or against any party involved in this complaint or Mr. Fischer. In fact, I personally know and like Mr. Fischer. I also personally know and like Jon Muth, a plaintiff in this complaint and my former attorney. In *In re Servaas*, Mr. Muth represented Judge Servaas, and I

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[2] I raise the issue of disqualification pursuant to the newly amended MCR 2.003(B), which provides that "[a] party may raise the issue of a judge's disqualification by motion or the judge may raise it."

[3] On January 20, 2010, the plaintiffs brought this complaint for superintending control pursuant to MCR 9.122(A)(2), which provides in pertinent part that "a party aggrieved by the dismissal may file a complaint in the Supreme Court."

[Attachment to Justice Weaver's statement explaining her non-participation.]

disclosed his earlier representation of me to the parties in that case.[4] I now write to provide the parties in the instant complaint with the same disclosure.[5]

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[4] Please see the attached documents.

[5] When the *Servaas* matter initially came before this Court, I advised the parties by memo on January 23, 2008 as follows:

> Attorney Jon Muth has represented me within the past year, for instance, as my attorney during the public hearing concerning the majority of four's adoption of the "Gag Order," Administrative Order No. 2006-08 [See Administrative Order No. 2006-8 (AO 2006-8), including my dissent, attached hereto].

I note the fact that AO 2006-8, the "Gag Order," was immediately adopted on an emergency basis by a 4-3 vote in a secret executive session on December 6, 2006. The secret executive session excluded all Court staff and the "Gag Order" was adopted at that session without notice to the public and in fact without prior notice to some of the justices. The "Gag Order" was never retained pursuant to this Court's orders and procedures. Administrative Order (AO) No. 1997-11 addresses Supreme Court administrative public hearings. Under Section (B)(2) of AO 1997-11, "[u]nless immediate action is required, the adoption or amendment of rules or administrative orders that will significantly affect the administration of justice will be preceded by an administrative public hearing . . .." The "Gag Order" was adopted without first holding a public administrative hearing on December 6, 2006.

AO 1997-11(B)(2) further requires that "[i]f no public hearing has been held before a rule is adopted or amended, the matter will be placed on the agenda of the next public hearing, at which time the Supreme Court will hear public comment regarding whether the rule should be *retained or amended*." (Emphasis added.) Therefore on January 17, 2007, the "Gag Order" was presented for public comment at a public administrative hearing. The records of this Court show that after the January 17, 2007 public administrative hearing, the matter was "passed" to a later date and thus, no action was taken. There was no vote by this Court to retain or amend the "Gag Order" and to this day, there has been no vote. In fact, the court file was closed without a vote from the Court on February 27, 2007. Despite the fact that there never was a vote to retain or amend the "Gag Order," it

[Attachment to Justice Weaver's statement explaining her non-participation.]

I write further to clarify the circumstances of and disclose a conversation that took place between myself and Mr. Muth in October 2009 regarding *In re Servaas*. This Court's opinions in *In re Servaas* were published for the public on July 31, 2009. On August 24, 2009 the JTC filed a motion for rehearing or clarification in this Court. On September 11, 2009 this Court issued an order denying a motion for rehearing and containing an additional statement by Chief Justice Kelly, which clarified by amendment her original opinion. Therefore, this Court's file in *In re Servaas* closed on September 11, 2009.

In mid-September 2009, I briefly encountered my friend and former attorney, Mr. Muth, at the State Bar of Michigan Fellows Reception in Dearborn. Given that the file in *In re Servaas* had already been closed, Mr. Muth and I agreed to meet in Traverse City for a visit over lunch when he would be passing

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was published in *Michigan Rules of Court—State*. Without any vote to retain or amend the "Gag Order," it has erroneously remained as an allegedly effective administrative order in our Court rules and on this Court's website.

I also advised the parties in the *Servaas* matter as follows:

> Although this Court has not established clear, thorough, open and fair rules for disqualification of justices, it is necessary to inform the Court and the parties of my association with attorney Jon Muth. I have no personal bias for or against Mr. Muth, or any of the parties, or other attorneys in this matter . . . .

I repeated my disclosure to the parties on March 26, 2008 when the case again came before this Court. The parties did not object to my participation in the *Servaas* matter. Mr. Fischer, representing the JTC, specifically waived any objection to my participation.

[Attachment to Justice Weaver's statement explaining her non-participation.]

through town on October 1, 2009. At the time that we agreed to meet, and up until the time I received this Court's Commissioner Report in late March 2010, I did not remember that at the March 4, 2009 *In re Servaas* oral argument, Mr. Fischer stated that "Judge Servaas had his attorneys and a number of others file a grievance against me with the Attorney Grievance Commission." Mr. Fischer made this statement in response to questions about whether the JTC had authorized or encouraged him to proceed in the manner that he did while handling the *Servaas* matter and making an unannounced visit to confront Judge Servaas in his chambers.[6]

Because I did not remember Mr. Fischer's statement at oral argument, I did not realize that a file for a grievance against Mr. Fischer may have been opened and an investigation of his conduct may have been ongoing. Under MCR 9.126, such files are sealed.[7] Therefore, I had no official notice of any file's existence, and I had no notice of any file's status.

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[6] The record in *In re Servaas* contains an audio recording of Mr. Fischer's unannounced visit to Judge Servaas's chambers on January 16, 2008 and his threat to "drag [Judge Servaas's] name through the mud" unless he agreed to resign by 9:00 a.m. the following morning. The recording was made, apparently without the knowledge of Mr. Fischer or Judge Servaas, by the State Police Trooper accompanying Mr. Fischer on the unannounced visit to Judge Servaas's chambers. The recording was also made public in the media, and is available online at http://blog.mlive.com/grpress/2008/04/_by_john_tunison_the.html (last accessed April 20, 2010).

[7] MCR 9.126—Open Hearings; Confidential Files and Records, provides in pertinent part:

[Attachment to Justice Weaver's statement explaining her non-participation.]

Mr. Muth and I did meet on October 1, 2009 for lunch in Traverse City. He indicated that he found this Court's result in *In re Servaas* strange, convoluted, and surprisingly close after what he had witnessed during the oral argument. I responded that his observation was correct and that the vote was originally 6-1 in Judge Servaas's favor. I told him my speculation was that the emphasis and the direction of some justices' positions perhaps shifted with recognition that the State Court Administrator and his office may have had more involvement in the *Servaas* matter than merely referring such allegations to the JTC for investigation and process according to JTC rules.

I reminded Mr. Muth that in my concurrence in *In re Servaas*, I called for an investigation of the JTC and any others possibly involved, but that no such investigation had occurred.[8] Instead, this Court published six (6) separate opinions, resulting in the convoluted decision that prompted a motion for rehearing or clarification by the JTC, required an amendment for clarification to one justice's opinion, and led to Mr. Muth's questions. Mr. Muth and I did not

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(A) Investigations. Except as provided in these rules, investigations by the administrator or the staff may not be made public. At the respondent's option, final disposition of a request for investigation not resulting in formal charges may be made public.

[8] In my concurring opinion in *In re Servaas*, I urged this Court to "open an administrative file to investigate how this matter unfolded, including the events and actions of the Judicial Tenure Commission (JTC) and/or others responsible leading up to the JTC's recommendation of this case to this Court." ___ Mich at ___ (Weaver, J., concurring). Justice Hathaway signed my concurring opinion.

[Attachment to Justice Weaver's statement explaining her non-participation.]

discuss or mention any request for an AGC investigation of Mr. Fischer or the possibility of a complaint for superintending control, which is the underlying issue of the instant complaint. We did not discuss any possible allegations of attorney misconduct by Mr. Fischer, or the instant complaint, in any way.[9]

Although Mr. Muth was my attorney at one point in time, he was not my attorney at any time while *In re Servaas* was pending, nor when we met in October 2009. To clarify, Mr. Muth is not currently my attorney, and I have not discussed the instant complaint with him, nor have I had any communication with him since I learned a few weeks ago in late March 2010 that the instant complaint had been filed in this Court. The instant complaint, while related to the *Servaas* matter, is a separate and distinct case.

Before I agreed to have lunch with Mr. Muth, I should have remembered Mr. Fischer's statement at the *In re Servaas* oral argument that a grievance was filed against him by Judge Servaas's attorneys. Had I remembered, I would have

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[9] Of course, in October 2009 I could not have known of the instant complaint for superintending control because it did not exist given that the AGC had not yet dismissed the underlying request for investigation of Mr. Fischer's conduct. In fact, the AGC did not dismiss the plaintiffs' 2008 request until November 17, 2009, by a personal and confidential letter sent to plaintiffs and Mr. Fischer. The instant complaint for superintending control was not filed in this Court by Mr. Muth and the other plaintiffs until January 20, 2010. Because the AGC proceeding was kept secret from this Court until the filing of the instant complaint on January 20, 2010, I could not have been aware in October 2009, when I met with Mr. Muth, of the procedural steps leading up to the instant complaint in this Court. Nevertheless, in retrospect, I should not have met with Mr. Muth.

[Attachment to Justice Weaver's statement explaining her non-participation.]

realized that any grievance filed against Mr. Fischer by Mr. Muth could be pending with the AGC, and I would not and should not have met with Mr. Muth. But I did not remember and we did meet. Therefore, I must recuse myself from participating in the instant complaint for superintending control because of the appearance of bias or impropriety[10] that my meeting with Mr. Muth may present.[11]

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[10] The test for determining whether an appearance of impropriety exists as laid out in *Caperton v A T Massey Coal Co, Inc*, 556 US ___; 129 S Ct 2252, 2255; 173 L Ed 2d 1208 (2009), is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." Because of my meeting with Mr. Muth, it might appear to a reasonable person that I would not be impartial if I were to participate in this complaint.

[11] This Court recently amended MCR 2.003 to include an appearance of impropriety standard as a ground for disqualification of judges. The newly amended rule set forth in MCR 2.003(C)(1)(b) states: "The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as annunciated in *Caperton v Massey*, or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." (Citation omitted.)

My meeting with Mr. Muth took place before this Court amended MCR 2.003 to include an appearance of impropriety standard. The first opportunity for this Court to apply the newly amended MCR 2.003 was in *Pellegrino v Ampco Systems Parking*, Docket No. 137111, when the plaintiff in that case filed a motion for disqualification of Justice Markman based on campaign statements Justice Markman had made about the plaintiff's attorney nine years prior to this Court amending the rule to include the appearance of impropriety standard. When reviewing and deciding the disqualification motion filed against Justice Markman, I stated that I "will not apply the appearance-of-impropriety standard retroactively to statements made by a justice concerning a party or a party's attorney prior to the rule's amendment." *Id.* While I stated in *Pellegrino* that I will not apply the appearance of impropriety standard retroactively to other members of this Court, in this matter I will apply the standard retroactively to myself because since 2003 I have been calling for this Court to establish clear, written, and fair rules for

[Attachment to Justice Weaver's statement explaining her non-participation.]

In light of the above information, I will only participate in this complaint if the parties, Brady *et al.* and the AGC, agree to waive my disqualification in accordance with MCR 2.003(E).[12]

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disqualification and have been addressing the issue of my participation when necessary, as I did in *In re JK*, 468 Mich 202; 661 NW2d 216 (2003), *Gilbert v Daimler Chrysler*, 469 Mich 883; 669 NW2d 265 (2003), *Henry v Dow Chem Co*, ___ Mich ___; 772 NW2d 301 (2009), *In re Servaas*, ___ Mich ___; 774 NW2d 46 (2009), and *Kyser v Kasson Twp*, 483 Mich 903; 761 NW2d 692 (2009).

[12] MRC 2.003(E) provides:

> Waiver of Disqualification. Parties to the proceeding may waive disqualification even where it appears that there may be grounds for disqualification of the judge. Such waiver may occur whether the grounds for disqualification were raised by a party or by the judge, so long as the judge is willing to participate. Any agreement to waive the disqualification must be made by all parties to the litigation and shall be in writing or placed on the record.

[Attachment to Justice Weaver's statement explaining her non-participation.]

MEMORANDUM

TO: Corbin Davis, Clerk of the Michigan Supreme Court
cc: Justices

FROM: Justice Elizabeth A. Weaver

RE: *In re Anonymous Judge*, #135650

DATE: January 23, 2008

Upon receiving the respondent's brief in this matter this morning, January 23, 2008, it came to my attention that Judge Servaas is represented by attorney Jon R. Muth. Pursuant to the Code of Judicial Conduct Canon 3(C):

> A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B).

Attorney Jon Muth has represented me within the past year, for instance, as my attorney during the public hearing concerning the majority of four's adoption of the "Gag Order," Administrative Order No. 2006-08.

Although this Court has not established clear, thorough, open and fair rules for disqualification of justices, it is necessary to inform the Court and the parties of my association with attorney Jon Muth. I have no personal bias for or against Mr. Muth, or any of the parties, or other attorneys in this matter; nor have I discussed this case with anyone and am therefore willing to serve in this matter. However, if any party or attorney requests by January 29, 2008 that I not serve, I will recuse myself.

At today's judicial conference, I informed the justices of the above and requested that Corbin Davis, Clerk of the Court, send this statement to the parties and attorneys as promptly as possible.

[Attachment to Justice Weaver's statement explaining her non-participation.]

MEMORANDUM

TO: The Justices
cc: Corbin Davis, Mike Schmedlen and Danilo Anselmo

FROM: Justice Elizabeth A. Weaver

RE: *In re Hon Steven R Servaas,* #135835 [redacted]
No. 9 on CR Agenda for April 2, 2008

DATE: March 26, 2008

This Court recently considered another matter concerning the Honorable Steven R. Servaas before it: *In re Anonymous Judge,* Docket No. 135650. On January 23, 2008, I circulated a memorandum to the justices, and requested that the Clerk of the Court notify the parties, that an attorney representing Judge Servaas, Jon R. Muth, has represented me within the past year.

As attorney Jon Muth is also representing Judge Servaas in this matter, Docket No. 135835, by this memo, I again repeat my statement made in *In re Anonymous Judge,* # 135650, attached hereto. I further request that the Clerk of the Court notify the parties that I plan to participate in *In re Hon Steven R Servaas,* #135835, having heard no objection to my participation in the earlier matter, *In re Anonymous Judge,* # 135650.

[Attachment to Justice Weaver's statement explaining her non-participation.]

Administrative Order 2006-8

Michigan Compiled Laws Annotated Currentness
Administrative Orders of the Michigan Supreme Court
→ ADMINISTRATIVE ORDER 2006-8. DELIBERATIVE PRIVILEGE AND CASE DISCUSSIONS IN THE SUPREME COURT

The following administrative order, supplemental to the provisions of Administrative Order No. 1997-10, is effective immediately.

All correspondence, memoranda and discussions regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical, improper or criminal conduct to the JTC or proper authority.

CREDIT(S)

Entered December 6, 2006, 477 Mich.

COMMENTS

Cavanagh, Weaver and Kelly, JJ., dissent.

Dissenting statements by Weaver and Kelly, JJ., to follow.

WEAVER, J. (dissenting). I dissent to the unscheduled and abrupt adoption of Administrative Order 2006-08 (AO 2006-08) by the majority of four; Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN[1] because it unconstitutionally restricts a justice's ability to perform his duty to the public by barring a justice from "giv[ing] in writing" his "reasons for each decision" and "the reasons for his dissent."[2] By adopting AO 2006-08 and ordering the suppression of my dissent in *Grievance Administrator v Fieger*, #127547, the majority of four are attempting to hide their own unprofessional conduct and abuse of power which has resulted in their failure to conduct the judicial business of the people of Michigan in an orderly, professional, and fair manner.

The majority's adoption of AO 2006-08 during an unrelated court conference, without public notice or opportunity for public comment, illustrates the majority of four's increasing advancement of a policy of greater secrecy and less accountability-a policy that wrongly casts "a cloak of secrecy around the operations" of the Michigan Supreme Court.[3]

Simply put, AO 2006-08 is a "gag order," poorly disguised and characterized by the majority of four as a judicial deliberative privilege. The fact is, no Michigan case establishes a "judicial deliberative privilege," nor does any Michigan statute, court rule, or the Michigan Constitution.

AO 2006-08-the "gag order"- has been hastily created and adopted by the majority of four, without proper notice to the public, and without opportunity for public comment, despite such requirements directed by Administrative Order 1997-11. Administrative Order 1997-11(B)(2) states:

Unless immediate action is required, the adoption or amendment of rules or **administrative orders that will signifi-**

[Attachment to Justice Weaver's statement explaining her non-participation.]

cantly affect the administration of justice will be preceded by an administrative public hearing under subsection (1). If no public hearing has been held before a rule is adopted or amended, the matter will be placed on the agenda of the next public hearing, at which time the Supreme Court will hear public comment on whether the rule should be retained or amended. (Emphasis added.)

The adoption of AO 2006-08 was not preceded by an administrative public hearing. Further, AO 2006-08 was not shown on the notice of public administrative hearing scheduled for January 17, 2007 agenda that was circulated and published on December 14, 2006. After learning that AO 2006-08 was not placed on the next public administrative hearing agenda as required by AO 1997-11, I informed by memo of the same date (December 14) the justices and relevant staff, that AO 1997-11(B)(2) requires that AO 2006-08 be included in the notice for the next public administrative hearing on January 17, 2007. That AO 2006-08 significantly affects the administration of justice is obvious given that the majority of four relied on it to order on December 6, 2006, the suppression of my dissent in *Grievance Administrator v Fieger*, #127547, motion to stay. As of today, December 19, 2006, AO 2006-08 has not been placed on the January 17, 2007 public hearing notice and agenda.[4]

The majority has not publicly articulated any reason why AO 2006-08 should be adopted, nor any reason why immediate action without prior notice to the public or a public hearing was necessary. Article 6, § 6 of the Michigan Constitution requires in writing reasons for decisions of the Court. However, AO 2006-08 can be employed by any majority to impermissibly and unconstitutionally restrict the content of a justice's dissent or concurrence. Thus any present or future majority can in essence censor and suppress a dissenting or concurring justice's opinions.

The public has a vested, constitutional interest in knowing the reasons for a dissenting or concurring justice's divergence from a majority opinion.[5] The majority of four's efforts to censor and suppress the opinions of other justices significantly affect the administration of justice and violate the Michigan Constitution Art 6 § 6. The "gag order," AO 2006-08, is unconstitutional and unenforceable. As employed by the majority in *Grievance Administrator v Fieger*, #127547, the current majority is using AO 2006-08 to censor and suppress my dissent. I cannot and will not allow it to interfere with the performance of my duties as prescribed by the Michigan Constitution and with the exercise of my rights of free expression as guaranteed by both the Michigan Constitution and the United States Constitution.

The majority of four has adopted this "gag order" (AO 2006-08) in order to suppress my dissent in *Grievance Administrator v Fieger*, motion for stay, #127547. Finding no "gag rule" in the Michigan Constitution, statutes, case law, court rules and canons of judicial ethics, the majority of four has decided instead to legislate its own "gag order." The majority of four's "gag order" evidences an intent to silence me now, and to silence any future justice who believes it is his duty to inform the public of serious mishandling of the people's business.[6]

The majority's "gag order" purportedly protects the justices' deliberations under a so-called "judicial deliberative privilege" based on unwritten traditions.

But the Michigan Constitution, statutes, case law, and court rules do not establish a judicial deliberative privilege.[7] In fact, the closest thing to a "judicial deliberative privilege" in Michigan is contained within the Canons of the Code of Judicial Conduct. It is this so-called "judicial deliberative privilege" that I have understood for my entire 32-year judicial career, and by which I strive to abide.

As to a judge's ability to speak regarding "a pending or impending proceeding in any court," Canon 3A(6) provides:

A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court or the judge's holdings or actions.

[Attachment to Justice Weaver's statement explaining her non-participation.]

Canon 3A(6) thus recommends against a judge speaking on a case that is pending or impending in any court; however, Canon 3A(6) does not absolutely prohibit comment on such cases.[8]

As to a judge's "administrative responsibilities," Canon 3B does not even address, much less recommend or require, abstention from public comment. Canon 3 B(1) does state that

A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

One way to "facilitate the performance of the administrative responsibilities of other judges and court officials" is to inform the public when they need to know of a misuse or abuse of power, or know of repeated, unprofessional behavior seriously affecting the conduct of the people's business.

Certainly nothing in Canon 3 can be said to create any obligation of confidentiality or permanent secrecy like that adopted by the majority of four in AO 2006-08, and in the November 13, 2006, IOP. It should be noted that there have been instances both in the past and present, in which justices have made references in opinions to matters discussed at conference and in memorandum, and to actions before the Court.[9]

In determining when one must speak out, or abstain from speaking out, I am guided by the fact that, as a justice, I am accountable first and foremost to the public. The public expects to be informed by a justice if something is seriously wrong with the operations of the Supreme Court and the justice system. How else would the public know and be able to correct the problem through the democratic and constitutional processes? The public rightly expects the justices of this Court to act with courtesy, dignity, and professionalism toward one another. In matters of principle and legitimate public concern, however, the public does not expect a justice to "go along to get along." The public trusts, or should be able to trust, that the justices of this Court will not transform the Court into a "secret society" by making rules to protect themselves from public scrutiny and accountability.

Yet the public also expects that justices will exercise wise and temperate discretion when disclosing information regarding the operations of the Court and the justices' performance of their duties. The public does not expect, and likely would not tolerate, being informed every time a justice changes positions on a matter before the court, or every time a justice loses his temper with a colleague. The public expects justices to debate frankly, to be willing to change positions when persuaded by better argument, and to be willing to admit that they have changed their positions. Moreover, momentary, human imperfections do not affect the work of the Court. The public would lose patience with and not support a justice who recklessly and needlessly divulged such information for intemperate or political reasons. It is an elected or appointed justice's compact with the people that, whenever possible, a justice will make all reasonable efforts to correct problems on the Court from within.

But the public needs and expects to be informed by a justice when repeated abuses of power and/or repeated unprofessional conduct influence the decisions and affect the work of their Supreme Court and the justice system. I believe it is my duty and right to inform the public of such repeated abuses and/or misconduct if and when they occur.

I recognize that there is a federal judicial deliberative privilege of uncertain scope in federal common law, but that is not Michigan law and is not binding on this Court. Moreover, the deliberative privilege articulated in federal law does not prevent a justice from speaking out regarding matters of legitimate public concern. *Pickering v Board of Educ*, 391 US 563 (1968).

The federal deliberative privilege is narrowly construed and qualified and it does not apply to administrative actions. Furthermore, that privilege is not intended to protect justices, but rather operates to protect the public confidence in

[Attachment to Justice Weaver's statement explaining her non-participation.]

the integrity of the judiciary.

For such public confidence to be warranted, the Michigan Supreme Court must be orderly and fair and must act with integrity, professionalism, and respect. In a pertinent case, the federal Fifth Circuit Court of Appeals addressed whether a judge could be reprimanded for publicly commenting upon the administration of justice as it related to a case in his court. *Scott v Flowers*, 910 F2d 201 (5th Cir 1990). The court cited *Pickering*, supra, in recognition that the deliberative privilege could not prevent the judge from truthfully speaking out regarding matters of legitimate public concern where the judge's First Amendment rights outweighed the government's interest in promoting the efficient performance of its function.

In light of *Pickering, supra*, the *Scott* court concluded:

Neither in its brief nor at oral argument was the Commission able to explain precisely how Scott's public criticisms would impede the goals of promoting an efficient and impartial judiciary, and we are unpersuaded that they would have such a detrimental effect. Instead, we believe that those interests are ill served by casting a cloak of secrecy around the operations of the courts, and that by bringing to light an alleged unfairness in the judicial system, *Scott* in fact furthered the very goals that the Commission wishes to promote. [*Scott, supra* at 213.]

The *Scott* court thus held that the judge could not constitutionally be reprimanded for making public statements critical of the court.

The federal deliberative privilege as defined in the federal common law does not extend to every utterance and action within the Court's conferences and communications. It does not protect actions taken on non-adjudicative matters involving administrative responsibilities. It also does not extend to actions or decisions of the Court, because the actions and decisions of the Court are not deliberations, they are facts that occur at the end of a deliberative period.

Further, any judicial deliberative privilege does not extend to repeated resort to personal slurs, name calling, and abuses of power, such as threats to exclude a justice from conference discussions, to ban a justice from the Hall of Justice, or to hold a dissenting justice in contempt. Nor does any judicial privilege extend to conduct such as refusing to meet with justices on the work of the Court as the majority of four have now twice done on November 13 and November 29, 2006. The privilege certainly does not extend to illegal, unethical, and improper conduct. Abuses of power and grossly unprofessional conduct are entirely unrelated to the substantive, frank, and vigorous debate and discussion of pending or impending adjudicated cases that a properly exercised judicial privilege should foster.

An absolute judicial deliberative privilege that the majority of four of this Court has wrongly created in AO 2006-08 does not exist in the Michigan Constitution, statutes, case law, court rules, or Code of Judicial Conduct, and should not be allowed to prohibit the publication of any justice's dissent or concurrence.

Perhaps further attempts to define the scope of the so-called "judicial deliberative privilege" in Michigan may be warranted. However, the privilege cannot effectively be expanded beyond that expressed within the Code of Judicial Conduct through the abrupt, unconstitutional adoption of Administrative Order 2006-08, "gag order."

Most importantly, any judicial deliberative privilege defined in any rule or order must not infringe on a justice's constitutional duties and rights. Const 1963, art 6, § 6 requires that

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.** (Emphasis added.)

Any new court rule or administrative order on deliberations that would force a dissenting or concurring justice to not

[Attachment to Justice Weaver's statement explaining her non-participation.]

include in his dissent or concurrence any or all of his reasons would interfere with the justice's duty under art 6, § 6. In effect, such a rule would allow the majority justices to re-write the dissent or concurrence, silence their opposition, and would be unconstitutional. AO 2006-08 is such an unconstitutional rule.

If the majority wanted to attempt to further define the so-called "judicial deliberative privilege" in Michigan, it should have done so by opening an administrative file on the issue and by inviting public comment before making a rash decision to adopt a "gag order" without public notice or comment and before implementing the "gag order" by ordering the suppression of a fellow justice's dissent. After all, any judicial deliberative privilege must serve the public's interest in maintaining an efficient and impartial judiciary, not the justices' personal interests in concealing conduct that negatively and seriously affects the integrity and operations of the Court. The public must, therefore, have a voice in defining the boundaries of any expanded so-called "judicial deliberative privilege" that the majority of this Court desires to legislate. I have already expressed in dissents on administrative matters (which the majority has refused to release) that the majority of four has repeatedly abused its authority in the disposition of and closure of ADM 2003-26, the Disqualification of Justices file. They have mischaracterized final actions as straw votes and failed to correct, approve and publish minutes, and my dissents thereto, for conferences on the Disqualification of Justices file, ADM 2003-26, dating back almost ten (10) months to March 1, 2006.

Regrettably, under the guise of promoting frank discussion, the majority of four has tried to erect an impermeable shield around their abusive conduct-itself the cause of the breakdown of frank, respectful and collegial discussion on this Court. No law or rule exists to support this idea, anywhere. The majority of four have precipitously and abruptly adopted AO 2006-08 without notice to fellow justices or the public, and without opportunity for public comment.

Over the past year and longer, the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, have advanced a policy toward greater secrecy and less accountability. I strongly believe that it is past time to end this trend and to let sunlight into the Michigan Supreme Court. An efficient and impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts." *Scott, supra.*

FOOTNOTES

1. On December 6, 2006, moved by Chief Justice TAYLOR, and seconded by Justices CORRIGAN and YOUNG, the majority of four adopted AO 2006-08. Justices CAVANAGH, WEAVER, and KELLY dissented. As adopted the order states:

The following administrative order, supplemental to the provisions of Administrative Order 1997-10, is effective immediately.

All correspondence, memoranda and discussions regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical, improper or criminal conduct to the JTC or proper authority.

CAVANAGH, WEAVER and KELLY, JJ., dissent.

Dissenting statements by Weaver and Kelly, J J., to follow.

2. Const 1963, art 6, § 6 requires that:

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.** (Emphasis added.)

[Attachment to Justice Weaver's statement explaining her non-participation.]

3. *Scott v Flowers*, 910 F2d 201, 213 (5th Cir 1990).

4. Note that AO 2006-08 must be placed on the public hearing notice for January 17, 2007, by December 20, 2006, to conform to the 28 day notice requirement of AO 1997-11.

5. By requiring that justices give reasons for their decisions in writing, Michigan Constitution Art 6 § 6 gives the people of Michigan an opportunity to improve justice by providing a window to learn how their Supreme Court is conducting Michigan's judicial business. Furthermore, requiring written decisions from justices provides information and guidance for case preparation to future litigants, who may have similar issues to decided cases.

6. On November 13, 2006, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN voted to adopt an Internal Operating Procedure (IOP) of the Court, substantively identical to the "gag order" adopted by AO 2006-08. Justices CAVANAGH and KELLY abstained. I voted against the IOP/secret "gag rule." The majority of four adopted the IOP/secret "gag rule" in an unannounced executive session from which court staff were excluded. As adopted on November 13, the IOP/secret "gag rule" states:

All memoranda and conference discussions regarding cases or controversies on the CR and opinion agendas are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical or criminal conduct to the Judicial Tenure Commission or proper law enforcement authority.

IOPs are unenforceable guidelines adopted by majority vote, without public notice or comment, and can be changed at any time, without public notice or comment, by a majority vote. (See Supreme Court internal operating procedures at http://courts.michigan.gov/supremecourt/ (accessed on December 19, 2006), which provides in a disclaimer that the IOPs are unenforceable and only require a majority vote to be adopted.) The adoption of this IOP was never reported in the Supreme Court minutes. It appears that the majority found that the hastily adopted IOP "gag rule" would not be a proper vehicle to suppress my dissents because my dissents could not be suppressed by color of an unenforceable court guideline.

Thus, on November 29, 2006 the majority moved and seconded the adoption of an "emergency" Michigan Court Rule, another "gag rule," to suppress my dissents and concurrences. The majority discussed but tabled the new proposed emergency court rule that was substantively identical to AO 2006-08 "gag order" that was adopted on December 6, 2006.

Finally, on December 6, 2006, during an unrelated court conference, without public notice or opportunity for public comment, the majority adopted AO 2006-08, the "gag order." There was no notice given to the justices that an administrative order was to be considered, nor was the matter ever on an administrative agenda of this Court. Nonetheless, AO 2006-08 was adopted by a 4-3 vote by Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN. Shortly thereafter, it was moved, seconded, and adopted by a 4-3 vote, by Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN to suppress my dissent in *Grievance Administrator v Fieger*, #127547, motion to stay. Justices CAVANAGH, WEAVER and KELLY dissented. Chief Justice TAYLOR then ordered the clerk of court, who was present, not to publish my dissent in Fieger.

7. In the order, AO 2006-08 states that AO 2006-08 is "supplemental to the provisions of Administrative Order 1997-10." I note that Administrative Order 1997-10 (AO 1997-10) does not prohibit a justice of the Supreme Court from disclosing information.

By its plain language, AO 1997-10 is inapplicable. It addresses *public* access to judicial branch administrative information. The order lists types of information that this Court can exempt from disclosure *when faced with a request*

[Attachment to Justice Weaver's statement explaining her non-participation.]

from the public for that information. Administrative Order 1997-10 is not relevant to and does not prohibit a justice of this Court from disclosing information, even information that might be considered deliberative, when disclosure involves matters of legitimate public concern.

8. To abstain is "[t]o refrain from something by one's own choice." Webster's New World Dictionary, 2nd College Edition (1982).

9. For example, most recently, in Justice CAVANAGH'S concurring statement in *In re Haley*, 476 Mich 180, 201 n 1 (2006), he stated:

This Court is currently engaged in a discussion about the proper procedure for judicial disqualifications, as well as the ethical standards implicated in such a procedure. Further, this Court will soon be asking for public comment and input to further this discussion in a more open manner.

In addition, in his dissent in *Grievance Administrator v Fieger*, 476 Mich 231, 327 n 17 (2006), Justice CAVANAGH stated:

Further, while I do not join in the fray between the majority and my colleague Justice WEAVER, I take this opportunity to note that three alternate proposals, two of which have been crafted by this majority, regarding how this Court should handle disqualification motions have been languishing in this Court's conference room for a substantial period of time. In the same way I will look forward to the dust settling from the case at bar, I will similarly anticipate this Court's timely attention to the important matter of disqualification motions. I take my colleagues at their word that the issue of disqualification will be handled in a prompt manner in the coming months.

Note that Justice CAVANAGH'S statements, published in his concurrence in *Haley* and his dissent in *Fieger*, were not objected to by any justice, including the majority of four.

In addition to these more recent references to matters discussed at judicial conferences, see in *In re Mathers*, 371 Mich 516 (1963).

Order Adding Administrative Order No. 2006-8 to the Public Hearing Scheduled on January 17, 2007, [order entered December 20, 2006]

On order of the Court, Administrative Order 2006-8 has been added to the public hearing scheduled for January 17, 2007. Such order, having been enacted by the Court as an emergency measure on December 6, 2006 for purposes of preserving the integrity and confidentiality of the Court's deliberative process and to reflect practices that have characterized the Michigan Supreme Court, and to the best of our knowledge every other appellate court within the United States, including the United States Supreme Court, since their inception, the Court is particularly interested in witnesses addressing the following question: Where a justice violates or threatens to violate **Administrative Order 2006-8**, what means of enforcement and/or sanction, if any, are properly adopted by the Court?

WEAVER, J. (*concurring and dissenting*). I concur only with placing on the January 17, 2007 public administrative hearing the adoption of Administrative Order No. 2006-8 (AO 2006-8), adopted by a 4-3 vote on December 6, 2006, by Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN. I dissent from the remaining language in the order.

As stated in my dissent to AO 2006-8 (filed yesterday, December 19, 2006), AO 2006-8 must be placed on the January 17, 2007, public administrative hearing because it significantly affects the administration of justice as it can be used to order the censorship and/or suppression of any justice's dissents or concurrences, as the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, did on December 6, 2006, by order-

[Attachment to Justice Weaver's statement explaining her non-participation.]

ing the Clerk of the Court to suppress my December 5, 2006, dissent from *Grievance Administrator v Fieger*, Docket No. 127547 (motion for stay).

Censoring and/or suppressing a justice's written opinion is contrary to article 6, § 6 of the Michigan Constitution and the right to free expression as guaranteed by both the Michigan Constitution and the United States Constitution. Further, censoring and/or suppressing a justice's written opinion interferes with a justice's duty to inform the public of abuse of power and/or serious mishandling of the people's judicial business.

The issue that should be of most interest and given most attention at the January 17, 2007, public administrative hearing is the constitutionality of AO 2006-8.

KELLY, J. (*concurring in part and dissenting in part*). A bare majority of the justices adopted Administrative Order No. 2006-8 on an emergency basis without stating what emergency existed. That same majority now requests public comment on what sanctions are appropriate for violation of the order. AO 2006-8 contains no sanctions, and the hearing order lists none that might be appropriate. I can recall no other instance in which the Court has sought public comment without revealing such information.

The language that the majority does present to the public is a rule that it purports to be necessary to preserve the integrity and confidentiality of the Court's deliberative process. What interests me most is the community's view on whether this rule is necessary or even legal. I request comment on whether the rule unnecessarily or even unconstitutionally restricts the right of justices to speak out on matters crucial to the functioning of the judiciary. I am interested in hearing what good reasons exist to: (1) prevent release of information once a case has been finally decided, (2) prevent release of information about administrative matters, and (3) limit justices to disclosing certain information to only the Judicial Tenure Commission or a "proper authority," rather than to the public at large. I believe that full and frank discussion on this important new rule will be had only when these questions are addressed.

CAVANAGH, J., concurs with KELLY, J.

Administrative Order 2006-8, MI R ADMIN Order 2006-8

Current with amendments received through December 1, 2009.

END OF DOCUMENT

[Attachment to Justice Weaver's statement explaining her non-participation.]

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April 30, 2010

Via First Class Mail

Corbin R. Davis, Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: Brady, et al v Attorney Grievance Commission
Supreme Court Docket No. 140409

Dear Mr. Davis:

Once again, I have been delegated by the petitioners in the above-referenced case, of which I am one, to communicate on their behalf with the Justices of the Supreme Court. Specifically, I have been asked to request that you inform the Justices that petitioners do not object to Justice Weaver continuing to participate in the case. We do not read her memorandum of April 20, 2010, as a request that we and the Attorney Grievance Commission waive her disqualification. We read that memorandum as simply informing all involved that she has decided to refuse herself unless the parties decide to waive her disqualification or refusal, which we do, although we do not believe that there is any impropriety or appearance of impropriety calling for her to step aside.

After considering all of the information provided to us, including the information provided by Justices Corrigan, Young and Markland, and the letter sent to the Justices by Mr. Muth, we are of the opinion that there is no basis, including even the appearance of impropriety, for Justice Weaver to disqualify herself. While our request for investigation of Mr. Fischer relates to his conduct in handling what became *In re Servaas*, the propriety or impropriety of that conduct is a completely independent issue. Therefore, the conversation between Justice Weaver and Mr. Muth regarding that case is unrelated to the above-referenced case. There is, therefore, no basis for any objection to Justice Weaver's continued participation. Hence, our decision.

Very truly yours,

Dennis C. Kolenda

DCK/cms
cc: Robert L. Agacinski

[Attachment to Justice Weaver's statement explaining her non-participation.]

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April 30, 2010

Justices of the Supreme Court
c/o Mr. Corbin R. Davis, Clerk of the Court
Michigan Hall of Justice
925 W. Ottawa Street
P.O. Box 30052
Lansing, Michigan

Re: Justice Weaver's Request to Remit Disqualification, *Brady, et al. v AGC*
Docket No. 140409

Dear Mr. Davis:

Please see the attached letter addressed to the Michigan Supreme Court, which I would appreciate you disseminating to the Justices. By separate communication from Dennis C. Kolenda the petitioners in this case will respond to the Request to Remit Disqualification.

Thank you for your assistance.

Very truly yours,

MILLER JOHNSON

By Jon R. Muth

JRM:kll
Enclosure

[Attachment to Justice Weaver's statement explaining her non-participation.]

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April 30, 2010

Justices of the Supreme Court
c/o Mr. Corbin R. Davis, Clerk of the Court
Michigan Hall of Justice
925 W. Ottawa Street
P.O. Box 30052
Lansing, Michigan

Re: Justice Weaver's Request to Remit Disqualification, *Brady, et al. v AGC*, Docket No. 140409

Dear Justices of the Supreme Court:

This letter responds to the letter of Justices Corrigan, Young and Markman dated April 28, 2010. It states the facts of my communication with Justice Weaver and establishes categorically that there was no violation of any of the Canons or Rules of Professional Conduct cited in that letter. I believe that these facts also clearly establish that there is no basis of Justice Weaver to consider disqualification, even under an appearance of impropriety standard. The rule has never been and cannot be that a conversation between a judge and a lawyer can have the effect of disqualifying the judge from participation in a case in which the lawyer has some involvement, when the subject matter of the case was never discussed and when the matter was not even in litigation when the conversation took place.

I have known and been friendly with Justice Elizabeth Weaver since our service together on the Michigan Trial Court Assessment Commission during 1997-98 . Since that time we have spoken or met socially on several occasions. As might be expected after a career of almost 39 years in the law, I am also friendly with and have had occasional social contact with other judges.

During the period from July 27, 2006 and March 30, 2007 (the dates of Miller Johnson's first and last time entries) I was retained by Justice Weaver to provide legal services. At no time after March 30, 2007 have I had an attorney-client relationship with Justice Weaver.

The Judicial Tenure Commission proceedings against Judge Servaas commenced on or about January 17, 2008. Judge Servaas was represented in that matter by Miller Johnson. The primary lawyer was my partner, James S. Brady.

While I was involved in the representation of Judge Servaas from the onset, my role was negligible until the hearing before the Judicial Tenure Commission. I presented the oral argument for Judge Servaas there on July 14, 2008 and in the Supreme Court on March 4, 2009.

[Attachment to Justice Weaver's statement explaining her non-participation.]

MILLER JOHNSON

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At the first occasion that the Supreme Court was presented with a motion from the Judicial Tenure Commission in *In re Servaas*, on January 23, 2008, and again on March 28, 2008, when a second motion was presented, Justice Weaver gave accurate formal notice to the parties and to the Court of her prior professional relationship with me. Miller Johnson discussed this disclosure with our client for purposes of determining how to respond. Neither party objected to Justice Weaver's participation in *In re Servaas* and the Judicial Tenure Commission affirmatively waived any objection.

In re Servaas was argued before the Supreme Court on March 4, 2009 and decided on July 31, 2009. Petitioner's Motion for Clarification or Rehearing was filed by the Judicial Tenure Commission on August 24, 2009. It was resolved by the Court's order of September 11, 2009, which closed the case.

Prior to the final decision of *In re Servaas*, I never spoke to or had any communication with Justice Weaver about that case or any related issue. The only communication I or anyone at Miller Johnson had with her, any member of the Supreme Court or the Court regarding that case prior to the final decision was through the filing of formal correspondence, pleadings and briefs.

Never from the time In re Servaas reached the Supreme Court on the Report and Recommendation of the Judicial Tenure Commission until its final decision did I speak to or communicate with Justice Weaver on any subject.

I saw Justice Weaver at the Pellows Reception at the State Bar meeting in Dearborn on September 16, 2009. We conversed for several minutes, mostly in the company of others. Since we had not met or spoken for many months and since I was planning to travel through Traverse City on October 1, 2009 on my return from a mediation in the Upper Peninsula, we made arrangements to meet for lunch.

I met Justice Weaver at her office shortly after noon on October 1 and we traveled to a downtown Traverse City restaurant for lunch. During our time together we discussed an array of subjects, ranging from Michigan State basketball and its Final Four prospects to current politics. During the conversation Justice Weaver told me something of the *Servaas* decision-making process. Justice Weaver's Disclosure Statement of April 20, 2010 accurately summarizes the content of the conversation. At the time of this conversation, *In re Servaas* had been finally and definitely resolved. There was no matter pending or impending anywhere as to which this could be considered an *ex parte* communication.

Shortly after my meeting with Justice Weaver I told Judge Servaas of the conversation as it related to his case.

[Attachment to Justice Weaver's statement explaining her non-participation.]

MILLER JOHNSON

Justices of the Supreme Court
c/o Mr. Corbin R. Davis, Clerk of the Court
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Page 3

The grievance against Mr. Fischer was filed on July 2, 2008. I was one of seventeen lawyers who signed the complaint. I was also the primary draftsman and it was transmitted to the Attorney Grievance Commission over my signature.

As of October 1, 2009 no action had been taken by the Attorney Grievance Commission with respect to the grievance and I had no knowledge of when it might be processed or what action might be taken. I had not at that date seen any answer to the grievance from the Respondent. Lacking any communication from the Grievance Administrator regarding the complaint, other than the fact that the matter was to be investigated following the resolution of *In re Servaas*, I knew that there was nothing then pending before any court or tribunal. I had no information that suggested that the matter would ever come to the attention of the Supreme Court. On November 17, 2009 the Attorney Grievance Commission dismissed the complaint against Mr. Fischer. On January 20, 2010 the instant Complaint for Superintending Control was filed in the Supreme Court.

During my conversation with Justice Weaver on October 1, 2009 there was no discussion of any aspect of the Fischer grievance. Nor was there any discussion regarding Mr. Fischer or his actions that led to the grievance or his role in the *Servaas* case. I have never at any time had any discussion or communication with Justice Weaver or any other member of the Court about anything pertaining to Mr. Fischer. At the oral argument of *In re Servaas* and in the briefing that preceded it, we made a conscious effort to say nothing of the grievance. We deemed it a separate and unrelated matter, the mention of which only had the potential to distract from already complex issues and to cast the Judicial Tenure Commission, for which Mr. Fischer advocated, in an unfair and compromised position. The only reason it came to the attention of the Court at the oral argument was on account of the statement made by Mr. Fischer.

From my knowledge of *In re Servaas* and my knowledge of the alleged facts in the Fischer grievance, the result in the *Servaas* case, much less how it was reached, has no relevance to any aspect of the Fischer grievance or the issue now presented to the Supreme Court on the Complaint for Superintending Control.

Very truly yours,

MILLER JOHNSON

By 
Jon R. Muth

JRM:kll
cc: Attorney Grievance Commission
Complainants on Fischer grievance

[Attachment to Justice Weaver's statement explaining her non-participation.]

PRESS RELEASE MAY 13, 2010 FROM JUSTICE ELIZABETH A. WEAVER
RE: MICHIGAN SUPREME COURT JUSTICE ELECTION POLITICS

Yesterday, May 12, 2010 three of my colleagues (Justices Corrigan, Young and Markman) revealed to the public that they sent a letter regarding me to the Judicial Tenure Commission. Any accusations by my colleagues that I have violated ethical rules are incorrect. I have done nothing wrong.

Nothing particularly surprises me anymore in the politics of Supreme Court Justice Elections. My colleagues have gone to great lengths to create a controversy. They are politically attacking me in an attempt to bully me into not running for re-election because they want this Court to be a "secret club." Such political maneuvering is unworthy of my colleagues. I was not elected by the people to be part of a "secret club," I have a constitutional right to not have my dissents suppressed and a duty to the people of this State to keep them informed about how this Court conducts its judicial business.

Justice Young has publicly stated that he objects to my serving on this Court, and I have no reason to believe that Justices Corrigan and Markman disagree. While three of my colleagues may not want me on this Court, many people throughout the State are urging me to run again this November 2010 and continue as a Justice of the Supreme Court of Michigan. I have not yet made a decision about whether to run for re-election. However, when I do make my decision it will be based on the best interest of the people, and not as a result of political bullying.

This type of Supreme Court Justice politics is another reason why we need to reform how Michigan Justices are elected and appointed. Justices should be independent, orderly, professional, fair, accountable, and truly restrained in the use of the Supreme Court's power. Justices should possess and apply common sense. Most importantly, Justices should insist upon transparency, not secrecy, when conducting the people's judicial business in an independent, non-partisan manner, regardless of any special interest groups or a Justice's personal agendas.

For information about my reform proposals, please see my personally funded website, www.justiceweaver.com. In addition, the segment from this Court's May 12 Public Administrative Conference pertinent to the unconstitutional "gag order" will soon be available on my website.

A copy of this Press Release will be available at www.justiceweaver.com.

[Attachment to Justice Weaver's statement explaining her non-participation.]

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June 8, 2010

Corbin R. Davis, Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
P.O. Box 30052
Lansing, MI 48909

Re: Brady, et al. v AGC
Supreme Court Docket No.140409

140409

Dear Mr. Davis:

Please communicate this responsive correspondence to the Justices regarding the above-captioned matter.

I have received the letter of June 1, 2010 from the Attorney Grievance Commission. Mr. McGlynn is correct that I received a copy of Mr. Fischer's answer on August 20, 2009 and that I filed a response on behalf of the complainants on September 11, 2009. That portion of my earlier letter wherein I state "I had not at that date seen any answer to the grievance from the Respondent" is inaccurate. I trusted my memory and not my file and for that inaccuracy I apologize.

That error, however, does not in any way impact the salient issues in the current debate. Mr. Fischer's answer to the complaint was lacking in any revelatory information that was not already known and was so non-responsive that it caused the complainants' to make note of his failure to adhere to the applicable rules in their response of September 1. The grievance was, as I indicated, under investigation on October 1 and the AGC had given me no indication of the likely outcome. Regardless of the state of my knowledge of the grievance process, it was not a subject I discussed with Justice Weaver.

Since this letter addresses errors in communication, I would be remiss if I did not bring to the Court's attention certain inaccurate information that has been reported in the press and attributed to members of the Court. I will give but three examples.

[Attachment to Justice Weaver's statement explaining her non-participation.]

MILLER JOHNSON

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1. An article by Barton Deiters in the Grand Rapids Press on May 14 reports: "Weaver gave 'tactical and strategic' information to Muth, who also served as Weaver's attorney in separate matters."

First, I obtained no tactical and strategic information and certainly none that would impact my role as one of seventeen complainants in the Fischer grievance. Second, the article suggests, but does not explicitly say, that at the time of the meeting I was serving as counsel to Justice Weaver. As you know from my prior communication, any attorney-client relationship had ended many months before.

2. An article in the Lansing State Journal on May 16 reports, allegedly quoting one Justice: "Justice Weaver appears to have broken this court's ... rule that a judge should not secretly help one side in a lawsuit."

First, the Servaas case was fully resolved at the time of the conversation, so no assistance was possible. Second, no "help" was provided for any other lawsuit (or even the Fischer grievance if that can be considered one.)

3. A report by Interlochen Public Radio on May 13 stated: "[T]he grievance is that Weaver revealed details of one of the Justices' closed-door sessions to a lawyer who used the information to craft a motion in an attorney discipline case before the Supreme Court." Specific quotes were attributed to certain Justices that support the impression that I was provided "strategic" information.

First, nothing in my conversation with Justice Weaver was of any possible use in making tactical or strategic decisions regarding the Fischer grievance. It has been clear from the outset that the resolution of the grievance is in no way conditioned upon or related to the result in the Servaas case. How or why individual justices voted in the Servaas case may speak to their views regarding the conduct of Judge Servaas, not that of Mr. Fischer. Second, I did not craft the Complaint for Superintending Control. Dennis Kolenda is its author. Third, nothing in the Complaint for Superintending Control requires tactical or strategic consideration of the attitudes of specific justices toward Judge Servaas or Mr. Fischer. It is addressed solely to the process of the Attorney Grievance Commission. Finally, to seek insight into the attitude of the justices toward Mr. Fischer, one need only go to the Court's web site and review the oral argument tape on the Servaas appeal. To the extent that any insight regarding the Fischer grievance might be

[Attachment to Justice Weaver's statement explaining her non-participation.]

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derived from utterances by members of the Court, they will we found there and in the written opinions in the Servaas case.

Hopefully, future public utterances by those who have knowledge of the details of the conversation Justice Weaver had with me will accurately reflect what was actually said – and not said. The Court may wish to consider simply releasing the actual content of the conversation so that the media will not be led to speculate and the public will be able to better judge the propriety of all involved.

Very truly yours,

MILLER JOHNSON

By 
Jon R. Muth

JRM:kll
cc: Attorney Grievance Commission

GR_DOCS 1809882v2 62920.972

Reconsideration Denied June 23, 2010:

BROOKS v STARR COMMONWEALTH, No. 139144; Court of Appeals No. 277469. Summary disposition at 486 Mich 910.

KELLY, C.J. and CAVANAGH and HATHAWAY, JJ., would grant reconsideration.

Summary Disposition June 25, 2010:

FRIEND v FRIEND, No. 139165; Court of Appeals No. 284330. On April 14, 2010, the Court heard oral argument on the application for leave to appeal the May 21, 2009 judgment of the Court of Appeals. On order of the Court, the motion to dismiss and the application are again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Houghton Circuit Court for clarification of its alimony award. On remand, the circuit court shall indicate whether its alimony award was intended to be alimony in gross or periodic alimony. Clarification is necessary in light of the conflicting directions the circuit court gave when rendering its spousal support award.

First, the award provides gradually decreasing rehabilitative payments to allow appellant to assimilate into the workforce and establish economic self-sufficiency. This suggests that the payments are periodic alimony because periodic alimony is designed to provide support and maintenance rather than to distribute property.[1]

Second, the award states that the annual sums payable to appellant "shall be subject to reduction over the term of the period for which alimony is awarded." This suggests that the award is periodic alimony because only periodic alimony is subject to modification. Alimony in gross is nonmodifiable.

Third, the uniform spousal support order states that, for tax purposes, the alimony payments will be deductible to the payer (appellee) and included in the income of the payee (appellant). This suggests that the award is periodic alimony because alimony in gross is not a taxable event to the payee. However, periodic alimony is taxable to the payee.

Fourth, no contingencies such as death or remarriage are included in the spousal support award. This suggests that it is alimony in gross. Periodic alimony is typically terminated on the death or remarriage of the recipient. Alimony in gross is not.

As a precondition of the trial court clarifying the nature of its award, appellant shall purge herself of any outstanding findings of contempt in the circuit court within 90 days of the date of this order. 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.

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[1] See *Staple v Staple*, 241 Mich App 562, 566 (2000) ("If . . . alimony is either a lump sum or a definite sum to be paid in installments, [it] is . . . alimony in gross [which is] not really alimony intended for the maintenance of a spouse, but rather is in the nature of a division of property.").

The motion to settle jurisdiction is denied as moot.

We do not retain jurisdiction.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the Court's order remanding to the trial court on the alimony issue and otherwise denying the defendant mother's application for leave to appeal. Defendant has repeatedly violated the trial court's orders concerning custody and parenting time, thus depriving the plaintiff father of any contact or relationship with his children for nearly three years. The trial court has found defendant in contempt of court at least twice and issued a bench warrant for her arrest. The majority reaches the merits of defendant's application while she continues to defy the trial court's orders, including the very order from which she seeks relief. I would instead adopt the "fugitive disentitlement doctrine" and condition our consideration of defendant's application on her compliance with the trial court's orders.

The parties' November 29, 2007 judgment of divorce included counseling and parenting time provisions with which defendant failed to comply. Plaintiff first filed a motion for an order to show cause in February 2008. After a March 28, 2008 hearing at which defendant failed to appear, the trial court found defendant in contempt of court. In an April 21, 2008 opinion and order, the trial court ordered the parties and children to appear at the office of the counselor specified in the divorce judgment within 10 days. After defendant failed to comply with that order, plaintiff filed a second motion to show cause in July 2008. The court ordered defendant to appear at a hearing on September 15, 2008. After she failed to appear, the court held her in contempt and issued a warrant for her arrest on December 8, 2008.

At oral argument in this Court on April 14, 2010, plaintiff's counsel stated that, because of defendant's refusal to comply with custody and parenting time orders, plaintiff's last meaningful visitation with his children took place in August 2007. As a result, plaintiff has "basically no relationship" with his children at this point. Yet plaintiff has apparently paid, and defendant has apparently continued to collect, spousal support and child support under the terms of the judgment of divorce. In her application for leave to appeal, defendant raises several challenges to the divorce judgment.

Defendant has "wil[l]fully and purposely evaded legal processes and contumaciously defied and nullified every attempt to enforce the judgments and orders" of the trial court. *MacPherson v MacPherson*, 13 Cal 2d 271, 277 (1939). The trial court's contempt orders and bench warrant amount to a formal adjudication of defendant's nonappearance. I believe that defendant's fugitive status "disentitles [her] to call upon the resources of the Court for determination of h[er] claims." *Molinaro v New Jersey*, 396 US 365, 366 (1970). I would not entertain her request for legal redress "while [s]he stands in an attitude of contempt to legal orders and processes of the courts of this state." *MacPherson*, *supra*. Instead, I would adopt the approach of the Arizona Supreme Court in *Stewart v*

Stewart, 91 Ariz 356 (1962),[1] and require defendant to comply with the trial court's orders within a specified period of time or face dismissal of her application for leave to appeal. I would give defendant 56 days to comply before dismissing her application.

YOUNG and MARKMAN, JJ., joined the statement of CORRIGAN, J.

In re HANSEN, No. 139507; reported below: 285 Mich App 158. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we hereby vacate the July 21, 2009 judgment of the Court of Appeals, and we remand this case to the Manistee Circuit Court Family Division for reconsideration of its decision to terminate the respondent's parental rights in light of *In re Mason*, 486 Mich 1042 (2010).

We do not retain jurisdiction.

WEAVER, J. (*dissenting*). I dissent from the majority's decision to vacate the judgment of the Court of Appeals and to remand this case to the trial court for reconsideration in light of *In re Mason*, 486 Mich 142 (2010). I continue to believe that *In re Mason* was wrongly decided and even if that case was not wrongly decided, it does not apply to the different facts in this case in which leave was improvidently granted. I would deny leave and allow the decision by the Court of Appeals terminating the respondent's parental rights to stand.

Orders Granting Oral Argument on Cases Pending on Application for Leave to Appeal June 25, 2010:

PEOPLE v BREIDENBACH, No. 140153; Court of Appeals No. 294319. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address: (1) whether the rule of *People v Helzer*, 404 Mich 410 (1978), should be reconsidered; (2) whether the defendant waived or forfeited his right to a second jury's determination of his status as a sexual delinquent; and (3) whether any error was harmless or harmless beyond a reasonable doubt. The parties may file supplemental briefs within 56 days of the date of this order, but they should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae.

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[1] In *Stewart*, the appellant husband challenged the parties' divorce judgment. The Arizona Supreme Court agreed with the "[t]he majority rule" that an appellate court has discretion to dismiss an appeal when the appellant has violated a trial court order. *Stewart*, 91 Ariz at 358. The court gave the appellant 30 days to comply with all of the trial court's orders. *Id*. at 360. "If at the end of that period he continues to defy those orders his appeal herein will be dismissed." *Id*.

Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v MCCAULEY, No. 140422; reported below: 287 Mich App 158. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). At oral argument, the parties shall address whether a defendant can raise a challenge to the effective assistance of his attorney during the plea bargaining process where the defendant rejected the plea offer and subsequently received a fair trial, and, if so, what remedies should be available to the defendant. The parties may file supplemental briefs within 56 days of the date of this order, but they should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

In re PM, No. 140983; Court of Appeals No. 291874. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties may file supplemental briefs within 56 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Granted June 25, 2010:

MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP v NAFTALY, No. 140814; reported below: 286 Mich App 616. The application for leave to appeal the December 29, 2009 judgment of the Court of Appeals is considered, and it is granted, limited to the issue of whether the circuit courts have subject matter jurisdiction over appeals from a decision of the state tax commission regarding property classification.

We further order that this case be argued and submitted to the Court together with the case of *Iron Mountain Information Management, Inc v Robert Naftaly, et al* (Docket Nos. 140817-140824), at such future session of the Court as both cases are ready for submission.

IRON MOUNTAIN INFORMATION MANAGEMENT, INCORPORATED v NAFTALY, Nos. 140817 -24; reported below: 286 Mich App 616. The application for leave to appeal the December 29, 2009 judgment of the Court of Appeals is considered, and it is granted, limited to the issue of whether the circuit courts have subject matter jurisdiction over appeals from a decision of the state tax commission regarding property classification.

We further order that this case be argued and submitted to the Court together with the case of *Midland Cogeneration Venture Ltd v Robert Naftaly, et al* (Docket No. 140814), at such future session of the Court as both cases are ready for submission.

Leave to Appeal Denied June 25, 2010:

PEOPLE v BALES, No. 139956; Court of Appeals No. 292320.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

WEAVER, J. (*concurring*). I concur in this Court's denial order. I write additionally to recommend this Court open an administrative file to consider whether sanctions should be imposed on an appellate counsel who claims that his own trial work was "ineffective" and would include consideration of a requirement that fees be refunded when there has been a judicial finding of ineffectiveness.

CORRIGAN, J. (*concurring).* I concur in the Court's denial order but I would refer counsel to the Attorney Grievance Commission. Attorney Frank Eaman was retained to represent defendant at trial and on direct appeal. In the motion for relief from judgment now before us, Mr. Eaman claims on defendant's behalf that he rendered ineffective assistance of counsel because he failed to object to several claimed instances of prosecutorial misconduct. Mr. Eaman also now claims that he rendered ineffective assistance on direct appeal because he failed to raise the issue of his own ineffective assistance as trial counsel. MRPC 1.1 provides that "[a] lawyer shall provide competent representation to a client."[1] In

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[1] See also MRPC 1.7(b) concerning conflicts of interest. In *Matter of Sexson*, 666 NE 2d 402, 403-404 (Ind, 1996), the Indiana Supreme Court held that the respondent attorney violated the analogous Indiana rule of professional conduct by "represent[ing] a client when he was limited by his own interests, to wit, arguing his own ineffectiveness at the trial level . . . ."

In addition, in *Hill v Mississippi*, 749 So 2d 1143, 1149-1150 (Miss App, 1999), the Mississippi Court of Appeals opined that counsel's claim of his own ineffectiveness was "problematic and inappropriate." The court believed that the claim implicated four rules of professional conduct: Miss. Rules of Professional Conduct 1.1 (1998) ("A lawyer shall provide competent representation to a client."); Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); Rule 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests . . . ."); and Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous . . . ."). The *Hill* court nonetheless proceeded to review and reject the defendant's ineffective assistance claims. *Id*. at 1150-1151.

In *Archer v Mississippi*, 986 So 2d 951 (2008), the Mississippi Supreme Court, quoting *Hill* and *Lyle v Mississippi*, 908 So 2d 189 (Miss App, 2005), agreed that self-ineffectiveness claims are prob-

addition, I would open an administrative file to consider whether sanctions should be imposed on an appellate attorney who claims that his own trial work was "ineffective."

YOUNG and MARKMAN, JJ., joined the statement of CORRIGAN, J.

PEOPLE v SIRDAREAN ADAMS, No. 140384; Court of Appeals No. 287034.

KELLY, C.J., and CAVANAGH and CORRIGAN, JJ., would remand this case to the Court of Appeals.

GRIEVANCE ADMINISTRATOR v BAKER, No. 140619.

CORRIGAN and YOUNG, JJ., would grant leave to appeal.

WEAVER, J., not participating. I abstain from voting on any items dealing with the Judicial Tenure Commission (JTC) and/or the Attorney Grievance Commission (AGC) to avoid any appearance that I could be trying to affect the outcome of the referrals of me to the JTC and AGC by Justices CORRIGAN, YOUNG and MARKMAN.

In re GRAY, No. 141043; Court of Appeals No. 294426.

PEOPLE v DEVON HOWARD, Nos. 141070 and 141071; Court of Appeals Nos. 288723 and 288724.

In re BOWMAN, No. 141112; Court of Appeals No. 29259.

Summary Disposition June 28, 2010:

In re ABDULLAH, No. 139586; Court of Appeals No. 284905. On March 10, 2010, the Court heard oral argument on the application for leave to appeal the July 21, 2009 judgment of the Court of Appeals. On March 24, 2010, the Court ordered the trial judge in the Wayne Circuit Court, Juvenile Division, to state the specific statutory provision pursuant to which the juvenile respondent was adjudicated delinquent. On order of the Court, the trial court having now filed its answer, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and reinstate the adjudication of delinquency, for the reason that the juvenile was adjudicated delinquent pursuant to MCR 750.520d(1)(c), based on the victim's incapacity.

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lematic. It held that, except in extraordinary circumstances where ineffectiveness is clear from the record, a claim of ineffectiveness of trial counsel, where the defendant is represented on direct appeal by his trial counsel, should only be reviewed in a post-conviction proceeding. *Id*. at 956. The court dismissed the defendant's ineffective assistance of counsel claim without prejudice, stating that he would be permitted to raise the issue in a post-conviction proceeding. *Id*. at 957. Thus, *Archer* abrogated *Hill* insofar as *Hill* reviewed the ineffective assistance claim on direct appeal. It is not clear whether the *Archer* court contemplated the possibility that the same allegedly ineffective attorney may represent the defendant in the post-conviction proceeding.

Order on Motion for Rehearing June 28, 2010:

PEOPLE v RICHMOND, No. 136648; Court of Appeals No. 277012. On order of the Court, the prosecution's motion for rehearing of this Court's opinion, 486 Mich 29 (2010), is granted in part. We grant the prosecution's request for clarification about how it may proceed against defendant in light of this Court's decision.

The prosecution may refile the charges against defendant and, if necessary, file an interlocutory appeal to challenge the underlying suppression ruling. As the dissent in *Richmond* explained, the circuit court's suppression ruling is subject to correction because of the intervening change in the law occasioned by our decision in *People v Keller*, 479 Mich 467 (2007). Slip op at 3-4. See also *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 38 (1995) (exception to law of the case doctrine); *People v Johnson*, 191 Mich App 222, 225 (1991) (exception to collateral estoppel doctrine). This Court's opinion vacates the Court of Appeals' decision, which corrected the circuit court's ruling in light of *Keller*, on jurisdictional grounds, not on the merits.

Moreover, we note that the prosecutor has non-frivolous arguments such that she can appropriately seek to reinstate her case. The comments to MRPC 3.1 define "frivolous" as "an action taken primarily for the purpose of harassing or maliciously injuring a person." In light of the intervening change in the law in *Keller*, in view of the fact that the prosecutor has received a unanimous Court of Appeals decision in her favor, and in view of the clarifying nature of the instant decision, we believe that reasonable arguments remain available to the prosecutor to explain why reinstatement of charges under these circumstances is appropriate.

In all other respects, the motion for rehearing is denied.

CORRIGAN, J. (*concurring in part and dissenting in part*). I would grant the prosecution's motion for rehearing, and upon rehearing, would affirm for the reasons stated in my dissenting opinion in *People v Richmond*, 486 Mich 29, 42 (2010). As the prosecutor suggests in her motion for rehearing, the majority opinion in *Richmond* creates an absurd situation: a prosecutor may *accept* a dismissal of charges but may *not move* for such a dismissal without rendering the case "moot." When a prosecutor maintains legally cognizable and live interests that can be vindicated only through appellate review, whether a claim is "moot" does not arbitrarily turn on whether the prosecutor, rather than the defendant or the trial court, moves to dismiss the case.

I concur in the Court's order of clarification, however, because I agree that the prosecution may proceed in the manner explained in the order. The prosecutor clearly has a non-frivolous case that she rightfully wishes to pursue. Thus, where double jeopardy grounds do not bar it, this order preserves a prosecutor's statutory right of appeal and ensures that the administration of justice will not be forever thwarted by the rule created in *Richmond*.

KELLY, C.J., and CAVANAGH, J., would deny rehearing.

Leave to Appeal Denied June 28, 2010:

PEOPLE v EL-AMIN, No. 138994; Court of Appeals No. 289406.

PEOPLE v CHAPMAN, No. 139349; Court of Appeals No. 291649. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ARTZ, No. 140049; Court of Appeals No. 294013. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v HAMPTON, No. 140056; Court of Appeals No. 293951. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v CURTIS BAKER, No. 140057; Court of Appeals No. 293140. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v ELBERT GILBERT, No. 140087; Court of Appeals No. 292323. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v YARBROUGH, No. 140108; Court of Appeals No. 292427. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v KELLY, No. 140138; Court of Appeals No. 294344. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v WASHINGTON, No. 140159; Court of Appeals No. 292891. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v WARE, No. 140168; Court of Appeals No. 292380. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v HERNANDEZ, No. 140222; Court of Appeals No. 293425.

PEOPLE v AQUARIUS WALKER, No. 140224; Court of Appeals No. 285635.

PEOPLE v CALHOUN, No. 140279; Court of Appeals No. 294011. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BULLITT, No. 140287; Court of Appeals No. 293689. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v HARRISON, No. 140317; Court of Appeals No. 293690. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v HARP, No. 140329; Court of Appeals No. 293665. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v KENT, No. 140341; Court of Appeals No. 293803.

TATE v DEPARTMENT OF CORRECTIONS, No. 140347; Court of Appeals No. 294071.

PEOPLE v LOVEJOY, No. 140363; Court of Appeals No. 293273. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BRAYBOY, No. 140381; Court of Appeals No. 293550. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v MCGORE, No. 140386; Court of Appeals No. 293610.

PEOPLE v MALLORY, No. 140393; Court of Appeals No. 293236. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v NORTHRUP, No. 140412; Court of Appeals No. 294602.

PEOPLE v MARTI, No. 140414; Court of Appeals No. 295298. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v TURRENTINE, No. 140420; Court of Appeals No. 293786. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v VAUGHN HILL, No. 140425; Court of Appeals No. 293812. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v MONK, No. 140426; Court of Appeals No. 293656. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

HI-LO HEIGHTS LAKEFRONT PROPERTY OWNERS ASSOCIATION v COLUMBIA TOWNSHIP, No. 140431; Court of Appeals No. 286493.

PEOPLE v CLINT MCGOWAN, No. 140432; Court of Appeals No. 140432.

PEOPLE v HORN, No. 140434; Court of Appeals No. 294908. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

GENNA v JACKSON, No. 140445; reported below: 286 Mich App 413.

PEOPLE v BLACKMON, No. 140450; Court of Appeals No. 294572.

TAYLOR v KENT RADIOLOGY, No. 140466; reported below: 286 Mich App 490.

PEOPLE v CHRISTIAN PHILLIPS, No. 140473; Court of Appeals No. 293442. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v STEPHEN MITCHELL, No. 140477; Court of Appeals No. 293765. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v GRIFFES, No. 140481; Court of Appeals No. 275197.

PEOPLE v RAMON JONES, No. 140482; Court of Appeals No. 294684.

PEOPLE v PERIN, No. 140500; Court of Appeals No. 293189. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DUNLAP, No. 140501; Court of Appeals No. 294407. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v ELIJAH COOK, No. 140505; Court of Appeals No. 292679.

PEOPLE v MCCLURE, No. 140506; Court of Appeals No. 294845. Defendant's motion for relief from judgment is prohibited by MCR 6.502(G).

PEOPLE v MARANIAN, No. 140507; Court of Appeals No. 294973. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v DEJUAN EDWARDS, No. 140519; Court of Appeals No. 294332. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BOTELLO, No. 140521; Court of Appeals No. 294497. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BRANDON EDWARDS, No. 140529; Court of Appeals No. 294217. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v HEATH MCGOWAN, No. 140531; Court of Appeals No. 274829.

PEOPLE v PHILIP THOMPSON, No. 140532; Court of Appeals No. 294460. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v BRANDON JOHNSON, No. 140544; Court of Appeals No. 295114. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v JAMES JONES, No. 140547; Court of Appeals No. 294862.

PEOPLE v LUSTER, No. 140548; Court of Appeals No. 287142.

PEOPLE v JAMES JONES, No. 140549; Court of Appeals No. 294863.

PEOPLE v SUTHERLAND, No. 140552; Court of Appeals No. 295224. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v NETT, No. 140553; Court of Appeals No. 290149.

PEOPLE v BRADLEY, No. 140556; Court of Appeals No. 294900. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v SAMS, No. 140557; Court of Appeals No. 292995. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v MICHAEL ANTHONY THOMPSON, No. 140571; Court of Appeals No. 287997.

PEOPLE v BAYDOUN, No. 140579; Court of Appeals No. 281972.

PEOPLE v ANDRE BROWN, No. 140580; Court of Appeals No. 294509. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v FREDERICK WILSON, No. 140581; Court of Appeals No. 285886.

PEOPLE v FORD, No. 140585; Court of Appeals No. 294026. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v HAMILTON, No. 140586; Court of Appeals No. 295024. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v ORICK, No. 140587; Court of Appeals No. 293950. Defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

PEOPLE v POOLE, No. 140589; Court of Appeals No. 284245.

PEOPLE v LAMAR JONES, No. 140594; Court of Appeals No. 285170.

PEOPLE v WISE, No. 140598; Court of Appeals No. 286957.

KINNEY v DEPARTMENT OF CORRECTIONS, No. 140610; Court of Appeals No. 294294.

PEOPLE v RAKHAMIMOV, No. 140616; Court of Appeals No. 295586.

FISHER v SOUTHFIELD PUBLIC SCHOOLS, No. 140626; Court of Appeals No. 288106.

LEWIS v ST JOSEPH COUNTY MEDICAL CONTROL AUTHORITY, No. 140646; Court of Appeals No. 283741.

PEOPLE v DWAYNE WILLIAMS, No. 140648; Court of Appeals No. 295088.

PEOPLE v LAJONATHAN WADE, No. 140656; Court of Appeals No. 295052.

PEOPLE v HANEY, No. 140657; Court of Appeals No. 289382.

PEOPLE v CAMEL, No. 140664; Court of Appeals No. 290270.

LIGHTNINGBOLT v DEPARTMENT OF CORRECTIONS, No. 140665; Court of Appeals No. 290828.

In re DOBSON TRUST (DOBSON v SOUTHERN MICHIGAN BANK & TRUST), No. 140669; Court of Appeals No. 285248.

PEOPLE v PIERCE, No. 140671; Court of Appeals No. 293993.

PEOPLE v NOBLES, No. 140672; Court of Appeals No. 293121.

PEOPLE v DERRICK JACKSON, No. 140674; Court of Appeals No. 295373.

PEOPLE v KENNEDY, No. 140675; Court of Appeals No. 294126.

PEOPLE v PIPPEN, No. 140676; Court of Appeals No. 286325.

DEVLIN v ATTORNEY GENERAL, No. 140680; Court of Appeals No. 287827.

PEOPLE v DEWUAN SIMMONS, No. 140689; Court of Appeals No. 295345.

PEOPLE v PAUPORE, No. 140692; Court of Appeals No. 287475.

PEOPLE v MISCHLEY, No. 140695; Court of Appeals No. 295147.

PEOPLE v BOYER, No. 140702; Court of Appeals No. 294962.

PEOPLE v BREEDING, No. 140703; Court of Appeals No. 289225.

PEOPLE v SCARBOROUGH, No. 140705; Court of Appeals No. 286545.

PEOPLE v PACE, No. 140707; Court of Appeals No. 294717.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v STEELE, No. 140710; Court of Appeals No. 285641.

PEOPLE v VASQUEZ, No. 140712; Court of Appeals No. 291589.

PEOPLE v KEVIN HILL, No. 140714; Court of Appeals No. 287226.

PEOPLE v CLEMENT, No. 140716; Court of Appeals No. 294683.

PEOPLE v POSEY, No. 140719; Court of Appeals No. 289820.

SPIVEY v POMEROY, No. 140724; Court of Appeals No. 293846.

BALCOM MARINE CENTRES INCORPORATED v HOEKSEMA, No. 140726; Court of Appeals No. 288292.

PHINISEE v GENERAL MOTORS CORPORATION, No. 140727; Court of Appeals No. 295119.

PEOPLE v GERBER, No. 140728; Court of Appeals No. 295509.

WELCH v KHOURY, No. 140732; Court of Appeals No. 285106.

SMITH v DEPARTMENT OF CORRECTIONS, No. 140734; Court of Appeals No. 284744.

PEOPLE v PIRKEL, No. 140743; Court of Appeals No. 294032.

GAMBLE v FARMERS INSURANCE EXCHANGE, No. 140745; Court of Appeals No. 290119.

PEOPLE v GORDON-WOOD, No. 140746; Court of Appeals No. 287515.

PEOPLE v VANKLAVEREN, No. 140747; Court of Appeals No. 286683.

PEOPLE v RODGERS, No. 140748; Court of Appeals No. 295826.

PEOPLE v LYONS, No. 140753; Court of Appeals No. 288583.

PEOPLE v NICHOLSON, No. 140754; Court of Appeals No. 294391.

PEOPLE v ERIC JOHNSON, No. 140755; Court of Appeals No. 289289.

PEOPLE v ROCCA, No. 140756; Court of Appeals No. 286682.

PEOPLE v JERRY LONG, No. 140757; Court of Appeals No. 284499.

PEOPLE v JAMES CRAWFORD, No. 140762; Court of Appeals No. 284853.

PEOPLE v PATTERSON, No. 140764; Court of Appeals No. 295684.

PEOPLE v CLARK, No. 140765; Court of Appeals No. 289828.

PEOPLE v MACON, Nos. 140767, 140768, and 140769; Court of Appeals Nos. 286662, 286663, and 286665.

PEOPLE v JOHN DOUGLAS JONES, No. 140770; Court of Appeals No. 287910.

PEOPLE v THOMAS SIMMONS, No. 140771; Court of Appeals No. 288047.

PEOPLE v TODD PORTER, No. 140778; Court of Appeals No. 294883.

PEOPLE v FOURCHA, No. 140781; Court of Appeals No. 288214.

PEOPLE v SAVAGE, No. 140782; Court of Appeals No. 295998.

PEOPLE v IVEY, No. 140785; Court of Appeals No. 288190.

PEOPLE v LASCO, No. 140789; Court of Appeals No. 290603.

PEOPLE v DENA THOMPSON, No. 140792; Court of Appeals No. 286849.

WORLD SAVINGS BANK v NASSAR, No. 140794; Court of Appeals No. 288904.

PEOPLE v WINSTON, No. 140795; Court of Appeals No. 293214.

PEOPLE v PUGH, No. 140796; Court of Appeals No. 295526.

PEOPLE v PROUT, No. 140799; Court of Appeals No. 289900.

PEOPLE v MALCOLM WALLACE, No. 140801; Court of Appeals No. 296046.

PEOPLE v CLAY, No. 140802; Court of Appeals No. 286478.

DEVLIN v CIVIL SERVICE COMMISSION, No. 140813; Court of Appeals No. 294131.

PEOPLE v TERRENCE SHAW, No. 140816; Court of Appeals No. 287224.

PEOPLE v BARRY ADAMS, No. 140825; Court of Appeals No. 282638.

PEOPLE v LATIMER, No. 140826; Court of Appeals No. 287791.

PEOPLE v STEGALL, No. 140827; Court of Appeals No. 288703.

PEOPLE v STACHNIK, No. 140828; Court of Appeals No. 295823.

PEOPLE v PATRICK SMITH, No. 140829; Court of Appeals No. 288519.

PEOPLE v BEAVERS, No. 140830; Court of Appeals No. 294963.

DEVLIN v CIVIL SERVICE COMMISSION, No. 140831; Court of Appeals No. 287826.

PEOPLE v MOORER, No. 140834; Court of Appeals No. 295529.

MORRIS v HOMEQ SERVICING CORPORATION, No. 140835; Court of Appeals No. 288631.

PEOPLE v DANIELS, No. 140836; Court of Appeals No. 287769.

PEOPLE v WOLFE, No. 140837; Court of Appeals No. 288672.

PEOPLE v DAWKINS, No. 140838; Court of Appeals No. 289065.

PEOPLE v MORSE, No. 140839; Court of Appeals No. 296110.

PEOPLE v GLENN, No. 140844; Court of Appeals No. 295678.

PEOPLE v BRIAN MILLER, No. 140849; Court of Appeals No. 286771.

PEOPLE v MCCONNELL, No. 140852; Court of Appeals No. 289463.

PEOPLE v RYNBERG, No. 140853; Court of Appeals No. 295739.

PEOPLE v KRUPA, No. 140854; Court of Appeals No. 295610.

PEOPLE v LEOS, No. 140855; Court of Appeals No. 287216.

PEOPLE v MCADORY, No. 140856; Court of Appeals No. 295853.

PEOPLE v JASON GILBERT, No. 140857; Court of Appeals No. 289001.

STATE FARM FIRE & CASUALTY COMPANY v BAY CITY ELECTRIC LIGHT & POWER, No. 140858; Court of Appeals No 289466.

SHARP v DEPARTMENT OF CORRECTIONS, No. 140860; Court of Appeals No. 290154.

PEOPLE v DESHAWN PARKER, No. 140874; Court of Appeals No. 284309.

PEOPLE v HARBIN, No. 140909; Court of Appeals No. 288381.

PEOPLE v LUNA, No. 140911; Court of Appeals No. 287178.

PEOPLE v LATTIMORE, No. 140916; Court of Appeals No. 290042.

PEOPLE v KEVIN WILLIAMS, No. 140931; Court of Appeals No. 296086.

PEOPLE v PRITCHETT, No. 140935; Court of Appeals No. 295775.

GRIEVANCE ADMINISTRATOR v SMITH, No. 140939.

PEOPLE v DOEHRMAN, No. 140940; Court of Appeals No. 294774.

PEOPLE v NEWSON, No. 140942; Court of Appeals No. 289646.

WAGLE v DEPARTMENT OF CORRECTIONS, No. 140961; Court of Appeals No. 295112.

WOODWARD NURSING CENTER INC v MEDICAL ARTS, INCORPORATED, No. 140963; Court of Appeals No. 295297.

PEOPLE v SHELTON, No. 140965; Court of Appeals No. 295958.

JACKMAN v JACKMAN, No. 141008; Court of Appeals No. 297350.

HILER v COOPER, Nos. 141020 and 141021; Court of Appeals Nos. 294233 and 294234.

HOME-OWNERS INSURANCE COMPANY v FOWLER BUILDING COMPANY, No. 141061; Court of Appeals No. 295105.

PEOPLE v ARNOLD, No. 141110; Court of Appeals No. 296306.

Leave to Appeal Before Decision by the Court of Appeals Denied June 28, 2010:

PEOPLE v TIMOTHY BROWN, No. 141027; Court of Appeals No. 297479.

PEOPLE v MUTCH, No. 141162; Court of Appeals No. 298044.

MCCARTHY v SOSNICK, No. 141182; Court of Appeals No. 295784.

MCCARTHY v SOSNICK, No. 141184; Court of Appeals No. 295782.

Superintending Control Denied June 28, 2010:

GALLANT v ATTORNEY GRIEVANCE COMMISSION, No. 140872.

Reconsideration Denied June 28, 2010:

PEOPLE v PATTON, No. 139684; reported below 285 Mich App 229. Leave to appeal denied at 485 Mich 1119.

ST FRANCIS HOSPITAL OF ESCANABA v HOME-OWNERS INSURANCE COMPANY, No. 139919; Court of Appeals No. 292530. Leave to appeal denied at 485 Mich 1128.

LEIGHIO v LOVELAND INVESTMENTS, Nos. 140173 and 140174; Court of Appeals Nos. 285393 and 285394. Leave to appeal denied at 485 Mich 1129.

PEOPLE v MANN, No. 140205; Court of Appeals No. 281673. Leave to appeal denied at 486 Mich 901.

OLIVARES v WORKERS COMPENSATION MAGISTRATE, No. 140561; Court of Appeals No. 294722. Leave to appeal denied at 486 Mich 904.

PEOPLE v BOLDEN, No. 140620; Court of Appeals No. 294285. Leave to appeal denied at 486 Mich 904.

Summary Dispositions July 2, 2010:

In re LOGAN, No. 139546. The Judicial Tenure Commission has issued a Decision and Recommendation, to which the respondent, 61st District Court Judge Benjamin H. Logan, II, consents. It is accompanied by a settlement agreement, in which the respondent waived his rights, stipulated to findings of fact and conclusions of law, and consented to a sanction that would be no greater than a public censure.

In resolving this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000):

> [E]verything else being equal:
>
> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

In the present case, those standards are being applied in the context of the following findings of fact of the Judicial Tenure Commission, which, following our de novo review, we adopt as our own:

1. Respondent is, and was on June 17, 2008, the Chief Judge of the 61st District Court in the City of Grand Rapids, Kent County, Michigan.

2. On June 17, 2008, an altercation took place at the Grand Rapids home of [Kent County Commissioner] Mr. James Vaughn, which involved Mr. Vaughn, Cassandra Mitchell and Ida Cross. As a result of the incident, Ms. Cross required medical treatment.

3. That same day, Mr. Vaughn was arrested by officers of the Grand Rapids Police Department (GRPD) on a probable cause charge of aggravated domestic assault and taken to the Kent County Correctional Facility (KCCF). He was booked at approximately 9:26 a.m.

4. A few hours later, [Kent County Commissioner] Mr. Paul Mayhue visited Mr. Vaughn at KCCF.

5. Respondent is an elected official in the City of Grand Rapids (Kent County), and James Vaughn is an elected member of the Kent County Board of Commissioners. Paul Mayhue served on that Board with Mr. Vaughn until Mr. Mayhue's defeat in the August, 2008 primary.

6. Respondent and Mr. Mayhue engaged in a series of telephone calls on June 17, 2008, most of which while Mr. Vaughn was incarcerated. The identity of the callers and times are as follows:

(a) Mr. Mayhue to Respondent at approximately 12:22 p.m.;

(b) Respondent to Mr. Mayhue at approximately 1:41 p.m.;

(c) Respondent to Mr. Mayhue at approximately 1:48 p.m.;

(d) Respondent to Mr. Mayhue at approximately 2:03 p.m.;

(e) Mr. Mayhue to Respondent at approximately 2:08 p.m.;

(f) Respondent to Mr. Mayhue at approximately 9:15 p.m.;

(g) Mr. Mayhue to Respondent at approximately 9:40 p.m.

7. Telephone company records reflect that:

(a) Most of the calls lasted a minute or less, and resulted in voice mail messages being left or in no contact at all; and that

(b) The phone call from Mr. Mayhue to Respondent at 2:08 p.m. lasted approximately 15 minutes.

8. Respondent was not handling arraignments at the 61st District Court on June 17, 2008, when a person in Mr. Vaughn's situation could expect to be arraigned.

9. While Mr. Vaughn was incarcerated, Respondent directed his staff to obtain a copy of the initial police report, which was obtained by accessing the GRPD's computer system at the 61st District Court.

10. At approximately 2:30 p.m., Respondent directed that a fax be sent to the KCCF reporting that he had sent a personal recognizance bond for Mr. Vaughn in the amount of $5,000 with conditions, among others, that he have no contact with either Cassandra Mitchell or Ida Cross. The fax was sent as directed.

11. Respondent did not contact the GRPD for additional information, but relied on the initial investigation report in determining to authorize the bond.

12. At 2:50 p.m. Mr. Vaughn was released from the KCCF upon agreeing to the terms of the bond set by Respondent.

13. Shortly after Mr. Vaughn's release on bond, the GRPD telephoned the KCCF to authorize his release pending further investigation. The detective in charge of the investigation was unaware that Mr. Vaughn had been released on bond.

14. Respondent did not direct that the GRPD be informed of the bond he had set for Mr. Vaughn, but it is the practice of the 61st District Court to fax to the Department all special bond conditions like those which were set by Respondent for Mr. Vaughn, which was done at the same time the KCCF was informed of the bond. The fax was sent, as is common practice, to the GRPD Warrant Office, not the investigating detective.

15. Mr. Vaughn was subsequently charged in July, 2008, with and was convicted in March, 2009, of aggravated assault and domestic violence by a jury. Ms. Mitchell was convicted of assault and battery. On April 17, 2009, Mr. Vaughn was sentenced to a term of incarceration in the Kent County Jail.

We also adopt the Commission's conclusion that these facts demonstrate, by a preponderance of the evidence, that respondent breached the standards of judicial conduct as set forth in the settlement agreement:

16. The conduct described above created the appearance of impropriety, which erodes public confidence in the judiciary, in violation of [the Michigan Code of Judicial Conduct], Canon 2A, and, as such, constitutes:

(a) Misconduct in office as defined by the Michigan Constitution 1963, as amended, Article VI, § 30 and MCR 9.205;

(b) Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article VI, § 30 and MCR 9.205;

(c) A failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the [MCJC,] Canon 1;

(d) A failure to conduct himself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, contrary to MCJC, Canon 2B; and

(e) Conduct that exposes the court to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(A)(2).

After reviewing the recommendation of the Judicial Tenure Commission, the settlement agreement, the standards set forth in *Brown*, and the above findings of fact and conclusions of law, we accept the recommendation of the Commission and order that Honorable Benjamin H. Logan, II be publicly censured. This order stands as our public censure.

MARKMAN, J. (*concurring in part and dissenting in part*). I agree that, at a minimum, the discipline imposed by this Court's order is appropri-

ate. But I would remand to the Judicial Tenure Commission (JTC) for further explanation to determine if significantly greater discipline is appropriate.

By letter of May 3, 2010, the Chairperson of the JTC informed this Court that the JTC had not determined whether respondent testified falsely because that count was effectively dismissed as a result of the settlement agreement, and that she could not provide this Court with any further information because this would be outside the scope of the stipulated facts provided to the JTC, citing *Dana Corp v Employment Security Com'n*, 371 Mich 107 (1963). Although *Dana* held that stipulated facts are "sacrosanct" and cannot be "alter[ed]," it further held that a court can, of course, "reject any offered stipulation as incomplete . . . ." *Id.* at 110-111. Here, the offered stipulation *is* incomplete because it does not address whether respondent testified falsely in the course of the JTC investigation, i.e., it does not address the apparent inconsistency between the stipulated fact that respondent received a phone call from a particular individual that lasted approximately 15 minutes and respondent's multiple denials of having any such conversations on the date in question. Therefore, I would direct the JTC to hold an evidentiary hearing, and take any other action it deems necessary, to answer sufficiently and completely the questions raised in this statement. That is, I would direct the JTC to determine whether respondent testified falsely to the JTC in the course of its investigation, and, if not, how respondent's 15-minute phone call can be reconciled with respondent's multiple denials of having any such conversations on the date in question.

I am also deeply troubled by the message that is being sent by the Court in this and in other recent cases of judicial misconduct. In particular, I believe that the wrong message is being communicated as to this Court's resolve in severely sanctioning false judicial statements. In *In re Servaas*, 484 Mich 634 (2009), decided last year, this Court, contrary to the recommendation of the Judicial Tenure Commission to remove the respondent judge from office for testifying falsely, imposed only a public censure. In that case, there was substantial evidence that the judge had moved outside of the district from which he was elected in direct violation of the Michigan Constitution, and then engaged in a pattern and practice of actions to conceal this misconduct, including providing false testimony under oath. Moreover, in the accompanying case of *In re Halloran*, 486 Mich 1054 (2010), the Court imposed only a public censure and a 14-day suspension, despite the respondent judge's admission that he dismissed 30 cases in order to avoid the disclosure of the fact that he had failed to timely adjudicate those cases. In addition, the fact that, in many of these cases, the parties simply continued to litigate as if nothing happened, raises concerns about whether the respondent judge was forthright with the parties about the dismissals. As in this case, the Court was unwilling to remand to the JTC for further investigation concerning respondent's honesty. Finally, in the instant case, the Court imposes only a public censure, despite the fact that respondent appears to have testified falsely to the JTC.

As the leadership court within our state's judiciary, we communicate in these cases either that we do not take seriously false statements made in the course of a judge's exercise of duties, or that we believe we lack the authority to require the JTC to address such matters. Either of these propositions is alarming, and very much inconsistent with the leadership traditionally exercised by this Court in preserving and maintaining a judiciary of the highest professional and ethical standards. Because I strongly disagree with each of these propositions, and because I believe this Court must exercise a more responsible stewardship of the judicial branch, I would direct the JTC to investigate the instant matter further.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

WEAVER, J., not participating. I abstain from voting on any items dealing with the Judicial Tenure Commission (JTC) and/or the Attorney Grievance Commission (AGC) to avoid any appearance that I could be trying to affect the outcome of the referrals of me to the JTC and AGC by Justices CORRIGAN, YOUNG and MARKMAN.

In re HALLORAN, No. 139830. The Judicial Tenure Commission has issued a decision and recommendation for discipline, and the Honorable Richard B. Halloran, Jr. has consented to the Commission's findings of fact, conclusions of law, and recommendation of a sanction, which was to be no less than a public censure and no greater than a public censure and a 14-day suspension without pay.

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). We adopt the findings and conclusions of the Judicial Tenure Commission. Respondent was at all times a judge of the Third Circuit Court. He has admitted violating Canon 3A(5) of the Code of Judicial Conduct by failing to dispose promptly of the business of the court and by failing to exercise personal responsibility for his own behavior and for the proper conduct and administration of the court in which he presided, contrary to MCR 9.205(A). Respondent failed to timely adjudicate at least 30 family law cases within the guidelines of Michigan Supreme Court Administrative Order 2003-7. Those guidelines were implemented to ensure that judges timely process cases and require that judges submit caseflow statistics to the State Court Administrative Office. The guidelines provide that all family law cases are to be adjudicated within 364 days of filing. Respondent dismissed 30 cases as the guidelines threshold approached in order to avoid those cases being identified as being out of compliance with AO 2003-7. He would continue to work on the adjudication of those cases in a conscious design to avoid detection of those cases as being out of compliance.

As stated by the Judicial Tenure Commission:

> The standards of judicial conduct make clear that an important component of justice is the prompt dispatch of judicial duties. Through his unjustified delay in resolving cases pending on his docket and his attempts to thwart detection of cases failing to meet the guidelines established by Administrative Order 2003—7, Respondent has failed in this responsibility. The facts asserted in the Formal Complaint, and established by the parties' stipulation in

> this matter, show by a preponderance of the evidence that Respondent breached the standards of judicial conduct and is responsible for (1) failing to dispose promptly of the business of the court, contrary to MCJC, Canon 3A(5), and (2) failing to exercise personal responsibility for his own behavior and for the proper conduct and administration of the court in which he presided, contrary to MCR 9.205(A).

The Judicial Tenure Commission recommended respondent be publicly censured. Two members dissented from that portion of the recommendation, stating that a 14-day suspension was the appropriate sanction under the circumstances:

> Respondent has admitted to a deliberate pattern of misconduct on the bench. Under these circumstances, we believe that consideration of the *Brown* factors requires a sanction more substantial than a mere public censure. . . .
>
> Apart from the *Brown* factors, a matter of particular concern here is the element of dishonesty inherent in Respondent's actions. We agree with the Commission's finding that Respondent acted with a specific intent to conceal from the State Court Administrator's Office the fact that many of the matters pending in his courtroom were out of compliance with Michigan Supreme Court Administrative Order 2003-7. The dishonesty of Respondent's practice of entering unjustified no-progress dismissals is revealed by the fact that, in many of the cases, the parties simply continued to litigate as if nothing had changed. Continued litigation of dismissed cases became part of the culture of Respondent's courtroom. Thus, while the litigation continued apace, both the Third Circuit Court and the State Court Administrator's Office necessarily labored under a misapprehension regarding the state of Respondent's docket. Calculated dishonesty from a judicial officer, especially with regard to the administration of justice, merits a sanction more than a public censure. [Concurring/Dissenting Opin, 1-2.]

After reviewing the Recommendation of the Judicial Tenure Commission, the Concurring and Dissenting Opinions, the settlement Agreement, the standards set forth in *Brown*, and the above findings and conclusions, we agree with the dissenting opinion and order that the Honorable Richard B. Halloran, Jr., be publicly censured and suspended for 14 days without pay, effective 21 days from the date of this order. This order stands as our public censure.

MARKMAN, J. (*concurring in part and dissenting in part*). I agree that, at a minimum, the discipline imposed by this Court's order is appropriate. But I would remand to the Judicial Tenure Commission (JTC) for further explanation to determine if significantly greater discipline is appropriate.

By letter of May 3, 2010, the Chairperson of the JTC informed this Court that she could not provide the information requested in this Court's prior order because such information was outside of the scope of

the stipulated facts provided to the JTC, citing *Dana Corp v Employment Security Comm*, 371 Mich 107 (1963). Although *Dana* held that stipulated facts are "sacrosanct" and cannot be "alter[ed]," it further held that a court can, of course, "reject any offered stipulation as incomplete . . . ." *Id.* at 110-111. Here, the offered stipulation, in our judgment, *is* incomplete because it does not address the issues and questions raised in this statement. Therefore, I would direct the JTC to hold an evidentiary hearing, and take any other action it deems necessary, to answer sufficiently and completely the questions raised in such statement. That is, I would direct the JTC to indicate: (1) the substance of the allegations contained in the request for investigation that was dismissed as part of the settlement agreement; (2) how that matter and the cases referred to in paragraphs 14a-14dd of the settlement agreement were brought to the attention of the JTC; (3) with respect to each case referred to in the settlement agreement, whether the parties or their attorneys were contemporaneously notified of the dismissal of the case; (4) if so, whether they complained or otherwise indicated objection; and (5) whether any dismissal or action by respondent subordinated the substantive legal merits of any case to respondent's determination to mislead the State Court Administrative Office.

I am also deeply troubled by the message that is being sent by the Court in this and in other recent cases of judicial misconduct. In particular, I believe that the wrong message is being communicated as to this Court's resolve in severely sanctioning false judicial statements. In *In re Servaas*, 484 Mich 634 (2009), decided last year, this Court, contrary to the recommendation of the JTC to remove the respondent judge from office for testifying falsely, imposed only a public censure. In that case, there was overwhelming evidence that the judge had moved outside of the district from which he was elected in direct violation of the Michigan Constitution, and then engaged in a pattern and practice of actions to conceal this misconduct, including providing false testimony under oath. Moreover, in the accompanying case of *In re Logan*, 486 Mich 1050 (2010), the Court again imposed only a public censure, despite the fact that the respondent judge appears to have testified falsely to the JTC—the stipulated facts indicate that he engaged in a telephone call with an individual that lasted approximately 15 minutes, despite having repeatedly denied having any telephone conversations with that same individual on the date in question. As in this case, the Court was unwilling to remand to the JTC for further investigation concerning whether respondent testified falsely. Finally, in the instant case, the Court again imposes only a public censure and a 14-day suspension, despite respondent's admission that he dismissed 30 cases in order to avoid disclosure of the fact that he had failed to timely adjudicate those cases. In addition, the fact that, in many of these cases, the parties simply continued to litigate as if nothing happened, raises concerns about whether respondent had been forthright with the parties concerning such dismissals. Moreover, this is not the first time that respondent has been subject to discipline by the JTC. See *In re Halloran*, 466 Mich 1219 (2002).

As the leadership court within our state's judiciary, we communicate here either that we do not take false statements made in the course of a judge's exercise of duties seriously, or we believe that we lack the authority to require the JTC to address such matters. Either of these propositions is alarming, and very much inconsistent with the leadership traditionally exercised by this Court in preserving and maintaining a judiciary of the highest professional and ethical standards. Because I strongly disagree with each of these propositions, and because I believe this Court must exercise a more responsible stewardship of the judicial branch, I would direct the JTC to investigate the instant matter further.

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

WEAVER, J., not participating. I abstain from voting on any items dealing with the Judicial Tenure Commission (JTC) and/or the Attorney Grievance Commission (AGC) to avoid any appearance that I could be trying to affect the outcome of the referrals of me to the JTC and AGC by Justices CORRIGAN, YOUNG and MARKMAN.

Leave to Appeal Granted July 2, 2010:

In re INVESTIGATIVE SUBPOENAS (GRAND TRAVERSE COUNTY PROSECUTOR v MEIJER, INCOPORATED), Nos. 140297 and 140299; reported below: 286 Mich App 201. The parties shall include among the issues to be briefed whether a county prosecutor has the authority to investigate and prosecute violations of the Michigan Campaign Finance Act, MCL 169.201 *et seq*.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

MARKMAN, J. (*concurring*). I concur in the order granting leave to appeal. I write separately to request that the parties carefully address two threshold questions of justiciability. Here, the prosecutor originally sought authorization under MCL 767A.2(1) to issue subpoenas to investigate an alleged felony. Specifically, the prosecutor was investigating a violation of the Michigan Campaign Finance Act (MCFA), under MCL 169.254, which prohibits corporations and their agents from making election campaign contributions. In the meantime, the United States Supreme Court issued its ruling in *Citizens United v Federal Election Comm*, 558 US ___; 130 S Ct 876, 913 (2010), in which it held that "the Government may not suppress political speech on the basis of the speaker's corporate identity." Thus, *Citizens United* introduces the issue whether a violation under MCL 169.254 may be prosecuted at all and, as a result, whether the underlying issue in this case—the prosecutor's authority to prosecute felony violations of the MCFA—is moot. Moreover, the Court of Appeals held that a prosecutor has the authority to criminally enforce *other* provisions of the MCFA which were not affected by *Citizens United*. The prosecutor has indicated that he now intends to pursue criminal misdemeanor violations of the MCFA. However, at least to this point, this case has involved an alleged felony and the prosecutor's authority to investigate it; MCL 767A.2(1) does not authorize the issuance of subpoenas to investigate alleged misdemeanors. Therefore,

the issue also arises whether the issue of a prosecutor's authority to investigate misdemeanor violations under the MCFA is ripe. Thus, I respectfully request that the parties address: (1) whether the issue regarding a prosecutor's authority to prosecute felonies under MCL 169.254 is moot; and (2) whether the issue regarding a prosecutor's authority to prosecute misdemeanors under the MCFA is ripe.

CAVANAGH, J. (*dissenting*). I would deny the application for leave to appeal as I concur with the Court of Appeals statement that "[t]he statutory language neither expressly creates nor inherently implies any restriction applicable to the prosecutor's power to investigate criminal violations provided for by the MCFA." *In re Investigative Subpoenas*, 286 Mich App 201, 217; 779 NW2d 277 (2009).

Leave to Appeal Denied July 2, 2010:

PEOPLE v RABY, No. 139348; Court of Appeals No. 278617.

KELLY, C.J., would hold this case in abeyance for *People v Lewis*, Docket No. 140704, in which, by order of June 30, 2010, we directed the State Appellate Defender Office to file a supplemental application for leave to appeal.

ZWIERS v GROWNEY, No. 140121; reported below: 286 Mich App 38.

MARKMAN, J. (*dissenting*). For the reasons stated in my dissenting statement in *Ellout v Detroit Medical Ctr*, 486 Mich 1058, 1058-1059 (2010) (Docket No. 140300, order entered July 2, 2010), I would reverse the Court of Appeals.

CORRIGAN and YOUNG, JJ., join the statement of MARKMAN, J.

PEOPLE v KING, No. 140604; Court of Appeals No. 282533.

PEOPLE v SOUSA, No. 140791; Court of Appeals No. 295257.

DEPARTMENT OF TRANSPORTATION v DETROIT INTERNATIONAL BRIDGE COMPANY, No. 141083; Court of Appeals No. 294972.

SOUDEN v SOUDEN, Nos. 141230, 141231 and 141232; Court of Appeals Nos. 297676, 297677 and 297678.

ELLOUT v DETROIT MEDICAL CENTER, No. 140300; reported below: 285 Mich App 695.

MARKMAN, J. (*dissenting*). Plaintiff filed this medical malpractice action before the expiration of the mandatory notice period under MCL 600.2912b(1). The trial court, relying on *Burton v Reed City Hosp Corp*, 471 Mich 745 (2005), dismissed the action with prejudice. Relying on *Bush v Shabahang*, 484 Mich 156 (2009), the Court of Appeals, in a split decision, reversed and remanded for a dismissal without prejudice. *Ellout v Detroit Med Ctr*, 285 Mich App 695 (2009).

In *Burton,* 471 Mich at 747, this Court held that a complaint filed prior to the expiration of the notice period is a nullity and does not toll the statute of limitations because "MCL 600.2912b(1) unambiguously states that a person 'shall not' commence an action alleging medical malpractice until the expiration of the statutory notice period." In

addition, if a timely complaint is not filed before the period of limitations expires, dismissal with prejudice is required. *Id.* at 753.

MCL 600.2301 provides:

> The court in which any action or proceeding is *pending*, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties. [Emphasis added.]

In *Bush*, this Court held that MCL 600.2301 applies to notices of intent, and, thus, that a medical malpractice complaint should not be dismissed because of defects in the notice unless the notice was not a good-faith attempt to comply with the statute.

Bush is inapplicable here because it involved the filing of a defective notice of intent, while this case involves the filing of a complaint before the notice period expired. MCL 600.2301 is also inapplicable here because it only applies to "pending" actions, and there was no "pending" action here because a timely complaint had never been filed. As this Court recognized in *Burton*, MCL 600.2912b(1) unambiguously states that a person "shall not commence an action" until the notice period has expired. Because plaintiff was not authorized to commence this action when she filed the complaint, no action has been commenced, and, thus, there is no pending action. As this Court explained in *Boodt v Borgess Med Ctr*, 481 Mich 558, 564 (2008), if a plaintiff fails to file a notice of intent that complies with the statutory requirements, that plaintiff is not authorized to file a complaint.

Furthermore, allowing plaintiff to file a complaint before the notice period has expired would affect defendants' substantial rights because it would deprive them of the 154 or 182 days of notice that the statute clearly entitles them to.

Burton and *Boodt* have not been overruled, and, thus, are still good law; and the Court of Appeals clearly did not follow *Burton* and *Boodt*. Therefore, I would reverse the Court of Appeals.

CORRIGAN and YOUNG, JJ., join the statement of MARKMAN, J.

Reconsideration Denied July 2, 2010:

KACHUDAS v INVADERS SELF AUTO WASH, No. 139794; Court of Appeals No. 281411. Summary disposition at 486 Mich 913.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would grant reconsideration.

Rehearing Denied July 2, 2010:

DECOSTA v GOSSAGE, No. 137480; Court of Appeals No. 278665. Opinion at 486 Mich 116.

MARKMAN, J. (*dissenting*). I would grant defendant's motion for

rehearing and, on rehearing, I would vacate this Court's May 25, 2010 decision and affirm the Court of Appeals for the reasons set forth in my dissent. *DeCosta v Gossage*, 486 Mich 116 (2010).

CORRIGAN and YOUNG, JJ., joined in the statement of MARKMAN, J.

Appeal Dismissed on Stipulation July 2, 2010:

VYLETEL-RIVARD v RIVARD, No. 140065; reported below: 286 Mich App 13.

Reconsideration Denied July 9, 2010:

PEOPLE v WATERSTONE, No. 140775: reported below 287 Mich App 368. Summary disposition at 486 Mich 942.

Summary Disposition July 13, 2010:

BEATTIE v MICKALICH, No. 139438; reported below: 284 Mich App 564. On May 11, 2010, the Court heard oral argument on the application for leave to appeal the June 25, 2009 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Lapeer Circuit Court for further proceedings consistent with this order. A plaintiff is not required to plead a claim in avoidance of the limitations on liability provided in the Equine Activity Liability Act (EALA), MCL 691.1661 *et seq*. Cf. *Mack v Detroit*, 467 Mich 186, 198 (2002). In addition, although EALA abolished strict liability for horse owners, *Amburgey v Sauder*, 238 Mich App 228, 245 (1999), it did not abolish negligence actions against horse owners. Indeed, EALA expressly states that "[s]ection 3 does not prevent or limit the liability . . . if the . . . person . . . [c]ommits a negligent act or omission that constitutes a proximate cause of the injury." MCL 691.1665. Finally, given that the plaintiff offered documentary evidence to support her argument that the defendant was negligent and the content or substance of such documentary evidence would be admissible at trial, the lower courts erred in granting the defendant's motion for summary disposition. MCR 2.116(G)(6).

MARKMAN, J. (*concurring*). I concur in this Court's decision to reverse the judgment of the Court of Appeals, and write separately only to respond to the dissent. Both the Court of Appeals and the dissent conclude that the Equine Activity Liability Act (EALA), MCL 691.1661 *et seq*., only permits a negligence claim when it involves something other than inherently risky equine activity. I respectfully disagree.

Section 3 of the EALA (MCL 691.1663) provides:

> *Except as otherwise provided in section 5*, an equine activity sponsor, an equine professional, or another person is not liable for an injury to or the death of a participant or property damage resulting from an inherent risk of an equine activity. *Except as*

> *otherwise provided in section 5*, a participant or participant's representative shall not make a claim for, or recover, civil damages from an equine activity sponsor, an equine professional, or another person for injury to or the death of the participant or property damage resulting from an inherent risk of an equine activity. [Emphasis added.]

Section 5 of the EALA (MCL 691.1665) provides:

> Section 3 does not prevent or limit the liability of an equine activity sponsor, equine professional, or another person if the equine activity sponsor, equine professional, or other person does any of the following:
>
> * * *
>
> (d) Commits a negligent act or omission that constitutes a proximate cause of the injury, death, or damage.

It is uncontested that plaintiff was a "participant" "engage[d] in an equine activity" when she was injured. The issue is whether plaintiff's claim fits within the "negligent act or omission that is a proximate cause of the injury" exception of EALA. The Court of Appeals correctly held that EALA does not provide blanket immunity to a horse owner. However, I believe that it read the immunity that EALA does provide too broadly.

Prior to the enactment of EALA, common-law strict liability would have applied to the owner of a "green broke" horse. In *Trager v Thor*, 445 Mich 95, 99 (1994), this Court recognized that "[t]here has long existed at common law a cause of action against possessors of certain domestic animals for harm caused by those animals, regardless of fault." More specifically, "[s]trict liability attaches for harm done by a domestic animal where three elements are present: (1) one is the possessor of the animal; (2) one has scienter of the animal's abnormal dangerous propensities; and (3) the harm results from the dangerous propensity that was known or should have been known." *Id.* Here, defendant admitted that he knew that the horse was "green broke," and thus that only the most experienced riders should handle the horse. That is, defendant had knowledge of the horse's abnormally dangerous propensities. Indeed, that is why, according to his own testimony, he refused to let plaintiff ride the horse. Therefore, if, as plaintiff alleges, defendant did give plaintiff permission to ride the horse, and did instruct plaintiff to hold onto the lead rope while he placed the saddle on the horse, defendant under the common law would have been strictly liable for plaintiff's injuries. Because EALA abolished strict liability for horse owners, *Amburgey v Sauder*, 238 Mich App 228, 245 (1999), defendant is not strictly liable for plaintiff's injuries.

However, EALA did not abolish negligence actions against horse owners. Indeed, EALA expressly states that "[s]ection 3 does not prevent or limit the liability . . . if the . . . person . . . [c]ommits a negligent act or

omission that constitutes a proximate cause of the injury." MCL 691.1665. The Court of Appeals reasoned, and the dissent agrees, that allowing a negligence action for injuries sustained while engaged in equine activity would "render § 3 nugatory, as it would destroy the limited liability for qualifying defendants created under that section. However, this result would completely eviscerate the purpose for which the Legislature enacted EALA." *Beattie v Mickalich*, 284 Mich App 564, 573 (2009). The Court of Appeals and the dissent ignore that at common law horse owners were strictly liable. In light of this strict liability, reading § 5 of EALA as permitting negligence actions does not render § 3 nugatory. Instead, it signifies that horse owners are no longer subject to strict liability. This interpretation is consistent with *Gardner v Simon*, 445 F Supp 2d 786 (WD Mich, 2006), in which the federal district court held that EALA did not immunize defendant from an action in which plaintiff alleged that defendant had been negligent in failing to warn him about the dangerous propensities of the horse and of the fact that the horse had previously thrown three other riders. Moreover, § 3 may also signify that horse owners are no longer liable under the doctrine of respondeat superior, because § 5 states that only those persons who "[c]ommit[] a negligent act or omission" are liable.

Indeed, it is the Court of Appeals, and the dissent's, interpretation of EALA that renders aspects of the statute nugatory. Specifically, their interpretation would render § 5(d) nugatory. The Court of Appeals held that § 5(d) does not permit general negligence claims, but rather permits only those negligence claims that involve something other than "inherent[ly] risk[y] . . . equine activity." *Beattie*, 284 Mich App at 573-574. However, § 3 *already* limits its immunization to injuries resulting from "inherent[ly] risk[y] . . . equine activity." Given that § 3 already limits its immunization to injuries resulting from "inherent[ly] risk-[y] . . . equine activity," it would have been completely unnecessary for the Legislature to indicate in § 5 that injuries resulting from something *other* than "inherent[ly] risk[y] . . . equine activity" are exempt from this immunization, i.e., to exempt something from immunization that was not even subject to immunization in the first place.

Contrary to the dissent's contention, nowhere in this statement do I suggest that the Legislature's *only* goal was to eliminate strict liability. Given that the Legislature enacted a general limitation on liability and *four* exceptions to this limitation, eliminating strict liability was obviously not the Legislature's *only* goal. The dissent also criticizes me for violating the principle of *ejusdem generis* by failing to read the negligence exception in accord with the other three exceptions. Again, I respectfully disagree, and believe that our disagreement stems from the fact that I also disagree with the dissent's premise that the other three exceptions pertain to risks that are "above and *beyond*" the "inherent risk[s] of an equine activity." Instead, I believe that faulty tack, the rider's ability not matching the horse's personality, and dangerous latent conditions of the land are all "inherent risk[s] *of* an equine activity." Again, if they were not, there would be no need for the Legislature to exempt them from the general limitation on liability because such limitation only applies in the first place to injuries "resulting from an inherent risk of an equine activity." MCL 691.1663.

For these reasons, I concur in this Court's order reversing the Court of Appeals and holding that EALA does not bar recovery for negligent acts of horse owners. Although the statutory provisions at issue are by no means a model of clarity, and I do understand the contrary arguments of the dissent, I respectfully believe that the most reasonable interpretation of this statute is that which is presented in this Court's order.

KELLY, C.J., joined the statement of MARKMAN, J.

YOUNG, J. (*concurring in part and dissenting in part*). I dissent from the majority's order reversing the Court of Appeals' judgment. Instead, I would affirm that portion of the Court of Appeals judgment affirming the dismissal of plaintiff's claims based on the Equine Activity Liability Act (EALA), MCL 691.1661 et seq.[1]

MCL 691.1663 limits the liability of "an equine activity sponsor, an equine professional, or another person" (a "horse owner") when the alleged injury or damage "result[s] from an inherent risk of an equine activity."[2] This limitation on liability applies "[e]xcept as otherwise provided in [MCL 691.1665]." MCL 691.1665, in turn, provides exceptions to the EALA's limitation on liability when the horse owner "does" an enumerated item:

> (a) Provides equipment or tack and knows or should know that the equipment or tack is faulty, and the equipment or tack is faulty to the extent that it is a proximate cause of the injury, death, or damage.
>
> (b) Provides an equine and fails to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity and to determine the ability of the participant to safely manage the particular equine. . . .
>
> (c) Owns, leases, rents, has authorized use of, or otherwise is in lawful possession and control of land or facilities on which the participant sustained injury because of a dangerous latent condition of the land or facilities that is known to the [horse owner] and for which warning signs are not conspicuously posted.
>
> (d) Commits a negligent act or omission that constitutes a proximate cause of the injury, death, or damage.[3]

I agree with the Court of Appeals that MCL 691.1665(d) cannot be construed as broadly allowing general negligence claims without com-

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[1] I concur with the majority's assessment that the Court of Appeals incorrectly shifted the burden onto plaintiff to state her claims in avoidance of the EALA limitation on liability.

[2] "An inherent risk of an equine activity" is defined in MCL 691.1662(f) as "a danger or condition that is an integral part of an equine activity . . . ." This definition is consistent with the dictionary definition of the term "inherent": "Existing as an essential constituent or characteristic; intrinsic." *The American Heritage Dictionary of the English Language, New College Edition* (1976), p 676 (emphasis added).

[3] Emphasis added.

pletely eviscerating the entire concept of limited liability under the EALA. MCL 691.1665 must be read in conjunction with MCL 691.1663 to give effect to the act as a whole.[4] Giving effect to both provisions, the Court of Appeals correctly interpreted the exception of MCL 691.1665(d) as involving "human error" "not within the gamut of 'inherent[ly] risk[y] . . . equine activity.' "[5]

This interpretation is further bolstered by reading MCL 691.1665(d) with the other listed exceptions in the statute. "Under the statutory construction doctrine known as *ejusdem generis*, where a general term follows a series of specific terms, the general term is interpreted 'to include only things of the same kind, class, character, or nature as those specifically enumerated.' "[6]

MCL 691.1665 provides such "a general term follow[ing] a series of specific terms." Subsections (a)—(c) provide specific exceptions in specific situations: where the horse owner has provided faulty tack, failed to match the rider's ability to the horse's personality, or failed to warn of a known latent dangerous condition on the land. Each of these exceptions obviously involves an equine activity and a danger that could potentially arise in the course of that activity. However, each also involves an affirmative act or omission on the part of the horse owner, above and beyond the "inherent" or essential risks of an equine activity, which makes the equine activity even more dangerous. Therefore, we must interpret the more general negligence exception of subsection (d) "to include only things of the same kind, class, character, or nature" as the more specific, preceding subsections. Accordingly, a negligence claim pursuant to subsection (d) must also involve a negligent act or omission beyond the "inherent" risk of the equine activity, making the activity even more dangerous.

Moreover, the majority order, as well as Justice MARKMAN's concurring statement, base their interpretation of the negligence exception to the EALA on an overly narrow and faulty linchpin: that the exception was intended simply to eliminate strict liability for horse owners. However, this interpretation fails to consider that, if the Legislature's goal were merely to eliminate strict liability, it could have accomplished that goal in a much simpler and more direct fashion. Instead, the Legislature drafted a complex limitation on liability for injuries arising from an inherent risk of an equine activity and accompanied that limitation with numerous specific exceptions. Those exceptions must be read according to the canon of construction ejusdem generis in order to give effect to the statute as a whole. But the majority's and Justice MARKMAN's narrow focus on the

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[4] *Apsey v Memorial Hosp*, 477 Mich 120, 131 (2007) ("[A] reviewing court should not interpret a statute in such a manner as to render it nugatory. A statute is rendered nugatory when an interpretation fails to give it meaning or effect.")(citation omitted).

[5] *Beattie v Mickalich*, 284 Mich App 564, 573 (2009).

[6] *Neal v Wilkes*, 470 Mich 661, 669 (2004) (MARKMAN, J.), quoting *Huggett v Dep't of Natural Resources*, 464 Mich 711, 718-719 (2001).

legislative purpose of abolishing strict liability leads to an interpretation of MCL 691.1665(d) that violates this basic canon of statutory construction.

Here, plaintiff was injured while assisting defendant to saddle a horse. Saddling a horse in preparation of riding is clearly an equine activity and a horse's unexpected and negative reaction to being saddled is clearly an inherent risk of such activity.[7] Further, both plaintiff and defendant were aware of the particular horse's personality and of plaintiff's level of experience with horses. Specifically, defendant described the horse as "green broke" and plaintiff admitted her knowledge that the horse was "fast" and could be ridden only with defendant's supervision. The deposition testimony and the expert letter provided by plaintiff all indicate that this horse may have reacted negatively to being saddled no matter what method defendant used to effectuate the saddling. Accordingly, plaintiff cannot establish that defendant committed human error above and beyond the inherent or essential risk of this equine activity such that defendant increased the danger involved in the activity.[8] As a result, plaintiff has not created a genuine issue of material fact that her claim falls within the negligence exception to the EALA limitation on liability.[9] For this reason, I would affirm the Court of Appeals judgment affirming the trial court's dismissal of plaintiff's claims.

WEAVER and CORRIGAN, JJ., joined the statement of YOUNG, J.

Summary Dispositions July 15, 2010:

PEOPLE v STANLEY BROWN, No. 139934; Court of Appeals No. 292470. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as

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[7] See MCL 691.1662(f)(ii) (defining "inherent risk of an equine activity" as including "[t]he unpredictability of an equine's reaction to things such as sounds, sudden movements, and people, other animals, or unfamiliar objects").

[8] In this regard, I would note that the current case is factually distinguishable from *Gardner v Simon*, 445 F Supp 2d 786 (WD Mich, 2006), a federal case applying the Michigan EALA. The plaintiff in Gardner had no prior experience with the particular horse and the defendant failed to warn the plaintiff about the horse's known dangerous propensities. The defendant's negligent failure to warn amounted to human error that made the equine activity even more dangerous to the plaintiff. In the current case, plaintiff was aware that the horse was not well trained but wanted to ride the horse anyway. Given her preexisting knowledge of the heightened danger involved with the particular horse, plaintiff cannot establish that defendant's conduct rendered the activity more dangerous.

[9] As plaintiff failed to create a genuine issue of material fact, I believe the Court of Appeals should not have commented upon the admissibility of plaintiff's proffered expert opinion letter.

on leave granted, of whether: (1) the defendant received the effective assistance of counsel where trial counsel failed to specifically request and procure the National Council on Alcoholism and Drug Dependence staff activity logs before trial; (2) trial counsel was ineffective for failing to cross-examine the complainant regarding inconsistencies in her trial testimony, and between her trial testimony, preliminary examination testimony, and what she claimed in the initial police report; (3) counsel appointed to represent the defendant at the evidentiary hearing was ineffective for failing to point out these inconsistencies to the trial court; and (4) newly discovered evidence produced in the civil suit filed on behalf of the complainant, including all the documentary evidence and deposition testimony that resulted from that suit (including, but not necessarily limited to, the staff activity logs), requires a new trial. 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.

PEOPLE v BAILEY, No. 140654; Court of Appeals No. 278047. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. Application of the factors set forth in *People v Mezy*, 453 Mich 269, 285 (1996), to determine whether there was one agreement to commit two crimes, or more than one agreement each with a separate object, supports the conclusion that the defendant was involved in one agreement to undertake the drug sales for which he was separately charged and convicted. The Court of Appeals erred in concluding otherwise. Accordingly, the defendant's conviction of Count II violated the Double Jeopardy clauses of the United States and Michigan Constitutions. US Const, Am V, and Const 1963, art 1, § 15. We remand this case to the Grand Traverse Circuit Court for entry of an order granting the defendant's motion to reverse his conviction on Count II of the General Information.

CORRIGAN, J. (*concurring*). I concur in the Court's order peremptorily reversing the judgment of the Court of Appeals and remanding to the trial court for entry of an order granting defendant's motion to vacate his conviction of the second count of conspiracy to deliver less than 50 grams of cocaine. Defendant's conviction of a second count of conspiracy violates the Double Jeopardy clauses of the United States and Michigan Constitutions, US Const, Am V and Const 1963, art 1, § 15, because the prosecution failed to prove that defendant participated in two conspiracies, each with a separate object.

Defendant was convicted of two counts of conspiracy to deliver less than 50 grams of cocaine, MCL 750.157a and MCL 333.7401(2)(a)(*iv*). He appealed, arguing in part that his two conspiracy convictions constituted double jeopardy because the evidence reflected a single ongoing conspiracy. The Court of Appeals affirmed. Defendant sought leave to appeal, and this Court vacated the Court of Appeals analysis of defendant's double jeopardy argument and remanded for reconsideration under

People v Mezy, 453 Mich 269, 285 (1996).[1] The Court of Appeals remanded to the trial court, which purported to apply *Mezy* and ruled that defendant's two conspiracy convictions did not violate double jeopardy. The Court of Appeals affirmed.[2] Defendant again seeks leave to appeal here.

The lower courts clearly erred in rejecting defendant's double jeopardy argument because the record does not establish that defendant participated in two conspiracies. Under *Mezy*, *supra*, "[t]he essence of the determination is whether there is one agreement to commit two crimes, or more than one agreement each with a separate object." Defendant was charged with the two counts of conspiracy in connection with codefendant Darnell Blanchard's sale of cocaine to an undercover police officer on October 6, 2003, and October 10, 2003. Although police officers observed defendant with Blanchard during a drug sale on September 30, 2003, defendant was not present during the October 6 and October 10 drug sales. The evidence connecting him to these drug sales consisted of pre-recorded bills, found in a bedroom that defendant was apparently occupying, that had been used to pay Blanchard for drugs on October 6 and October 10. The evidence of *any* agreement between Blanchard and defendant was entirely circumstantial, and there is no indication in the record, circumstantial or otherwise, of *two separate agreements*. Application of the five *Mezy* factors to this case points to the conclusion that there was a single agreement: the charged drug sales were only four days apart and involved the same alleged coconspirators (defendant and Blanchard), charged with the same statutory offenses (delivery of less than 50 grams of cocaine) for the same overt acts (delivery of crack cocaine) from the same location (a Blockbuster Video store in Traverse City). At most, the evidence reflects a single ongoing conspiracy, and the drug sales on October 6 and October 10 were no more than overt acts

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[1] In *Mezy*, we provided the following framework for analyzing whether there are two conspiracies:

> In order to determine what the extent of the agreement is, so that we may determine whether there are two conspiracies or only one, we will use the same "totality of the circumstances" test used in constitutional double jeopardy analysis. This test includes the following factors: 1) time, 2) persons acting as coconspirators, 3) the statutory offenses charged in the indictments, 4) the overt acts charged by the government or any other description of the offenses charged that indicate the nature and scope of the activity that the government sought to punish in each case, and 5) places where the events alleged as part of the conspiracy took place. The essence of the determination is whether there is one agreement to commit two crimes, or more than one agreement each with a separate object.

[2] *People v Bailey*, unpublished opinion per curiam of the Court of Appeals, issued January 7, 2010 (Docket No. 278047).

during that conspiracy.[3] Thus, defendant's conviction of a second count of conspiracy violates double jeopardy and I fully support the Court's order reversing the decision of the Court of Appeals and remanding to the trial court for correction of this constitutional error.

WEAVER, J. (*dissenting*). I dissent and would not peremptorily reverse the judgment of the Court of Appeals because I do not find that the trial court committed clear error.

YOUNG, J. (*dissenting*). I dissent from the majority order peremptorily reversing defendant's conviction for the second conspiracy charge. In focusing narrowly on the "factors set forth in *People v Mezy*," the majority fails to give meaning to the most important language of the *Mezy* double jeopardy analysis: that we must look to the "totality of the circumstances," including the nonexclusive list of factors outlined in *Mezy*, to determine whether a defendant has committed one or multiple conspiracies.[1] Moreover, because of this flawed analysis, the majority order fails to consider whether the trial court clearly erred in determining, based on the totality of the circumstances, that defendant had committed two separate conspiracies.[2]

Here, the trial court considered the totality of the circumstances surrounding the two charged incidents of delivering a controlled substance and the attendant conspiracy charges. In doing so, the trial court considered various uncharged controlled buys as well as the charged incidents. After considering the entire body of evidence, the court found that defendant had directed each sale individually. Therefore, the court concluded that defendant had engaged in a series of conspiracies rather than one overarching conspiracy to deliver controlled substances. The trial court correctly considered the totality of the circumstances (including the nonexclusive list of enumerated factors) as directed by *Mezy*. Further, although I may not have reached the same factual conclusions as the trial court, I do not believe that the trial court committed clear error. Accordingly, I would deny leave to appeal.

Leave to Appeal Granted July 15, 2010:

PEOPLE V NOVAK, No. 140800; Court of Appeals No. 284838.

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[3] Contrary to Justice YOUNG's view, I find no evidence, either under the five *Mezy* factors, or in considering the "totality of the circumstances," to support the trial court's conclusion that defendant directed each sale individually. Notably, Justice YOUNG does not explain what specific evidence supports the trial court's conclusion.

[1] *People v Mezy*, 453 Mich 269, 285 (1996).

[2] We are bound to review a trial court's factual determinations for clear error. MCR 2.613(C); *People v Williams*, 475 Mich 245, 250 (2006). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498 (2002).

PEOPLE v SLAUGHTER, No. 141009; Court of Appeals No. 287459. The parties shall address whether: (1) the actions of firefighters may fall under the "community caretaker" exception to probable cause requirements; (2) the "emergency aid" aspect of the community caretaker exception applies in this case; and (3) the Court of Appeals erred when it held that the firefighters were first obligated to attempt to remedy the condition for which a neighbor called by using means that did not involve entry into the defendant's home.

We further order the Oakland Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel 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. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal July 15, 2010:

KING v STATE OF MICHIGAN, No. 140684; Court of Appeals No. 288290.

Leave to Appeal Denied July 15, 2010:

DALMIA v PALFFY, No. 140334; Court of Appeals No. 281706.
HATHAWAY, J., would grant leave to appeal.

PEOPLE v HOLDEN, No. 140356; Court of Appeals No. 284830.
KELLY, C.J., would grant leave to appeal.

PEOPLE v MATA, No. 140568; Court of Appeals No. 286173.

PEOPLE v STEVENSON BENNETT, No. 140617; Court of Appeals No. 286548.
KELLY, C.J., and CAVANAGH, J., would grant leave to appeal.

PEOPLE v PETERS, No. 140645; Court of Appeals No. 288219.

BEST v PARK WEST GALLERIES, INCORPORATED, No. 140678; Court of Appeals No. 293502.

PEOPLE v BEASLEY, No. 140694; Court of Appeals No. 295152.

PEOPLE v ATKINSON, No. 140701; Court of Appeals No. 295398.
KELLY, C.J., would remand this case for correction of the presentence investigation report.

PEOPLE v FLAKES, No. 140722; Court of Appeals No. 295443.

SOCIA v PACERS BASKETBALL CORPORATION, No. 140788; Court of Appeals No.284845.

INDUSTRIAL QUICK SEARCH, INCORPORATED v TERRYN, No. 140832; Court of Appeals No. 284163.

PEOPLE v MULHOLLAND, No. 140859; Court of Appeals No. 295738.
KELLY, C.J., would grant leave to appeal.

PEOPLE v CHAKUR, No. 140862; Court of Appeals No. 289143.

PEOPLE v HODGERS, No. 140880; Court of Appeals No. 287306.
KELLY, C.J., would grant leave to appeal.

Summary Disposition July 16, 2010:

PEOPLE v HOAG, No. 140179; Court of Appeals No. 294007. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Emmet Circuit Court in Docket No. 08-002989-FH only, and we remand that case to the trial court for resentencing. The defendant's sentencing guidelines range provided that he be sentenced to an intermediate sanction pursuant to MCL 769.34(4)(a) in Docket No. 08-002989-FH. On remand, the trial court shall sentence the defendant to an intermediate sanction, 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, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v BRANNON, No. 141093; Court of Appeals No. 292617. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and vacate the Monroe Circuit Court order granting the defendant's motion for a new trial. The record clearly established that defense counsel discussed issues of delayed reporting of sexual assault by a child witness with a potential expert witness, and made a reasonable strategic decision to forego expert testimony in light of the possibility that the witness might also provide testimony favorable to the prosecution. We remand this case to the trial court for reinstatement of the defendant's conviction and for further proceedings not inconsistent with this order.
CAVANAGH, J., would deny leave to appeal.

Leave to Appeal Granted July 16, 2010:

PEOPLE v KNAPP, No. 140739; Court of Appeals No. 295816. The parties shall include among the issues to be briefed whether the sentence of 39 to 45 years, despite being the product of an agreement, is invalid under *People v Tanner*, 387 Mich 683, 690 (1972); *People v Wright*, 432 Mich 84 (1989); and MCL 769.34(2)(b). See *People v Reid*, 465 Mich 969 (2002); *People v Powe*, 469 Mich 1032 (2004); and *People v Floyd*, 481 Mich 938 (2008).

We further order the Bay 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.

Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal July 16, 2010:

LAWRENCE M CLARKE, INCORPORATED v RICHCO CONSTRUCTION, INCORPORATED, No. 140683; Court of Appeals No. 285567.

In re CW (MARTIN v DEPARTMENT OF HUMAN SERVICES), No. 140841; Court of Appeals No. 292866.

Leave to Appeal Denied July 16, 2010:

CITY OF ROCKFORD v 63RD DISTRICT COURT, No. 140541; reported below: 286 Mich App 624.

WEAVER, J., would grant leave to appeal.

Reconsideration Granted July 16, 2010:

DUNCAN v STATE OF MICHIGAN, Nos. 139345, 139346 and 139347; reported below: 284 Mich App 246. Summary disposition at 486 Mich 906. On order of the Court, the motion for reconsideration of this Court's April 30, 2010 order is considered, and it is granted. We vacate our order dated April 30, 2010. On reconsideration, leave to appeal having been granted and the briefs and oral argument of the parties having been considered by the Court, we reverse the June 11, 2009 judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion. The defendants are entitled to summary disposition because, as the Court of Appeals dissenting opinion recognized, the plaintiffs' claims are not justiciable. Accordingly, we remand this case to the Ingham Circuit Court for entry of summary disposition in favor of the defendants. The motion for stay is denied.

MARKMAN, J. (*concurring*). I concur with the order granting defendant's motion for reconsideration, vacating this Court's order of April 30, reversing the Court of Appeals, and remanding to the trial court for entry of summary disposition in favor of defendants. In our prior order, we affirmed the result of the Court of Appeals, asserting that because "[t]his case is at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues." This was error for two reasons. First, as defendants observe, this order vacated the Court of Appeals' opinion without articulating any governing standards. Second, it is not premature to decide this case because the precise issue presented is whether plaintiffs have stated a claim on which relief can be granted, and this, as well as the threshold justiciability issues, can be determined on the face of the complaint. Defendants, in my view, are entitled to summary disposition for the following reasons set forth in the Court of Appeals dissent:

(1) The United States Supreme Court in *Gideon v Wainwright*, 372 US 335 (1963), and *Strickland v Washington*, 466 US 668 (1984), "was concerned with results, not process. It did not presume to tell the states *how* to ensure that indigent criminal defendants receive effective assistance of counsel." *Duncan v Michigan*, 284 Mich App 246, 357 (2009) (WHITBECK, J., dissenting).

(2) Plaintiffs' claims would have "the judiciary override the Michigan system of local control and funding of legal services for indigent criminal defendants," despite the absence of any constitutional violation. *Id*. at 358.

(3) Plaintiffs' claims are not sufficient to create a presumption of either prejudice, or prejudice per se, that would warrant either declaratory or injunctive relief. *Id*. at 361.

(4) Plaintiffs lack standing, and, therefore, their claims are not justiciable. *Id*. at 371.

(5) Plaintiffs' claims are not ripe for adjudication, and, therefore, their claims are not justiciable. *Id*. at 371, 376.

(6) Plaintiffs' claims are not justiciable and, therefore, the relief they seek should not be granted. *Id*. at 385.

(7) In finding a justiciable controversy, the Court of Appeals erred in adopting a number of assumptions that are conjectural and hypothetical, including assumptions that plaintiffs and the class they purport to represent will be convicted of the crimes with which they are charged, that such convictions will result from prejudice stemming from ineffective assistance of counsel, that such ineffective assistance will be attributable to the inaction of defendants, and that trial and appellate judges will be unable or unwilling to afford relief for such violations of the Sixth Amendment. *Id*. at 368-370.

(8) There is no constitutional precedent that "guarantees an indigent defendant a particular attorney" or an "attorney of a particular level of skill"; that requires that a "predetermined amount of outside resources be available to an attorney"; or that requires that there be a "meaningful relationship with counsel." *Id*. at 370.

(9) The Court of Appeals' assertions that affording plaintiffs injunctive relief "could potentially entail a cessation of criminal prosecutions against indigent defendants," *id*. at 273 (majority opinion), and "that nothing in this opinion should be read as foreclosing entry of an order granting the type of relief so vigorously challenged by defendants," *id*. at 281, accurately describe the potential consequences of its opinion, which consequences would constitute an altogether unwarranted and improper response to plaintiffs' claims. *Id*. at 380-385 (WHITBECK, J., dissenting).

(10) The Court of Appeals has "issued an open invitation to the trial court to assume ongoing operational control over the systems for providing defense counsel to indigent criminal defendants in Berrien, Genesee and Muskegon counties." *Id.* at 383. And with that invitation comes a "blank check" on the part of the judiciary to "force sufficient state level legislative appropriations and executive branch acquiescence" in assuming similar control over the systems in every county in this state, while "nullifying the provisions" of the criminal defense act and "superseding the authority of the Supreme Court and the State Court Administrator." *Id*. at 383-384.

For all of these reasons, I agree with the Court of Appeals dissent that defendant's motion for summary disposition should have been granted.[1]

CORRIGAN and YOUNG, JJ., joined the statement of MARKMAN, J.

KELLY, C.J. (*dissenting*). The motion for reconsideration should be denied. It adds nothing new to warrant an outcome different from the one correctly reached in this Court's April 30, 2010 order. Thus, there is no basis for this Court's decision to reverse the Court of Appeals.

FACTS AND PROCEDURAL HISTORY

This case involves a class action suit brought by indigent criminal defendants in Berrien, Genesee, and Muskegon counties. Plaintiffs allege that they, as well as future indigent defendants subject to felony prosecutions, are being denied their state and federal constitutional rights to counsel and the effective assistance of counsel. Plaintiffs allege that these constitutional violations stem directly from the indigent defense systems currently used in those counties.

The trial court certified plaintiffs' claims as a class action and denied defendants' motions for summary disposition. Defendants filed an interlocutory appeal in the Court of Appeals, which affirmed the trial court in a divided opinion.[1] Judge WHITBECK dissented and would have granted summary disposition to defendants. He concluded that plaintiffs lacked standing, that their claims were neither ripe nor justiciable, and that the class had been erroneously certified.[2]

Defendants appealed to this Court, and we granted leave to appeal.[3] We heard oral argument in April 2010. On April 30, 2010, we issued an order affirming the result reached by the Court of Appeals.[4] The order was premised on the important consideration that this case is at its earliest stages. Given that we must rule solely using plaintiffs' pleadings, it is premature to make a decision on the substantive issues. Finally, our order vacated the trial court's grant of class certification and remanded the case to that court for reconsideration in light of our decision in *Henry v Dow Chemical*.[5] Notably, no justice dissented from that order.

Defendants filed this motion for reconsideration on May 21, 2010. In it, defendants restate the same arguments from their application for leave to appeal. Their only new argument criticized our April 30 order as failing to provide proper guidance for the lower court.

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[1] Specifically, however, I do not agree necessarily with the Court of Appeals dissent that our state "has not fully met its obligations" under *Gideon* and *Strickland*. *Id*. at 398. It is unnecessary to address this issue at this time.

[1] *Duncan v Michigan*, 284 Mich App 246 (2009).

[2] *Id.* at 371, 376, 380, 388 (WHITBECK, J., dissenting).

[3] *Duncan v Michigan*, 485 Mich 1003 (2009).

[4] *Duncan v Michigan*, 486 Mich 906 (2010).

[5] *Henry v Dow Chemical*, 484 Mich 483 (2009).

WHAT HAS CHANGED?

Our court rules require that in order to be entitled to relief[6] a litigant seeking reconsideration must demonstrate that our previous ruling rested on a "palpable error." Yet there is nothing in defendants' motion for reconsideration of which we were not fully aware when we issued our previous order. What has changed warranting a different outcome now? Defendants complain that this Court's original order affirms the result of the Court of Appeals decision and vacates its reasoning without articulating any governing standards. However, we were certainly aware when we issued our previous order that, by affirming only the result reached by the Court of Appeals, we were remanding the case without a controlling standard.

Indeed, the only arguments proffered in favor of granting reconsideration are a revival of arguments that our previous order rejected. In their answer, plaintiffs correctly note that defendants' motion merely repeats the arguments it made earlier and that defendants are effectively asking this Court to issue an advisory opinion.

PLAINTIFFS' CLAIMS ARE JUSTICIABLE

Regarding the substantive issues in this case, our prior order correctly affirmed the result that the Court of Appeals majority reached. The concerns about the justiciability of plaintiffs' claims spelled out in Judge WHITBECK's dissenting opinion and accepted by the majority here are premature. Virtually all of those concerns relate to the type of relief sought by plaintiffs. The dissent criticized the majority for accepting four "assumptions" by allowing the case to go forward.[7] Yet the dissent failed

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[6] MCR 2.119(F)(3).

[7] *Duncan*, 284 Mich App at 369-370 (WHITBECK, J., dissenting):

> For [plaintiffs'] claims to be resolved *pre*-conviction requires at least four basic assumptions:
>
> • That the Duncan plaintiffs, and the class members they purport to represent, will in fact be convicted of the crimes with which they are charged or of some lesser offense;
>
> • That inactions of the state and the Governor will have caused such convictions; that is, these inactions will have so prejudiced the defense that the Duncan plaintiffs and the class they purport to represent will have been denied their Sixth Amendment right to a fair trial;
>
> • That the trial courts in the three named counties will be unable or unwilling to correct such results by ordering new trials on the basis of a finding of deficient performance and prejudice to the individual defendants; and

to acknowledge that its reasoning rested on four unsupported assumptions of its own: (1) that plaintiffs would prevail on the merits, (2) that the trial court would order sweeping declaratory and injunctive relief beyond the scope of its authority, (3) that such relief would necessarily entail the judicial branch taking "operational control" of the indigent defense systems in the counties in question, and (4) that if all of the above occurred, proper appellate review at that juncture would somehow be inadequate.

I find the assumptions of the Court of Appeals majority less troubling than those of the dissent, particularly given that this case is before us at a very preliminary stage. Thus, I agree with the Court of Appeals majority that "the trial court has jurisdiction and authority to order declaratory relief, prohibitory injunctive relief, and some level of mandatory injunctive relief, the full extent of which we need not presently define."[8]

At this preliminary stage, plaintiffs' claims adduce facts that establish that they have standing, and that their claims are ripe. Also, they state a claim upon which relief can be granted. Today's order slams the courthouse door in plaintiffs' face for no good reason.

CONCLUSION

The majority's decision to grant reconsideration and reverse the Court of Appeals judgment rests on no new information and on no "palpable error." Because I continue to believe that our order of April 30 correctly rejected defendants' arguments in favor of its motions for summary disposition, I dissent.

CAVANAGH and HATHAWAY, JJ., joined the statement of KELLY, C.J.

Statements Denying Motion for Disqualification July 19, 2010:

MCCARTHY V SCOFIELD, No. 140328; Court of Appeals No. 284129.

WEAVER, J. Plaintiff Patrick McCarthy alleges that I have improper and unethical political or social relationships with the defendants Michigan Department of Human Services and Oakland County Care House and thus that I am biased in favor of these defendants. His allegations are untrue and wholly without basis.

Further, I know of no other justification for my disqualification. For these reasons, I deny his motion to disqualify me from participation.

• That it is likely that if the Duncan plaintiffs are granted the preconviction declaratory and injunctive relief they seek, this will redress the situation for them and for the class they purport to represent.

[8] *Duncan*, 284 Mich App at 254-255.

CORRIGAN, J., denies plaintiff's motion to disqualify her from hearing this case and states as follows:

I have no pecuniary or business interests in the defendant organizations named in this case. I also have no personal or political relationships with any of the individual named defendants; indeed, I do not know any of them. It is a matter of public record that I act in an administrative capacity as the Michigan Supreme Court's liaison on child welfare matters. But my administrative duties are distinct from my judicial duty to fairly consider individual applications to this Court on a case by case basis. Plaintiff's unsupported allegation that I am biased in favor of the Department of Human Services is untrue. I have voted against the Department's position when I have concluded that its position is unsupported by the facts or law in a particular case.

YOUNG, J. Mr. McCarthy has moved to disqualify me from this case. Among other things, Mr. McCarthy alleges that I have political or social relationships with the parties defendant. All of his allegations concerning me are untrue and wholly without basis in fact. Moreover, independent of Mr. McCarthy's baseless allegations, I know of no other justification for my disqualification. For these reasons, I deny his motion to disqualify.

MARKMAN, J. Plaintiff has moved for my disqualification, alleging that I have an assortment of business and social relationships with defendants Department of Human Services and Oakland County Care House. I have no such relationships with either of these agencies, or with persons at these agencies, and there is no other basis under MCR 2.003 that would require that I be disqualified from participation in this case. Plaintiff's motion is crude and frivolous, marked by racial invective, and establishes utterly no basis for my disqualification. Notwithstanding, for the reasons set forth in my separate statement to the Court's order of June 3, 2010, I remain deeply concerned by the operation of MCL 28.243 as it pertains to plaintiff and urge that this statute be revisited by the Legislature.

Plaintiff's motion should serve to remind those assessing the impact of the Court's new disqualification rules why such rules are likely both to incentivize motions to disqualify justices, and to politicize the disqualification process. However frivolous plaintiff's motion, and however much a similar motion directed toward another party might have been subject to sanction, plaintiff's motion has now required that four justices of this Court drop everything else during this, the busiest time of our term, when every effort is being made to complete our docket before the end of July, in order to respond in writing whether each will continue to participate in this case. Plaintiff will now have 14 days in which to ponder the responses of the four challenged justices, and to determine whether to compel the participation of the entire Court in reviewing the disqualification decisions of each of the four challenged justices. If plaintiff chooses to compel the participation of the entire Court, each of its seven justices will then be required to review each of the challenged justices' statements and set forth in writing whether each of the challenged justices should be disqualified from participation, and the challenged justice will then be entitled to respond. Thus, there will be the interruption and delay of this Court's work, involving in this case as many as 36 separate statements and responses by justices addressing plaintiff's motion; there will be the

platform offered to a party (including almost certainly in the future a growing number of prisoners moving for relief from judgment many years after their convictions) to engage in tirades and denunciations of disfavored justices; and there will be the ability of a party, no matter how frivolous his motions for judicial disqualification, to command the full resources and attention of this Court, while diverting these resources and attentions from the Court's primary responsibilities. It is worth noting that there has not been a single moment since the implementation of our new disqualification rules last November in which there has not been at least one disqualification decision pending before this Court.

It is equally noteworthy that plaintiff's disqualification motion is directed toward only the four justices of this Court whose votes did not favor plaintiff in his underlying case, even though, almost certainly, there is not a whit of difference between the "relationships" of the four challenged justices, and the "relationships" of the three unchallenged justices, with defendants. Quite obviously, the only distinction is that plaintiff believes the unchallenged justices will continue to favor his position and the challenged justices will continue not to do so. This has nothing to do with ethics, but much to do with skewing a fair process.

Thus, a disqualification procedure that worked on this Court for 175 years to ensure honest and accountable decision-making, and that reflects the practices of the United States Supreme Court, and those of virtually every other state supreme court in the nation from the beginning of the republic, has been replaced by a procedure whose legacy will almost certainly prove to be the incentivization of frivolous disqualification motions, politicization of the disqualification process, and the diversion of the attentions of this Court from its primary responsibilities on behalf of the people of this state.

Summary Disposition July 23, 2010:

PEOPLE v JAJUAN WILLIAMS, No. 140845; Court of Appeals No. 295673. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Oakland Circuit Court and remand this case to the trial court for resentencing. Because conduct subject to scoring under offense variable (OV) 12, MCL 777.42, must be considered under that variable before it is considered under OV 13, see *People v Bemer*, 286 Mich App 26 (2009), and because conduct already scored under OV 12 must not be scored under OV 13, see MCL 777.43(2)(c), it appears that the defendant should have been assessed 5 points under OV 12, rather than 25 points under OV 13. The resulting change in the defendant's total OV score produces a lower applicable guidelines range, and the defendant is therefore entitled to resentencing. See *People v Francisco*, 474 Mich 82 (2006).

YOUNG, J. (*concurring*). I concur in the order remanding this case for resentencing only because we are bound to do so under *People v Francisco*, 474 Mich 82 (2006). I write separately to reiterate my continued adherence to Justice CORRIGAN's dissenting opinion in *Francisco*. Just as in *Francisco*, the current defendant's minimum sentence falls within the corrected minimum sentencing guidelines range. Accord-

ingly, but for *Francisco*, I would hold that any error in scoring the guidelines was harmless and deny leave to appeal.

CORRIGAN, J., joined the statement of YOUNG, J.

WEAVER, J. (*dissenting*). I dissent. I would affirm and would overrule *People v Francisco*, 474 Mich 82 (2006).

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court (other than grants and denials of leave to appeal from the Court of Appeals) of general interest to the bench and bar of the state.

Orders Entered April 27, 2010:

PROPOSED AMENDMENTS OF MCR 2.101, 2.102, 2.113, 2.603, 3.101, AND 8.119.

On order of the Court, this is to advise that the Court is considering amendments of Rules 2.101, 2.102, 2.113, 2.603, 3.101, and 8.119 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposed amendments 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.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 2.101. FORM AND COMMENCEMENT OF ACTION.

(A) [Unchanged.]

(B) Commencement of Action. A civil action is commenced by filing a complaint with a court. Every civil complaint must be accompanied by a summons form approved by the state court administrator pursuant to the requirements of MCR 2.102(B). The clerk of the court shall review the summons and attached complaint in accordance with MCR 2.102(A).

RULE 2.102. SUMMONS; EXPIRATION OF SUMMONS; DISMISSAL OF ACTION FOR FAILURE TO SERVE.

(A) Issuance. On the filing of a complaint, the clerk of the court ~~clerk~~ shall issue a summons to be served as provided in MCR 2.103 and 2.105 if the summons form and complaint completed by the plaintiff complies with the requirements of subrule (B) and MCR 8.119(C)(1). If the summons form and complaint completed by the plaintiff does not comply with subrule (B) and MCR 8.119(C)(1), the clerk of the court shall proceed in accordance with MCR 8.119(C)(2). A separate summons may issue against a particular defendant or group of defendants. A duplicate summons may be issued from time to time and is as valid as the original summons.

(B) Summons Form.

(1) Summons. A summons must be issued "In the name of the people of the State of Michigan,"~~;~~ under the seal of the court that issued it. It must be directed to the defendant, and include

~~(1)~~(a) the name and address of the court,

~~(2)~~(b) the names of the parties,

~~(3)~~(c) the file number,

~~(4)~~(d) the name and address of the plaintiff's attorney or the address of a plaintiff appearing without an attorney,

~~(5)~~(e) the defendant's address, if known,

~~(6)~~(f) the name of the court clerk,

~~(7)~~(g) the date on which the summons was issued,

~~(8)~~(h) the last date on which the summons is valid,

~~(9)~~(i) a statement that the summons is invalid unless served on or before the last date on which it is valid,

~~(10)~~(j) the time within which the defendant is required to answer or take other action, and

~~(11)~~(k) a notice that if the defendant fails to answer or take other action within the time allowed, judgment may be entered against the defendant for the relief demanded in the complaint.

(2) Plaintiff's Statements. The attorney for the plaintiff, or a plaintiff appearing without an attorney, must include on the summons form

(a) either of the following statements:

(i) There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint, or

(ii) A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in [this court]/[_____ Court], where it was given Docket Number _____ and was assigned to Judge _____. The action [remains]/[is no longer] pending.

(b) the following information for determining venue:

(i) the plaintiff's residence,

(ii) the defendant's residence, and

(iii) the place of the transaction or occurrence alleged in the complaint.

(C)–(G) [Unchanged.]

RULE 2.113. FORM OF PLEADINGS AND OTHER PAPERS.

(A)-(B) [Unchanged.]

(C) Captions.

(1) The first part of every pleading must contain a caption stating

(a) the name of the court;

(b) the names of the parties or the title of the action, subject to subrule (D);

(c) the case number, including a prefix of the year filed and a two-letter suffix for the case-type code from a list provided by the ~~S~~state ~~C~~court ~~A~~administrator pursuant to MCR 8.117 according to the principal subject matter of the proceeding;

(d) the identification of the pleading (see MCR 2.110[A]);

(e) the name, business address, telephone number, and state bar number of the pleading attorney;

(f) the name, address, and telephone number of a pleading party appearing without an attorney; and

(g) the name and state bar number of each other attorney who has appeared in the action.

(2) ~~The caption of a complaint must also contain either (a) or (b) as a statement of the attorney for the plaintiff, or of a plaintiff appearing without an attorney:~~

~~(a) There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.~~

~~(b) A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in [this court]/[_____ Court], where it was given docket number _____ and was assigned to Judge _____. The action [remains]/[is no longer] pending.~~

~~(3)~~ If an action has been assigned to a particular judge in a multijudge court, the name of that judge must be included in the caption of a pleading later filed with the court.

(D)-(G) [Unchanged.]

RULE 2.603. DEFAULT AND DEFAULT JUDGMENT.

(A) Entry of Default; Notice; Effect.

(1) If a party against whom a judgment for affirmative relief is sought has been served with the summons and complaint in accordance with these rules and has failed to plead or otherwise defend as provided by these rules, and ~~that fact is~~ those facts are made to appear by affidavit or otherwise, the clerk must enter the default of that party if the requirements of MCR 8.119(D)(1) are met. A request for entry of a default as to the amount due must be supported by affidavit and filed on a form approved by the state court administrator. If the default is entered, the clerk shall proceed in accordance with subrule (B)(2).

(2)-(3) [Unchanged.]

(B) Default Judgment.

(1) [Unchanged.]

(2) Default Judgment Entered by Clerk. Upon entry of a default as to an amount due pursuant to subrule (A)(1) ~~On request of the plaintiff supported by an affidavit as to the amount due~~, the clerk may sign and enter ~~a~~the default judgment for that amount and costs against the defendant~~,~~ if

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

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

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

(d) the amount stated in the affidavit is not greater than the amount stated in the complaint;

(e) the amounts (which may include damages, fees, and costs) stated in the default judgment appear to be correct; and

(f) there are no orders or other actions precluding entry.

If the affidavit, default, and default judgment form is not completed in compliance with the above requirements, the clerk of the court shall proceed in accordance with MCR 8.119(D)(3).

(3)-(4) [Unchanged.]

(C)-(E) [Unchanged.]

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A)-(B) [Unchanged.]

(C) Forms. The state court administrator shall publish approved forms for use in garnishment proceedings. Separate forms shall be used for periodic, ~~and~~ nonperiodic, and income tax garnishments. Each form used in a garnishment proceeding may only name a single defendant.

(1) The verified statement~~,~~ and writ~~, and disclosure~~ filed in garnishment proceedings must be ~~substantially~~ in the form approved by the state court administrator. The caption of the form must include the

(a) defendant's name and address and,

(b) if known, the social security number, employee identification number, federal tax identification number, employer number, or account number, except that the social security number and account number shall not appear on the original or the proof of service copy filed with the court, but shall only appear on the plaintiff, defendant, and garnishee copies.

(2) The disclosure filed in garnishment proceedings must be substantially in the form approved by the state court administrator. The disclosure filed with the court shall not contain the social security number or account number.

(D) Request for and Issuance of Writ.

(1) Requests for writs must be accompanied by a separate filing fee for each request.

(2) ~~The clerk of the court that entered the judgment shall review the request. The clerk shall issue a writ of garnishment if the writ appears to be correct, complies~~ The request shall be made and filed by the plaintiff, or someone on the plaintiff's behalf, shall comply with these rules and the Michigan statutes, and ~~if the plaintiff, or someone on the plaintiff's behalf, makes and files a statement~~ shall be verified in the manner provided in MCR 2.114~~(A)~~(B) stating:

~~(1)~~(a) that a judgment has been entered against the defendant and remains unsatisfied;

~~(2)~~(b) the amount of the judgment; the total amount of the postjudgment interest accrued to date; the total amount of the postjudgment costs accrued to date; the total amount of the postjudgment payments made to date, and the amount of the unsatisfied judgment now due (including interest and costs);

~~(3)~~(c) that the person signing the verified statement knows or has good reason to believe that

~~(a)~~(i) a named person has control of property belonging to the defendant,

~~(b)~~(ii) a named person is indebted to the defendant, or

~~(c)~~(iii) a named person is obligated to make periodic payments to the defendant.

(3) The clerk of the court that entered the judgment shall accept the request for filing if it has been completed in accordance with subrule (D)(2) and MCR 8.119(C)(1). If the request does not comply with these provisions, the clerk shall proceed in accordance with MCR 8.119(C)(2).

(4) If the clerk accepts the request for filing, before issuing the writ, the clerk shall determine that:

(a) the request and writ form is completed in compliance with subrule (C),

(b) the request complies with the requirements of MCR 8.119(D)(1),

(c) a judgment has been entered for the plaintiff in the case,

(d) the judgment remains unsatisfied,

(e) the judgment has not expired,

(f) the amounts stated in the request appear to be correct, and

(g) there are no orders or other actions precluding issuance of a writ.

If the request does not comply with these requirements, the clerk of the court shall proceed in accordance with MCR 8.119(D)(3).

(E) Writ of Garnishment.

~~(1) The writ of garnishment must have attached or must include a copy of the verified statement requesting issuance of the writ, and must include information that will permit the garnishee to identify the defendant, such as the defendant's address, social security number, employee identification number, federal tax identification number, employer number, or account number, if known.~~

~~(2)-(6)~~(1)-(5) [Renumbered, but otherwise unchanged.]

(F)-(T) [Unchanged.]

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

(A) Applicability. This rule applies to all actions in every trial court except that subrule (~~D~~E)(1) does not apply to civil infractions.

(B) [Unchanged.]

(C) Filing of ~~Papers~~Documents. ~~The clerk of the court shall endorse on the first page of every document the date on which it is filed.~~ ~~Papers~~Documents filed with the clerk of the court must comply with Michigan Court Rules and Michigan Supreme Court records standards.

(1) Minimum Filing Requirements. ~~The clerk of the court may reject papers which do not conform to MCR 2.113(C)(1) and MCR 5.113(A)(1).~~ Before accepting a document for filing, the clerk of the court shall determine that the document complies with the following minimum filing requirements:

(a) standards prescribed by MCR 1.109,

(b) legibility and language as prescribed by MCR 2.113(B) and MCR 5.113(A),

(c) captioning prescribed by MCR 2.113(C)(1) and MCR 5.113(A)(1),

(d) signature prescribed by MCR 2.114(C) and MCR 5.114(A),

(e) the filing fee is paid at the time of filing, unless waived or suspended by court order,

(f) documents are filed in the court of proper jurisdiction, and

(g) if applicable, proof of service is complete and verified in accordance with these court rules.

(2) Return of Documents. If the document does not comply with the minimum filing requirements in subrule (1), the clerk of the court shall reject the document for filing and promptly return it to the filing party, along with the filing fee, if any. The document shall be accompanied by a notice, substantially in the form approved by the state court administrator, that states the reason for the return and, if applicable, the action the filing party may take to refile the document. The notice shall include the name and telephone number of the clerk who is returning the document and the date it is mailed. The court shall maintain a copy of each notice prepared under this subrule.

(3) Filing Date. The clerk of the court shall endorse on the first page of every document the date on which it is received. The date of receipt is the filing date. If a document contains more than one date indicating receipt by the court, the latest date is the filing date.

(4) Submission to Judge. If the clerk of the court has other concerns with the accuracy of a document, it shall be submitted to the judge assigned to the case, the chief judge, or their designee judge for authorization to reject the pleading for filing and return of the document pursuant to subrule (2).

(D) Documents Accepted for Filing; Clerk of the Court Review. The clerk of the court shall review documents that have been accepted for filing and take action in accordance with this subrule.

(1) Review. The clerk of the court must determine that:

(a) the case number, petition number, and case caption on the document are accurate, and if not, the clerk may either correct any errors in that information when the correct information is adequately verified, or take action as required by subrule (2).

(b) any required notice to appear is accurate, and if not, the clerk must take action as required by subrule (2).

(c) the time for filing a document has been met, and if not, the clerk must take action as required by subrule (2).

The clerk of the court may not correct any other perceived errors.

(2) Notification. The clerk shall promptly notify parties of the corrections made or of any action that must be taken by the parties to correct the errors. If the clerk returns a document for corrective action by a party, the document shall be accompanied by a notice substantially in the form approved by the state court administrator that states the reason for the return. The notice shall include the name and telephone number of the clerk who is returning the document and the date it is mailed. The court shall maintain a copy of each notice prepared under this subrule.

(3) If the clerk of the court determines, after review, that an affidavit, default, and default judgment form does not comply with MCR 2.603(B)(2) or that a request for garnishment form does not comply with MCR 3.101(D)(4), the clerk shall not issue a default judgment or writ of garnishment, shall retain the filing fee, and shall either:

(a) return the form to the filing party, accompanied by a notice substantially in the form approved by the state court administrator that states the reason for the return. The notice shall inform the party of the right to file a request for judicial review with no additional fee and that a new form may be filed along with the required filing fee. The notice shall include the name and telephone number of the clerk who is returning the document and the date it is mailed. The court shall maintain a copy of each notice prepared under this subrule.

(b) submit the document to the judge assigned to the case, the chief judge, or their designee judge for review.

(4) If a party files a request for judicial review pursuant to subrule(3)(a) or a clerk submits a document for review pursuant to subrule (3)(b), upon review, the judge shall either allow the issuance of the default judgment or writ of garnishment or enter a written order stating the reasons for denying the issuance of a default judgment or writ of garnishment.

~~(D)~~(E)-~~(G)~~(H) [Relettered, but otherwise unchanged.]

Staff Comment: This proposal, recommended by a workgroup authorized by the Supreme Court, would establish specific rules for court clerks to screen documents that are submitted to a court for filing and return those documents that do not conform to certain minimum filing requirements.

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, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-32. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENTS OF RULES 6.425, 6.502, 7.204, AND 7.205 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.425, 6.502, 7.204, and 7.205 of the Michigan Court Rules. Before determining whether the proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter 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.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(F) [Unchanged.]

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

(1) Appointment of Lawyer.

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

(b) In a case involving a conviction following a trial, if the defendant is indigent, the court must enter an order appointing a lawyer if the request is filed within 42 days after sentencing or within the time for filing an appeal of right as provided in MCR 7.204(A) and (B). ~~The court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal.~~

(c) In a case involving a conviction following a plea of guilty or nolo contendere, 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) Scope of Appellate Lawyer's Responsibilities. The responsibilities of the appellate lawyer appointed to represent the defendant include representing the defendant

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

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

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

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

(2) [Unchanged.]

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

RULE 6.502. MOTION FOR RELIEF FROM JUDGMENT.

(A)-(G) [Unchanged.]

(H) Time for Filing. Unless otherwise permitted by law, a 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of:

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Michigan Supreme Court, the Michigan Legislature, or the United States Supreme Court, if that right has been newly recognized by one of those entities and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

RULE 7.204. FILING APPEAL OF RIGHT; APPEARANCE.

(A) [Unchanged.]

ALTERNATIVE A (Extension by Court of Appeals)

(B) Extension of Time for Filing Claim of Appeal. Upon a showing of excusable neglect, the Court of Appeals may extend the time for filing the claim of appeal by any party for a period not to exceed thirty-five days from the expiration of the time otherwise prescribed by this rule. Such an extension may be granted before or after the time otherwise prescribed by this rule has expired; but if a request for an extension is made after such time has expired, it shall be made by motion. An answer may be filed within 7 days of service. The time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2).

ALTERNATIVE B (Extension by Trial Court)

(B) Extension of Time for Filing Claim of Appeal. Upon a showing of excusable neglect, the trial court may extend the time for filing the claim of appeal by any party for a period not to exceed thirty-five days from the expiration of the time otherwise prescribed by this rule. Such an extension may be granted before or after the time otherwise prescribed by this rule has expired; but if a request for an extension is made after such time has expired, it shall be made by motion. An answer may be filed within 7 days of service. The time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2).

(B)-(H) [Unchanged but relettered.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A) Time Requirements: An application for leave to appeal must be filed within

(1) 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule; or

(2) 21 days after entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed, if the motion was filed within the initial

21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period.

(3) 21 days after entry of an order deciding a motion to withdraw a plea of guilty or nolo contendere filed under MCR 6.310(C) or a motion for resentencing filed under MCR 6.429(B)(3).

For purposes of subrules (A)(1) and (A)(2),"entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

ALTERNATIVE A (Extension by Court of Appeals)

(B) Extension of Time for Filing Application. Upon a showing of excusable neglect, the Court of Appeals may extend the time for filing the application for leave to appeal by any party for a period not to exceed twenty-one days from the expiration of the time otherwise prescribed by this rule. Such an extension may be granted before or after the time otherwise prescribed by this rule has expired; but if a request for an extension is made after such time has expired, it shall be made by motion. An answer may be filed within 7 days of service. The time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2).

ALTERNATIVE B (Extension by Trial Court)

(B) Extension of Time for Filing Application**.** Upon a showing of excusable neglect, the trial court may extend the time for filing the application for leave to appeal by any party for a period not to exceed thirty-five days from the expiration of the time otherwise prescribed by this rule. Such an extension may be granted before or after the time otherwise prescribed by this rule has expired; but if a request for an extension is made after such time has expired, it shall be made by motion. An answer may be filed within 7 days of service. The time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2).

(B)-(E) [Unchanged but relettered.]

~~(F) Late Appeal.~~

~~(1) When an appeal of right was not timely filed or was dismissed for lack of jurisdiction, or when an application for leave was not timely filed, the appellant may file an application as prescribed in subrule (B), file 5 copies of a statement of facts explaining the delay, and serve 1 copy on all other parties. The answer may challenge the claimed reasons for delay. The court may consider the length of and the reasons for delay in deciding whether to grant the application. In all other respects, submission, decision, and further proceedings are as provided in subrule (D).~~

~~(2) In a criminal case, the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.~~

(3) Except as provided in subrules (F)(4)and (F)(5), leave to appeal may not be granted if an application for leave to appeal is filed more than 12 months after the later of:

(a) entry of a final judgment or other order that could have been the subject of an appeal of right under MCR 7.203(A), but if a motion described in MCR 7.204(A)(1)(b) was filed within the time prescribed in that rule, then the 12 months are counted from the time of entry of the order denying that motion; or

(b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period, then the 12 months are counted from the entry of the order deciding the motion.

(4) The limitation provided in subrule (F)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for directed verdict of acquittal, to withdraw a plea, or to correct an invalid sentence, if the motion was filed within the time provided 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 motion for rehearing or reconsideration of a motion mentioned in subrule (F)(4) does not extend the time for filing an application for leave to appeal, unless the motion for rehearing or reconsideration was itself filed within 21 days after the trial court decides the motion mentioned in subrule (F)(4), and the application for leave to appeal is filed within 21 days after the court decides the motion for rehearing or reconsideration.

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) Notwithstanding the 12-month limitation period otherwise provided in subrule (F)(3), leave to appeal may be granted if a party's claim of appeal is dismissed for lack of jurisdiction within 21 days before the expiration of the 12-month limitation period, or at any time after the 12-month limitation period has expired, and the party files a late application for leave to appeal from the same lower court judgment or

~~order within 21 days of denial of a timely filed motion for reconsideration. A party filing a late application in reliance on this provision must note the dismissal of the prior claim of appeal in the statement of facts explaining the delay.~~

~~(6) The time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2).~~

(G) [Unchanged.]

Staff Comment: The amendments proposed in this order would impose time limits for the filing of motions for relief from judgment in criminal cases and would shorten time limits for late appeals in both civil and criminal actions. In proposed amendments of MCR 7.204 and MCR 7.205, alternative provisions are offered, under which, upon a showing of excusable neglect, the Court of Appeals or a trial court may grant an extension of time for filing a late appeal.

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, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-19. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Rehearing Denied May 13, 2010:

PEOPLE v PLUNKETT, No. 138123. Reported at 486 Mich 50.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., would grant rehearing.

Order Entered May 18, 2010:

PROPOSED AMENDMENT OF MCR 1.108.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 1.108 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The notices and agendas for public hearings are posted 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: additions are indicated by underline, and deletions by strikethrough.]

RULE 1.108. COMPUTATION OF TIME.

In computing a period of time prescribed or allowed by these rules, by court order, or by statute, the following rules apply:

(1) The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or ~~holiday~~ day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or ~~holiday~~ day on which the court is closed pursuant to court order.

(2)-(3) [Unchanged.]

Staff Comment: The proposed amendment of MCR 1.108 would allow a computed period of time to be extended to the next day the court is open when the last day in the period is a day that the court was closed by court 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 September 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-30. Your comments and the comments of others will be posted at: www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENTS OF MCR 3.973, 3.975 AND 3.976.

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.973, 3.975, and 3.976 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 by the Court before a final decision is made. 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.

RULE 3.973. DISPOSITIONAL HEARING.

(A)-(D) [Unchanged.]

(E) Evidence; Reports.

(1)-(4) [Unchanged.]

(5) The court, upon receipt of a local foster care review board's report, shall include the report in the court's confidential social file. The court shall ensure that all parties have had the opportunity to review the report and file objections before a dispositional order, dispositional review order, or permanency planning order is entered. The court may at its discretion include recommendations from the report in its orders.

(F)-(H) [Unchanged.]

RULE 3.975. POST-DISPOSITIONAL PROCEDURES: CHILD IN FOSTER CARE.

(A)-(D) [Unchanged.]

(E) Procedure. Dispositional review hearings must be conducted in accordance with the procedures and rules of evidence applicable to the initial dispositional hearing. The report of the agency that is filed with the court must be accessible to the parties and offered into evidence. The court shall consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant and material evidence at the hearing. The court, on request of a party or on its own motion, may accelerate the hearing to consider any element of a case service plan. The court, upon receipt of a local foster care review board's report, shall include the report in the court's confidential social file. The court shall ensure that all parties have had the opportunity to review the report and file objections before a dispositional order, dispositional review order, or permanency planning order is entered. The court may at its discretion include recommendations from the report in its orders.

(F)-(H) [Unchanged.]

RULE 3.976. PERMANENCY PLANNING HEARINGS.

(A)-(C) [Unchanged.]

(D) Hearing Procedure; Evidence.

(1)-(2) [Unchanged.]

(3) The court, upon receipt of a local foster care review board's report, shall include the report in the court's confidential social file. The court shall ensure that all parties have had the opportunity to review the report and file objections before a dispositional order, dispositional review order, or permanency planning order is entered. The court may at its discretion include recommendations from the report in its orders.

(E) [Unchanged.]

Staff Comment: This proposal was recommended by a committee of the Michigan Probate Judges Association in consultation with the Foster Care Review Board. It would require a court to maintain a local foster care review board report in the court's confidential social file, and ensure that all parties have had the opportunity to review the report before the court enters a dispositional order, dispositional review order, or permanency planning order. Courts also could include recommendations from the report in their orders under the proposed language.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-09. Your comments and the comments of others will be posted at: www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered June 8, 2010:

PROPOSED AMENDMENT OF MCR 8.110.

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 will be considered at a public hearing by the Court before a final decision is made. The notices and agendas for public hearings are posted 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: additions are indicated by underline, and deletions by strikethrough.]

RULE 8.110. CHIEF JUDGE RULE.

(A)-(B) [Unchanged.]

(C) Duties and Powers of Chief Judge.

(1)-(4) [Unchanged.]

(5) The chief judge of the court in which criminal proceedings are pending shall have filed with the state court administrator a quarterly report listing the following cases in a format prescribed by the state court administrator:

(a)-(b) [Unchanged.]

(c) in computing the 126-day and 301-day periods, the court shall exclude periods of delay

(1)-(3) [Unchanged.]

(4) during the time an order entered by an appellate court is in effect that stays the disposition or proceedings of the case.

(6)-(7) [Unchanged.]

(D) [Unchanged.]

Staff Comment: This proposal would exclude cases that are stayed during an interlocutory appeal from being included in the group of cases that a chief judge must report to the State Court Administrator that are delayed beyond the time guidelines.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-21. Your comments and the comments of others will be posted at: www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered June 30, 2010:

PROPOSED AMENDMENTS OF MCR 6.302 AND 6.610.

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 6.302 of the Michigan Court Rules and amendment of Rule 6.610 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.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

ALTERNATIVE A

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A)-(D) [Unchanged.]

(E) Additional Inquiries. On completing the colloquy with the defendant, the court must

(1) ask the prosecutor and the defendant's lawyer whether either is aware of any promises, threats, or inducements other than those already disclosed on the record, and whether the court has complied with subrules (B)-(D). If it appears to the court that it has failed to comply with subrules (B)-(D), the court may not accept the defendant's plea until the deficiency is corrected.

(2) if the defendant is not a citizen of the United States, ask the defendant's lawyer and the defendant whether they have discussed the possible risk of deportation that may be caused by the conviction. If it appears to the court that no such discussion has occurred, the court may not accept the defendant's plea until the deficiency is corrected.

(F) [Unchanged.]

ALTERNATIVE B

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A)-(D) [Unchanged.]

(E) Additional Inquiries. On completing the colloquy with the defendant, the court must

(1) ask the prosecutor and the defendant's lawyer whether either is aware of any promises, threats, or inducements other than those already disclosed on the record, and whether the court has complied with subrules (B)-(D). If it appears to the court that it has failed to comply with subrules (B)-(D), the court may not accept the defendant's plea until the deficiency is corrected.

(2) advise the defendant who offers a plea of guilty or nolo contendere that such a plea by a noncitizen may result in deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States. Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of the advisement.

(F) [Unchanged.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(D) [Unchanged.]

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

(1)-(2) [Unchanged.]

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

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

(b) a noncitizen defendant who offers a plea of guilty or nolo contendere risks deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States. Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of the advisement.

(~~b~~c) [Relettered but unchanged.]

(4)-(6) [Unchanged.]

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

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

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

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

(8)-(9) [Unchanged.]

(F)-(H) [Unchanged.]

Staff Comment: These proposals were generated following the recent United States Supreme Court decision in *Padilla v Kentucky*, 559 US ___; 130 S Ct 1473; 176 L Ed 2d 284 (2010), in which the Court held that defense counsel is required to inform a defendant about the risk of deportation as a potential consequence of a guilty plea. In that case, the Court held that "when the deportation consequence is truly clear, as it was in this case," counsel must give correct advice. The Court also noted that in "situations in which the deportation consequences of a particular plea are unclear or uncertain, — a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Padilla*, 130 S Ct 1483.

Proposal A would require a judge to ask a noncitizen defendant and the defendant's lawyer if they have discussed possible risk of deportation as a consequence of a guilty plea. The focus of this inquiry is whether the defendant is a noncitizen, and what the defense counsel has told the defendant. Proposal B would require a judge to give general advice to any defendant (whether or not the defendant is represented by counsel) that a guilty plea by a noncitizen may carry immigration consequences. This alternative would obviate the need to determine the defendant's citizenship status,which the defendant may not know or be willing to divulge.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-16. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

MARKMAN, J. (*concurring*). It is apparent, at least to this justice, that the only impetus for this proposed change in court rules is the United States Supreme Court's decision in *Padilla v Kentucky*, 559 US___;130 S Ct 1473; 176 L Ed 2d 284 (2010). In my view, *Padilla* discovered a new constitutional right that had properly remained undiscovered for the first 220 years of our nation's history, requiring that noncitizen criminal defendants be advised under the Sixth Amendment of the possible deportation consequences of their guilty pleas. That decision is inconsistent with the decisions of this state, *People v Davidovich*, 463 Mich 446 (2000), and will, given the complexity of immigration law, inevitably cause uncertainty as to guilty pleas in cases involving noncitizen criminal defendants, while opening up constitutional arguments that other possible collateral consequences of a guilty plea, to which there are no end, must also be the subject of warning and advice. In the end, I believe that *Padilla* will either require that more favorable plea agreements be offered to such defendants, or that more prosecutorial resources be

devoted to such cases in proceeding to trial. Although this Court is obligated to accommodate *Padilla*, I moved at administrative conference to publish Proposal A, offered by Mr. Baughman of the Wayne County Prosecutor's Office, because I believe his proposal is more closely in accord with this decision than Proposal B, in: (a) limiting the new inquiry required of the trial court to noncitizens, as opposed to requiring such inquiry to be made of all criminal defendants, thus avoiding an enormous waste of time and resources; (b) limiting the inquiry specifically to the deportation consequences of a guilty plea, which was the only issue before the Court in *Padilla*, rather than expanding this inquiry to encompass other collateral matters, such as the "exclusion of admission" and "naturalization;" and (c) preserving the focus upon the *lawyer's* duty to properly advise the client in light of the client's particular circumstances, rather than imposing an equivalent duty upon the trial court itself. While this Court is obligated to abide by *Padilla*, it is not obligated to afford new rights that go beyond that decision, and beyond the requirements of the Constitution, and I would not do so.

CORRIGAN, J., concurred with MARKMAN, J.

Order Entered July 13, 2010:

PROPOSED AMENDMENTS OF MRPC 7.3.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.3 of the Michigan Rules of Professional Conduct. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS.

(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services

useful, nor does the term "solicit" include "sending truthful and nondeceptive letters to potential clients known to face particular legal problems" as elucidated in *Shapero v Kentucky Bar Ass'n*, 486 US 466, 468; 108 S Ct 1916; 100 L Ed 2d 475 (1988).

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, or harassment.

(c) Every written, recorded, or electronic communication from a lawyer that seeks professional employment from a prospective client shall include the words "Advertising Material" prominently featured on the outside envelope, if any, and at the beginning and ending of any written, recorded, or electronic communication, unless the lawyer has a family or prior professional relationship with the recipient. If a written communication is in the form of a self-mailing brochure, pamphlet, or postcard, the words "Advertising Material" shall appear on the address panel of the brochure, pamphlet, or postcard.

Staff comment: The proposed addition of subrule (c) of MRPC 7.3 would require a lawyer who seeks professional employment from a prospective client to designate the writing as an advertisement by prominently displaying the words "Advertising Materials" on the outside envelope (or brochure, pamphlet, or postcard) and at the beginning and end of every written, recorded, or electronic communication.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-24. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

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which include attorney fees (Const 1963, art 9 § 32). *Adair v Michigan*, 486 Mich 468.

PROHIBITION OF UNFUNDED MANDATES

2. No state agency may require a new activity or service by a local unit of government or an increase in the level of any activity or service beyond that required by existing law unless the state appropriates and disburses funding to pay the local unit of government for any necessary increased costs; to establish a violation of this prohibition of unfunded mandates, a plaintiff must show that the state required a new activity or service or an increase in the level of an activity or service; if the state made no appropriation to cover the increased burden on local units of government, the plaintiff need not show the amount of increased costs; once the plaintiff has satisfied its burden, the state has the burden to demonstrate that no state funding was required because the state-mandated requirement did not actually increase costs or the increased costs were not necessary (Const 1963, art 9, § 29; MCL 21.233[6]). *Adair v Michigan*, 486 Mich 468.

SEPARATION OF POWERS

3. Courts may not impose requirements beyond reasonableness on zoning ordinances that regulate the extraction of natural resources without violating the constitutional separation of powers (Const 1963, art 3, § 2). *Kyser v Kasson Twp*, 486 Mich 514.

CONTRACTS TO WAIVE CHILDREN'S CLAIMS—*See*

PARENT AND CHILD 11

CONTROLLED SUBSTANCES

SCHEDULE 1 CONTROLLED SUBSTANCES

1. 11-carboxy-tetrahydrocannabinol is not a schedule 1 controlled substance (MCL 333.7212). *People v Feezel*, 486 Mich 184.

COSTS—*See*

CONSTITUTIONAL LAW 1

COUNTY HIGHWAYS—*See*

GOVERNMENTAL IMMUNITY 1

CREDIT INFORMATION ACCURACY—*See*

INSURANCE 1

leading and open-ended, and the statement must have been the child's creation (MRE 803A). *People v Gursky*, 486 Mich 596.

EVIDENCE OF BLOOD ALCOHOL LEVEL—*See*

CRIMINAL LAW 3

EX PARTE INTERVIEWS WITH HEALTH-CARE PROVIDERS—*See*

HEALTH 1

EXCEPTIONS TO MOOTNESS—*See*

APPEAL 3

EXHAUSTION OF ADMINISTRATIVE REMEDIES—*See*

APPEAL 1

EXPERT WITNESSES—*See*

EVIDENCE 1

FELON-IN-POSSESSION OF A FIREARM—*See*

CRIMINAL LAW 4

FORUM NON CONVENIENS—*See*

PARENT AND CHILD 6

GOVERNMENTAL IMMUNITY

HIGHWAY EXCEPTION

1. MCL 691.1402a(2), which provides that a discontinuity defect of less than 2 inches in a sidewalk creates a rebuttable inference that the municipality having jurisdiction over a sidewalk maintained it in reasonable repair, applies only to sidewalks adjacent to county highways. *Robinson v City of Lansing*, 486 Mich 1.

GROSS NEGLIGENCE—*See*

CRIMINAL LAW 3

HEADLEE AMENDMENT—*See*

CONSTITUTIONAL LAW 1, 2

onstrate by a preponderance of the evidence that the change is in the best interests of the child; in making its determination, the trial court must consider whether each of 12 best-interest factors set forth in MCL 722.23 applies; if the court determines that a particular factor is irrelevant to the issue before it, it must state that conclusion on the record, but need not make substantive factual findings concerning the factor beyond that determination. *Pierron v Pierron*, 486 Mich 81.

3. Factor i of the best-interest factors applicable in child-custody determinations (reasonable preference of the child) does not require that the child's preference be communicated through "detailed thought or critical analysis"; the reasonable-preference standard merely excludes preferences that are arbitrary or inherently indefensible (MCL 722.23[i]). *Pierron v Pierron*, 486 Mich 81.
4. The statutorily required presumptive award of custody given to a mother when an acknowledgment of parentage is executed pursuant to the Acknowledgment of Parentage Act does not serve as an initial custody determination under the Uniform Child Custody Jurisdiction and Enforcement Act (MCL 722.1001 *et seq*.; MCL 722.1101 *et seq*.). *Foster v Wolkowitz*, 486 Mich 356.
5. The consent to the general personal jurisdiction of Michigan courts regarding custody-related issues that arises from the execution of an acknowledgment of parentage provides no basis for Michigan to exert home-state jurisdiction pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act (MCL 722.1001 *et seq*.; MCL 722.1101 *et seq*.). *Foster v Wolkowitz*, 486 Mich 356.
6. In cases involving interstate custody disputes, arguments regarding which state's forum is most convenient must be addressed to and decided by the child's home state, which has jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act (MCL 722.1207[1]). *Foster v Wolkowitz*, 486 Mich 356.
7. The statutorily required presumptive award of custody given to a mother when an acknowledgment of parentage is executed pursuant to the Acknowledgment of Parentage Act may be set aside only when a custody

NATURAL RESOURCES EXTRACTION

2. A zoning ordinance that regulates the extraction of natural resources is presumed to be reasonable, and the burden is on the party challenging it to overcome this presumption by demonstrating that it advances no reasonable governmental interest. *Kyser v Kasson Twp*, 486 Mich 514.
3. A zoning ordinance that regulates the extraction of natural resources need only be reasonable to meet constitutional due process requirements (Const 1963, art 1, § 17). *Kyser v Kasson Twp*, 486 Mich 514.